

WISCONSIN COURT OF APPEALS
DISTRICT II

NORTH LAKE MANAGEMENT DISTRICT,

Petitioner,

Waukesha Circuit Court
Case No. 10CV5085

vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

REDDELIEN ROAD NEIGHBORHOOD ASSOCIATION, INC. (“RRNA”), et al.,

Petitioners,

Waukesha Circuit Court
Case No. 10CV5096

vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

PETITION FOR LEAVE TO APPEAL NON-FINAL ORDER
AND SUPPORTING MEMORANDUM

Submitted on July 5, 2011:

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TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

§809.50 PETITION 1

MEMORANDUM IN SUPPORT OF PETITION..... 1

I. INTRODUCTION 1

**A. The Supplemental Petition was Dismissed
on the Merits because of a Technicality..... 1**

**B. The Dismissal of the Supplemental Petition
will Result in the Permanent Loss of
Important Rights because of a Technicality..... 2**

II. STATEMENT OF THE ISSUES..... 4

III. STATEMENT OF THE FACTS..... 4

**IV. REASONS FOR GRANTING THIS
PETITION 7**

**A. This Case meets the Statutory Criteria for a
Permissive Appeal..... 7**

**i. Taking Jurisdiction of this Appeal
now will Substantially Clarify
Proceedings in this Litigation without
Unduly Burdening the Judicial
Resources of this Court 7**

**ii. Taking Jurisdiction of this Appeal
now will Protect the RRNA from
Substantial and Irreparable Injury 8**

**iii. Taking Jurisdiction of this Appeal
now will Clarify Issues of General
Importance in the Administration of
Justice 9**

**B. If this Court grants a Permissive Appeal,
there is a Substantial Likelihood of Success
on the Merits 10**

i. The Trial Court made an Error of Law which ought to be Corrected Immediately	11
ii. There is a close and Integral Relationship between the Primary Petition and the Supplemental Petition	11
iii. The Supplemental Petition complied with the Procedural Requirements of Chapter 227	13
iv. This Court should Immediately Review the Unsubstantiated Assumptions of the Trial Court in order to clarify the further course of this Litigation	15
v. When Chapter 227 is Silent, it is Clear that the Legislature Expects Courts to Apply the Code of Civil Procedure	16
vi. Chapter 227 allows for Amendments, and the Supplemental Petition is Exactly like an Amendment.....	17
vii. Whether the "Supplemental Petition" is viewed as a Supplement or as an Amendment - under the Law it must be Liberally Construed	18
viii. This Court should permit an Interlocutory Appeal because the RRNA's Substantive Rights will otherwise be forfeited and Rendered completely moot	21
CONCLUSION	22
§ 809.50(1) Certification	24
Certificate of Service.....	24
Appendix	Following page 24

TABLE OF AUTHORITIES

WISCONSIN CASES

<i>Harnischfeger Corp. v. LIRC</i> , 196 Wis. 2d 650, 539 N.W.2d 98 (1995).....	11
<i>Kallin v. Rainwater</i> , 226 Wis. 2d 134, 593 N.W.2d 865 (Ct. App. 1999)	11
<i>State ex rel. Delevan v. Cir. Ct. of Walworth County</i> 167 Wis. 2d 719, 482 N.W.2d 899 (1992).....	15
<i>State ex rel. Parker v. Sullivan</i> 184 Wis. 2d 668, 517 N.W.2d 449 (1994).....	11
<i>State v. Walworth County Cir. Ct.</i> , 167 Wis. 2d 719, 483 N.W.2d 899 (1992).....	18

WISCONSIN STATUTES

WIS. STAT. CHAPTER 227	PASSIM
WIS. STAT. § 227.02	9, 10, 15, 16, 17, 18
WIS. STAT. § 227.42	4
WIS. STAT. § 227.52	3, 4, 10, 22
WIS. STAT. § 227.53(1).....	13, 14
WIS. STAT. § 227.53(1)(a)(1)	3, 13
WIS. STAT. § 227.53(1)(a)(2m).....	1, 8, 14
WIS. STAT. § 227.53(1)(b).....	9, 11, 14, 17, 18
WIS. STAT. § 227.57(6).....	21
WIS. STAT. § 802.09	16
WIS. STAT. § 802.09(1)	18
WIS. STAT. § 802.09(4)	5, 17, 19

WIS. STAT. § 803.06	10, 19
WIS. STAT. § 808.03(2)	7
WIS. STAT. § 808.03(2)(a).....	23
WIS. STAT. § 808.03(2)(b)	23
WIS. STAT. § 809.50	1, 22

WISCONSIN ADMINISTRATIVE CODE

WIS. ADMIN. CODE NR CHAPTER 151	12
WIS. ADMIN. CODE NR § 103.08(3) & (4).....	12

FEDERAL CASES

<i>Bell v. U.S. Dept. of Defense,</i> 71 FRD 349 (D. N.H. 1976).....	20
<i>Eison v. Kallstrom,</i> 75 F. Supp. 2d 113 (S.D. N.Y. 1999))	20
<i>Families and Youth, Inc. v. Maruca,</i> 156 F. Supp. 2d 1245 (D. N.M. 2001).....	20
<i>Federal Telephone Corp. v. Associated Tel. & Tel. Co.,</i> 88 F. Supp. 375 (D. Del. 1949).....	20
<i>Garrison v. Baltimore & O.R. Co.,</i> 20 FRD 190 (W.D. Pa. 1957)	20
<i>Hertz Corp. v. Enterprise Rent-A-Car,</i> 557 F. Supp. 2d 185 (D. Mass. 2008)	20
<i>H F G Co. v. Pioneer Pub. Co.,</i> 7 FRD 654 (N.D. Ill. 1947)	20
<i>Vernay Labs v. Industrial Electronic Rubber Co.,</i> 234 F. Supp. 161 (N.D. Ohio 1964)	20

FEDERAL RULES

FEDERAL RULE OF CIVIL PROCEDURE 15(a)	17, 19, 21
---	------------

FEDERAL RULE OF CIVIL PROCEDURE 15(d).....17, 19, 21

OTHER STATE CASES

Shooshanian v. Wagner,
672 P. 2d 455 (Alaska 1983) 20

OTHER AUTHORITIES

GRENIG, 3 WISCONSIN PRACTICE - CIV. PRO.
§ 290.7 (4TH ED.) 17

WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE
§ 1504..... 19

WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE
§ 1506..... 21

**§ 809.50 PETITION TO THE
COURT OF APPEALS FOR DISTRICT II**

The Reddelien Road Neighborhood Association (hereafter, the “RRNA”), et al.,¹ by its counsel, Attorney William C. Gleisner, III together with Attorneys William H. Harbeck and Jeffrey O. Davis of Quarles & Brady, hereby petitions this Court for leave to appeal from a non-final June 21, 2011 Order of the Circuit Court of Waukesha County in Case No. 2010CV5096 [hereafter, “Case 5096”],² the Honorable Ralph M. Ramirez presiding, dismissing the RRNA’s Supplemental Petition in that case. Judge Ramirez’s Order is attached to this Petition as Appendix A.

MEMORANDUM IN SUPPORT OF PETITION

I. INTRODUCTION

**A. The Supplemental Petition was
Dismissed on the Merits because of a Technicality.**

The RRNA’s Supplemental Petition was dismissed on June 21, 2011 by the Trial Court on the technical grounds that it should have been filed as a separate petition. The Trial Court reached this conclusion even though the RRNA is permanently barred from refileing the Supplemental Petition as an independent petition because the Wis. Stats. § 227.53(1)(a)(2m) time limit on such a refileing expired on January 13, 2011. Before the Trial Court made its ruling, the DNR acknowledged that

¹ The Reddelien Road Neighborhood Association is a non-profit corporation representing the interests of nearly 100 residents of the Town of Merton in Waukesha County who own property on Reddelien Road and River Road next to North Lake. Forty of these residents are also named Petitioners in Waukesha County Circuit Court Case No. 2010CV5096.

² Presently this matter is pending before the Circuit Court as part of a consolidation of two cases (Case No. 10CV5085 and Case No. 10CV5096), but the non-final Order in question dismisses a Supplemental Petition which was only served and filed in Case No. 10CV5096 on January 11, 2011, prior to the date of consolidation on April 21, 2011.

once the Supplemental Petition was dismissed it would be impossible for the RRNA to refile it as an independent petition (*See attached* Appendix E, App. 087).³

B. The Dismissal of the Supplemental Petition will Result in the Permanent Loss of Important Rights because of a Technicality.

This case involves a Chapter 227 judicial review of an effort by the Respondent, Wisconsin Department of Natural Resources (hereafter, “DNR”), to build a boat launch on property owned by the DNR known as the “Kraus Site,” which is located adjacent to North Lake in Waukesha County and which is also in the middle of a residential neighborhood. The DNR is determined to do this despite strenuous objections by the North Lake Management District and the RRNA that the proposed launch will destroy valuable wetlands and navigable water, as well as cause flooding in the neighborhood and pollute North Lake.

In order to build this boat launch, the DNR will have to cut down over 400 trees and build a 2000 foot long asphalt road through or next to wetlands and then place a football field-sized asphalt parking lot in an area containing both wetlands and navigable water. *See attached* Appendix B, App. 10-15; Appendix C, App. p. 32; 48. The RRNA submits that the DNR plans will destroy important wetlands and navigable waters and will further cause significant flooding of the RRNA’s neighborhood and pollution of North Lake. *Id.* If this Court does not allow a permissive appeal and the dismissal of the RRNA’s Supplemental Petition is allowed to stand, this will result in the loss of important rights of the RRNA and its members because of a technicality.

³ The final date for refiling the RRNA’s Supplemental Petition was January 13, 2011. Therefore, it was already too late to refile when the DNR filed its Motion to Dismiss the Supplemental Petition on February 4, 2011.

The RRNA strongly supports public access to North Lake. In fact, there is an alternative to the Kraus Site known as the “Kuchler Site,” and one of the contentions of both the RRNA’s Primary Petition in Case 5096 and its Supplemental Petition is that the DNR failed to properly conduct a “practicable alternative analysis” of the Kraus and Kuchler Sites. Appendix B, App. pp. 20-23; Appendix C, App. pp. 44-46. This is one of many close interrelationships between the Primary Petition and the Supplemental Petition in Case 5096.

The Trial Court dismissed the Supplemental Petition which is the subject of this request to appeal, effectively on the merits, despite the fact that it pertained to the exact same boat launch project as the Primary Petition, the issues raised in both were closely interrelated, and even though the Supplemental Petition was filed and served in accordance with the express requirements of Wis. Stats. § 227.53(1)(a)(1). The Trial Court asserted as the basis for this ruling the technicality that the Supplemental Petition should have been filed as a “separate and distinct” petition, despite as shown *infra* that nothing in Chapter 227 requires such a result and even though the relevant terms of the Code of Civil Procedure applicable to this proceeding clearly allow for amendments and supplements to pleadings.

It is the position of the RRNA that the Supplemental Petition in Case 5096 was clearly a proper amendment to a properly filed and served § 227.52 Primary Petition in Case 5096. If the issues in this case are not taken up now by this Court, RRNA will likely lose forever its appeal rights because DNR will proceed with destructive activities at the close of the pending proceedings.

II. STATEMENT OF THE ISSUES

There are two closely related issues in this case:

1. Do Chapter 227 and the Wisconsin Code of Civil Procedure permit the filing of Supplemental Petitions for judicial review?
2. In dismissing the Supplemental Petition with prejudice, was the Trial Court correct that Chapter 227 requires a "separate and distinct" petition for each decision being challenged regardless of the interrelationship in this case between the Primary Petition and the Supplemental Petition?

III. STATEMENT OF FACTS

The DNR issued a so called Manual Code Approval on November 4, 2010 [hereafter, "Manual Code Approval"], whereby the DNR granted to itself a permit to proceed with the construction of a boat launch on the Kraus Site. On November 22, 2010, the RRNA filed a Wis. Stats. § 227.42 request with the DNR for a contested case hearing as to eight factual issues regarding the Manual Code Approval.

On December 3, 2010 the RRNA in addition filed a Wis. Stats. § 227.52 Primary Petition for judicial review of the Manual Code Approval [excerpts from which are contained in attached Appendix B] and that led to the opening of Case 5096. A copy of the November 22, 2010 request for contested case hearings was attached to and incorporated into the Primary Petition.⁴ Appendix B, App. pp. 004-005.

⁴ This is significant because the Supplemental Petition is in effect an appeal of the DNR's denial of seven of the issues raised in the November 22, 2010 request for contested case hearings. Clearly, the Primary Petition in Case 5096 and the Supplemental Petition are thus very closely related. *See also* other examples of how closely the primary petition and Supplemental cited and discussed *infra* at pp. 12-13 of this Memorandum.

On December 13, 2010 the DNR issued its decision on the request for contested case hearings, granting a contested case hearing as to only one factual issue raised by the RRNA and denying contested case hearings as to the RRNA's other seven factual issues.

The RRNA sought judicial review of the December 13, 2010 DNR decision to deny a contested case hearing as to the seven factual issues by means of its January 11, 2011 Supplemental Petition, excerpts from which are contained in attached Appendix C. By its terms, the Supplemental Petition was clearly labeled as a supplement to the primary petition in Case 5096.⁵ It is this Supplemental Petition which the Circuit Court dismissed on the merits by its June 21, 2011 Order in Appendix A and which is the subject of this petition for leave to file an immediate appeal.

On June 3, 2011, there was a hearing before the Trial Court on the DNR's motion to dismiss (the full transcript of that hearing is attached as Appendix D).

The DNR moved to dismiss the Supplemental Petition on two grounds. First, it argued that the RRNA did not seek approval of the Court before filing it, as is required by § 802.09(4) of Wisconsin Rules of Civil Procedure. *See* excerpt from DNR 2-4-11 Brief-in-Chief contained in attached Appendix E, App. pp. 083-084. The Court did not address or base its ruling on this argument.

Second, the DNR moved to dismiss on the grounds that the Supplemental Petition should have been filed as a separate petition. *See* excerpt from DNR 5-24-11

⁵ The Supplemental Petition began with the following words: "Petitioners, by counsel, hereby file a Supplemental Petition for Judicial Review supplementing their Petition for Judicial Review filed on December 3, 2010..." Appendix C, App. 029.

Reply Brief, also contained in attached Appendix E, App. pp. 084-090. At no point in its briefs or in the argument on June 3, 2011 does the DNR point to any specific provision of Chapter 227 which forbids the filing of supplemental petitions or requires that all petitions must be filed separately.

The RRNA argued at the June 3, 2011 hearing that “[t]here is no place in Chapter 227 where the Legislature specifically states that each Agency action must be the subject of a separate petition...” Appendix D, App. p. 062. The RRNA went on to point out that the supplemental petition could in any event be construed as an amendment. “The Supplemental Petition ... was intended [to] amend the main petition... [In fact,] 227.53(1)(b) allows amendments to petitions, [and] that section does not have a time limit in it, Your Honor.” *Id.* at App. pp. 063-064. The RRNA also offered to sever the Supplemental Petition from the primary petition in Case 5096 pursuant to Wis. Stats. § 803.06, but the Trial Court ignored this invitation.

Instead, the Trial Court adopted the reasoning and arguments of the DNR. The Trial Court ruled from the Bench that the Supplemental Petition should have been filed as a separate petition, and thus dismissed it, effectively on the merits. Appendix D, App. pp. 075-078. The Trial Court concluded as a matter of law “I believe that the specific provisions of Chapter 227 and the requirement to file a **separate and distinct petition** or action should be complied with, and because it wasn’t complied with, ... I’ll find that it did not follow the appropriate procedure as set out in Chapter 227; and, therefore, because the proper procedure wasn’t followed, ... it must be dismissed [Emphasis supplied].” *Id.* at App. p. 078.

IV. REASONS FOR GRANTING THIS PETITION

A. This Case meets the Statutory Criteria for a Permissive Appeal.

Wis. Stat. § 808.03(2) sets forth the criteria for a permissive appeal. This Court is authorized to hear such an appeal if it determines that an immediate appeal will: i) materially advance the termination of the litigation or clarify further proceedings in the litigation; ii) protect the petitioner from substantial or irreparable injury; or iii) clarify an issue of general importance in the administration of justice.

i. Taking Jurisdiction of this Appeal now will Substantially Clarify Proceedings in this Litigation without Unduly Burdening the Judicial Resources of this Court.

The issues involved are purely matters of law and will not require recourse to an extensive record. The decision of the Trial Court below turned entirely on the Trial Court's interpretation of provisions of civil procedure and statutory law. Appendix D, App. pp. 075-78. The Trial Court stated in part:

What's important for me as I make this decision is the distinctions that [the] parties have drawn in regards to the general rules of Civil Procedure in regards to pleading and the bringing together issues, and then as well Chapter 227, the statutory provisions concerning administrative procedure. And because I believe that the 227 statutes, the administrative procedures, are more particular and more on point, I am going to grant the motion ... by the DNR to dismiss the ... supplemental petition...

Appendix D, App. p. 076.

If a permissive appeal is granted in this case, it will not unduly burden the judicial resources of this Court. The record which this Court will need to decide the legal issues presented by the Trial Court's June 21, 2011 Order will not have to include much more than that which is attached to this Petition.

And yet, as will be shown in the next section of this Petition, the decision of the Trial Court effectively ends a significant portion of the RRNA's case on the merits based on a technicality and will force the RRNA to go ahead with a contested case hearing on only one of its eight claimed factual issues.

**ii. Taking Jurisdiction of this Appeal now will
Protect the RRNA from Substantial and Irreparable Injury.**

The RRNA's Supplemental Petition sought contested case hearings as to eight factual issues. *See* attached Appendix C, App. pp. 031-033. The DNR granted a contested case hearing as to only one factual issue.

The DNR is well aware that dismissal of the Supplemental Petition will in effect sound the death knell for the RRNA's other seven requested contested case hearings. In fact, before the Trial Court ruled on June 21, 2011, the DNR candidly acknowledged on May 24, 2011 that dismissal of the Supplemental Petition means that it is now too late to the RRNA to refile the request for contested case hearings as to the seven issues by reason the time limit in Wis. Stats. § 227.53(1)(a)(2m).⁶ The DNR agrees that this may be "harsh" (*See* attached Appendix E, p. 090), but that is the price the RRNA must pay for having made the technical mistake of filing a Supplemental Petition instead of filing an independent petition.

Thus by its own argument the DNR is acknowledging that dismissal of the RRNA's Supplemental Petition is effectively on the merits and a final decision. If this Court does not grant a permissive appeal, the RRNA will have to go forward with a

⁶ The DNR states on 5-24-11: "The Supplemental Petition in this case was not properly filed as a separate petition for judicial review, and it is [now] too late to file such a petition...." citing the 30 day time limit in Wis. Stats. § 227.53(1)(a)2m. Appendix E, App. pp. 87 & 89.

contested case hearing as to the one factual issue. If the DNR prevails as to that contested case hearing the DNR will be able to enter judgment in Case 5096 and put their Manual Code Approval into effect.⁷ The RRNA will be left with attempting an appeal of Case 5096 in the hopes of obtaining additional contested case hearings **after** the DNR has already cut down over 400 trees and asphalted over tens of thousands of square feet of wetlands and navigable waters. In other words, if this Court does not allow a permissive appeal of what the DNR itself acknowledges is a final Order, the RRNA and its citizens will suffer substantial and irreparable injury.⁸

**iii. Taking Jurisdiction of this Appeal now will Clarify
Issues of General Importance in the Administration of Justice.**

This case raises important questions concerning the proper interpretation of Chapter 227 and related laws. As argued *infra*,⁹ the proper interrelationship between Chapter 227 and the Wisconsin Code of Civil Procedure has been called into question by the Trial Court's decision in this case. In addition, other important questions are presented, such as:

1. Are supplemental petitions ever proper under Chapter 227?
2. When Chapter 227 is silent as to what procedure applies, does § 227.02 require application of an appropriate provision of the Wisconsin Code of Civil Procedure?
3. Why isn't a supplemental petition functionally the equivalent of a § 227.53(1)(b) amended petition?

⁷ See discussion and authorities cited *infra* at pp. 21-22 of this Memorandum.

⁸ *Id.*

⁹ See discussion and authorities cited *infra* at pp. 15-21 of this Memorandum.

4. If a petition has been improperly joined with another petition, why isn't appropriate to move to sever the petitions pursuant to § 803.06?

Another important question of general importance in the administration of justice has to do with piecemeal litigation. Where a primary petition has been timely filed and served, why is it inappropriate to consider a very closely related supplemental petition in the same proceeding, in the interests of judicial and administrative economy and in the furtherance of justice?

**B. If this Court grants a Permissive Appeal,
there is a Substantial Likelihood of Success on the Merits.**

The Supplemental Petition which was dismissed asks the Court to review the DNR's refusal to schedule a contested case hearing for seven out of eight factual issues specified in the Supplemental Petition. In effect, the Supplemental Petition (in Appendix C) amends a Primary Petition (in Appendix B) pursuant to Wis. Stats. § 227.52 for judicial review. No one disputes that the Primary Petition was properly filed and served.

The Trial Court dismissed the Supplemental Petition as a matter of law on the technical grounds that Chapter 227 requires a "separate and distinct" filing of the Supplemental Petition, despite the fact that the Supplemental Petition was very closely related to the § 227.52 Primary Petition in Case 5096 and despite the fact that nothing in Chapter 227 prohibits the filing of a supplemental petition.

In so ruling, the Trial Court ignored Wis. Stats. § 227.02 which specifies that compliance with Chapter 227 does not eliminate the necessity of complying with a procedure of another statute, such as § 802.09 of the Wisconsin Code of Civil

Procedure (which allows for both amended and supplemental pleadings). The Trial Court also ignored Wis. Stats. § 227.53(1)(b) which permits parties to amend their petition at any time, even after the deadline for filing the petition has passed. There is no time limit on seeking an amendment under § 227.53(1)(b).

i. The Trial Court made an Error of Law which ought to be Corrected Immediately.

The Judge's decision to dismiss the Supplemental Petition is not a discretionary ruling entitled to deference because it is a decision based solely on the law. Statutory interpretation is a question of law as to which appellate courts routinely conduct a *de novo* review. *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 659, 539 N.W.2d 98 (1995).

Appellate courts are not required to give deference to a circuit court's decision on matters of law. *Kallin v. Rainwater*, 226 Wis. 2d 134, 147, 593 N.W.2d 865 (Ct. App. 1999). Moreover, "a court does not... give deference to an agency's interpretation of a statute when the court concludes that the agency's interpretation directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise unreasonable or without rational basis." *State ex rel. Parker v. Sullivan*, 184 Wis. 2d 668, 699, 517 N.W.2d 449 (1994).

ii. There is a close and Integral Relationship between the Primary Petition and the Supplemental Petition.

The DNR seeks to suggest that the Supplemental Petition (in Appendix C) was an unrelated filing that had nothing at all to do with the primary petition in Case 5096 (in Appendix B). Nothing could be further from the truth.

In fact, the Primary Petition in Case 5096 and the Supplemental Petition are intimately interrelated. First, they pertain to the exact same project – i.e., the DNR’s proposed construction of a boat launch at the Kraus Site. Second, there is not a separate record for the action taken in connection with DNR's original Manual Code Approval and its December 13, 2011 Decision. In fact, the DNR itself acknowledges this fact. “[T]he [December 13, 2010 contested case hearing denial has no – no record that I know of ...” Appendix D, App. p. 054. Third, there is significant overlap in the contentions underlying both the Primary Petition in Case 5096 and the Supplemental Petition. For example:

- The RRNA Primary Petition in Case 5096 alleges that DNR improperly assessed the impact to wetlands from the project. *See* RRNA Primary Petition at Sect. IV.D., in attached Appendix B, App. pp. 016-018.
 - ✓ The RRNA Supplemental Petition seeks review of DNR’s denial of a hearing on this same issue. *See* RRNA Supplemental Petition Sect. I.A., ¶ 4, and Sect. I.B. 5, Issues 1 (a), (c)-(f). in attached Appendix C, App. pp. 030-031.
- The RRNA Primary Petition in Case 5096 alleges that DNR did not include a proper “practicable alternatives analysis” in the Permit as required under Wis. Admin. Code NR § 103.08(3) and (4). *See* RRNA Primary Petition at Sect. IV.F., in attached Appendix B, App. pp. 020-021.

- ✓ The RRNA Supplemental Petition seeks judicial review of DNR’s denial of a hearing on the same issue. *See* RRNA Supplemental Petition, Sect. I.A, ¶ 4, and Sect. I.B., ¶ 5, Issue 1(b), in attached Appendix C, App. pp. 031.
- The RRNA Primary Petition alleges that DNR failed to comply with the requirements of Wis. Admin. Code NR Chapter 151. *See* RRNA primary petition at IV.C, ¶¶ 27-40, in Appendix C, pp. 014-016.
 - ✓ The RRNA Supplemental Petition seeks review of DNR’s denial of a hearing on this exact same issue *See* RRNA Supplemental Petition Sect. I.A, ¶ 4 and Sect. I.B ¶ 5, Issues 3-4, Appendix C, App., p. 032.

In fact, there are a host of other overlapping provisions in the RRNA’s Primary Petition in Case 5096 and the RRNA’s Supplemental Petition in Case 5096. The Supplemental Petition is not irrelevant to the Primary Petition; it is in fact a *de facto* amendment of, or “supplement to” the Primary Petition of which it is an integral part.

iii. The Supplemental Petition complied with the Procedural Requirements of chapter 227.

Chapter 227’s procedural requirements for challenging an agency decision are very straightforward. Under Wis. Stats. § 227.53(1) a petition must be:

- 1) Served “personally or by certified mail upon the agency” (Wis. Stat. 227.53(1)(a)(1);
- 2) Filed “in the office of the clerk of circuit court for the county where the judicial review proceedings are to be held” (Id.); and

- 3) Service and filing must occur “within 30 days after personal service or mailing of the decision by the agency.” (Wis. Stat. 227.53(1)(a)(2m)).¹⁰

The DNR does not argue nor does the Trial Court find that the RRNA’s Supplemental Petition failed to comply with these procedural requirements. On the contrary, the Supplemental Petition was:

- 1) Personally served on the DNR on January 11, 2011;
- 2) Filed with the clerk of this court on January 11, 2011; and
- 3) Served and filed within 30 days of the DNR’s 12/13/10 decision on RRNA’s request for contested case review.

The DNR’s sole contention is that the Supplemental Petition is somehow technically flawed because it “was not filed as a **separate and distinct petition** for judicial review, and the time for [the RRNA] to properly file it has passed.” Excerpt from DNR Reply Brief, Appendix E, App. p. 087 [Emphasis supplied]. However, the plain fact remains that the “separate and distinct” requirement does not appear anywhere in Chapter 227.

Whatever its technical label, the Supplemental Petition is a “petition” which was both timely and properly served and filed; that is all that Wis. Stats. 227.53(1) requires. There simply is no statutory requirement that a “separate” petition be filed, and to add such a requirement would only lead to the unnecessary consumption of both the parties’ and the court’s resources. This unsubstantiated addition to Chapter 227, upon which the Trial Court specifically relies (Appendix D, App. 078) needs to be clarified for the purposes of this litigation and in order to spare the RRNA from the

¹⁰ Wis. Stats. 227.53(1)(b) also sets forth certain matters that a petition should address, such as “the nature of the petitioner’s interest,” “the facts showing that the petitioner is aggrieved by the decision,” and the “grounds” for reversal or modification of the petition. DNR does not contend that the Supplemental Petition is deficient in these respects.

serious injury of having their significant claims in the Supplemental Petition disposed of on the merits because of a mere technicality when in fact there is no basis in the law for such a disposition.

**iv. This court should Immediately Review the
Unsubstantiated Assumptions of the Trial Court
in order to clarify the further course of this Litigation.**

In arguing in favor of dismissing the RRNA's Supplemental Petition, the DNR has made a number of assumptions concerning the interrelationship between Wisconsin's Administrative Code and Wisconsin's Code of Civil Procedure which are unsupported by case law or statutory law. Unfortunately, the Trial Court accepted these assumptions in reaching its incorrect decision on the law in the case at bar.

Wis. Stats. § 227.02 provides: "Compliance with this chapter does not eliminate the necessity of complying with the procedure required by another statute." The DNR points out that *State ex rel. Delevan v. Cir. Ct. of Walworth County*, 167 Wis. 2d 719, 723, 482 N.W.2d 899 (1992) provides that in applying this statute there is an implicit prerequisite that § 227.02 only requires compliance with those procedures that do not conflict with Chapter 227. Excerpt from DNR Brief-in-Chief, Appendix E, App. p. 083. The DNR then ironically cites § 227.02 to justify an argument based on the § 802.09(4) of the Wisconsin Rules of Civil Procedure.

And yet, just as ironically, when the RRNA asserted the applicability of relevant provisions of the Code of Civil Procedure, the DNR strongly disagreed responded with the following argument:

[T]he [RRNA's] brief treats this like it's any old civil case, that anything that's related to the boat launch should be in one case. ... You know if

this were a tortfeasor's case, that would make sense, but it's not. It's an administrative review procedure that's a special kind of proceeding. ... This isn't ... just like a civil action we can liberally amend the pleadings for and pile other issues in. This is – we need to look – go decision by decision and just look at that record of the decision and see if the DNR properly applied the facts and the law to that when it issued its decision.

Appendix D, App. p. 057.

However, the DNR does not supply any authority for its assumption. It does not point to any provision in Chapter 227 which is in conflict with the Wisconsin the Wisconsin Rules of Civil Procedure's mandates concerning pleading amendments and supplements, such as those contained in Wis. Stats. § 802.09. And the Trial Court likewise accepts the unsubstantiated assumptions of DNR's counsel without requiring citation to any authority which would demonstrate why there is a conflict between Chapter 227 and § 802.09 of the Civil Code of Procedure. However, without a demonstration of such a conflict, the RRNA submits that Wis. Stats. §227.02 clearly requires compliance with the procedural mandate of § 802.09.

**v. When Chapter 227 is Silent, it is clear that the
Legislature Expects Courts to Apply the Code of Civil Procedure.**

The error of the Trial Court below derives in substantial part from its acceptance of the DNR's misreading of the clear mandate in Wis. Stats. § 227.02. The DNR argued to the Trial Court below that there is no such thing as a supplemental petition because Chapter 227 does not specifically refer to such a device, without answering the fundamental question as to why the rules on amendments and supplements in Wis. Stats. § 802.09 were in such conflict with the provisions of Chapter 227 that the conflict excused compliance with § 802.09.

Far from being a conflict, Chapter 227 does not forbid supplemental petitions; in fact, it does not even refer to them. The Legislature did not specifically forbid supplemental petitions in Chapter 227 and thus there is no reason why Wis. Stats. § 227.02 cannot be read as requiring Courts to countenance the use of “supplemental pleadings” under Wis. Stats. § 802.09(4), such as the Supplemental Petition in the case at bar. If the DNR disagrees, then it needs to seek redress with the Legislature.

**vi. Chapter 227 allows for Amendments, and
the Supplemental Petition is Exactly like an Amendment.**

The RRNA labeled the filing at issue as a "Supplemental" Petition. But given the interrelationship and overlap between the matters contained in both the Supplemental Petition and the Primary Petition in Case 5096 (as discussed *supra*), including the fact that they both ultimately pertain to the exact same Manual Code Approval for the exact same project, the RRNA could just as easily have entitled their “Supplemental Petition” an "Amended Petition.”

Professor Grenig makes it clear that whatever the name, great liberality should be allowed when a Court is confronted with a “supplemental” pleading. According to Grenig: “Wis. Stats. §802.09(4) is derived from [Federal Rule of Civil Procedure 15(d)]. Although a court has discretion to permit a supplemental pleading, it is an abuse of discretion to deny a supplemental pleading for later events that clearly relate to the original claim.” Grenig, 3 *Wisconsin Practice Series – Civil Procedure* (4th Ed. 2010) §290.7, pp. 458-459.

And what is more, in drafting Chapter 227 the Legislature expressly allows parties to amend petitions after the thirty day time limit on submitting a Petition has

run. According to Wis. Stats. § 227.53(1)(b) a “petition may be amended, by leave of court, **though the time for serving the same has expired.**” [Emphasis supplied]. There is no time limit on when a party must file and serve such an amendment.

A rose by any other name smells the same.... The RRNA respectfully submits that it ought to have had the opportunity to “amend” or “supplement” their primary petition in Case 5096 pursuant to § 227.53(1)(b) by adding the additional details and facts asserted in its Supplemental Petition.

**vii. Whether the “Supplemental Petition” is
viewed as a Supplement or as an Amendment –
under the law it must be Liberally Construed.**

Again, the RRNA submits that all Chapter 227 proceedings are subject to the mandate in § 227.02 (“Compliance with this chapter does not eliminate the necessity of complying with a procedure required by another statute”) and thus are subject to the procedural rules contained in other statutes, including those set forth in Chapter 802 of the Statutes.¹¹ Whether the RRNA’s Supplemental Petition is considered as a “supplemental” pleading under Wis. Stat. § 802.09(4) or an “amended” pleading under either § 802.09(1) or § 227.53(1)(b), leave to file it should be freely granted.

If construed as an amendment, the drafters of the Wisconsin Code of Civil Procedure were so convinced that amendments should be treated with great liberality that they decreed that amendments under § 802.09(1) should be allowed “once as a matter of course any time within 6 months after the summons and complaint....” In

¹¹ In addition to the excerpts from its Reply Brief in attached Appendix E, the DNR asserted this very point in another matter pending between the parties in Waukesha County Circuit Court, citing Wis. Stat. 227.02, and *State v. Walworth County Circuit Court*, 167 Wis. 2d 719, 723, 483 N.W.2d 899 (1992).

other words, no motion need even accompany its filing. Thus, as an amended pleading there should be no impediment to allowing the RRNA's Supplemental Petition as "a matter of course."

However, even construing it as a supplemental pleading, the drafters of the Code of Civil Procedure made it clear that the same liberality which applies to amendments should be accorded to supplements under § 802.09(4).

Since § 802.09(4) is based on FRCP 15(d), the RRNA submits that it is important to take a closer look at the judicial gloss on the federal rule. According to Wright & Miller, Federal Practice & Procedure §1504:

[E]ven if a supplemental pleading is interposed by a party without leave of court in the mistaken belief it is a Rule 15(a) amendment that may be made as a matter of course, it is doubtful that any prejudice would accrue to the opposing party because the time during which amendments as of right may be filed is relatively short and comes early in the action so that prejudice to any other party is unlikely.

The RRNA submits that the foregoing should apply to the case at bar. The RRNA strenuously argues that it is inconceivable that the mere labeling of the Supplemental Petition as a "supplement" instead of an "amendment" should result in the draconian remedy of dismissal with prejudice as sought by the DNR and as Ordered by the Trial Court.

In fact, if there was concern that the mixing of the Supplemental Petition and the main Petition in Case 5096 might cause confusion or somehow prejudice the DNR, the RRNA even offered to move to sever the Supplemental Petition from Case 5096, as clearly by Wis. Stats. § 803.06. Appendix D, app. p. 064. The Trial Court declined to even consider this offer.

The RRNA submits that the Supplemental Petition in this case is no different from a supplemental pleading in any other civil case. According to Wright & Miller, “An application for leave to file a supplemental pleading is addressed to the discretion of the court and should be freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action.”¹² *Id.* at §1504.

In the case of *Hertz Corp. v. Enterprise Rent-A-Car Co.*, 557 F. Supp. 2d 185 (D. Mass. 2008), the Court provided an in depth discussion of amendments vs. supplements, concluding as follows:

There is an open question as to whether an amended complaint asserting a cause of action that arose only after the prior complaint was filed should be regarded as a ‘supplemental’ rather than an ‘amended’ complaint. The difference is modest. An amended complaint filed pursuant to Federal Rule of Civil Procedure 15(a) typically relates to matters that have taken place prior to the date of the pleading that is being amended. A supplemental complaint typically allows the pleader to set forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

Id. at 191-192.

The *Hertz* Court concluded “the federal practice is to liberally allow supplemental pleadings.... While Rule 15(d) is less permissive than Rule 15(a), a

¹² Here are some of the cases cited by Wright & Miller in support of the quoted proposition: *Shooshanian v. Wagner*, 672 P.2d 455, 459 (Alaska 1983); *Hertz Corp. v. Enterprise Rent-A-Car Co.*, 557 F. Supp. 2d 185 (D. Mass. 2008); *Families and Youth Inc. v. Maruca*, 156 F. Supp. 2d 1245 (D.N.M. 2001); *Eison v. Kallstrom*, 75 F. Supp. 2d 113 (S.D. N.Y. 1999); *Bell v. U.S. Dept. of Defense*, 71 F.R.D. 349 (D.N.H. 1976); *Garrison v. Baltimore & O.R. Co.*, 20 F.R.D. 190 (W.D. Pa. 1957); *Federal Telephone & Radio Corp. v. Associated Tel. & Tel. Co.*, 88 F. Supp. 375 (D. Del. 1949); *H F G Co. v. Pioneer Pub. Co.*, 7 F.R.D. 654 (N.D. Ill. 1947); *Vernay Laboratories, Inc. v. Industrial Electronic Rubber Co.*, 234 F. Supp. 161 (N.D. Ohio 1964).

generous reading of Rule 15(d), at least in the early stages of litigation, is consistent with Rule 15(a)'s mandate that '[l]eave to amend is to be 'freely given' . . . unless it would be futile, or reward, *inter alia*, undue or intended delay.'" *Id.* at 192. In fact, recalling again that §802.09(4) is based on FRCP 15(d), Wright & Miller makes the following philosophical point at §1506:

One of the basic policies of the [rules of civil procedure] is that a party should be given every opportunity to join in one lawsuit all grievances against another party regardless of when they arose. More in keeping with this philosophy are those decisions that have allowed the joinder of new claims by supplemental pleading. Thus, in several cases courts have ruled that a supplemental pleading may include a new 'cause of action' when it would be convenient to litigate all the claims between the parties in the same action. **Other courts have construed plaintiff's original 'cause' broadly to embrace the claim in the supplemental pleading in order to reach substantially the same result** [Emphasis supplied].

The RRNA submits that this Court should exercise its discretion to take this case in order to correct the unsubstantiated assumptions of the Trial Court and in order clarify the future course of this litigation.

viii. This Court should permit an Interlocutory Appeal because the RRNA's Substantive Rights will otherwise be Forfeited and rendered completely moot.

The law requires that judicial reviews under Chapter 227 must include a review of all contested case hearings. *See* Wis. Stats. § 227.57(6) which provides: "If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action

depends on any finding of fact that is not supported by substantial evidence in the record.”

There will be a contested case hearing as to just one of the eight issues requested by the RRNA in its Supplemental Petition.¹³ Appendix D, App. p. 072. Once that contested case hearing is resolved, judgment may be entered as to the merits of the § 227.52 judicial review. If the DNR prevails on the merits of the judicial review, the Manual Code Approval can immediately be put into effect and the DNR can cut down over 400 trees and build a 2000 foot long asphalt road through or next to wetlands and then place a football field-sized asphalt parking lot in an area containing both wetlands and navigable water. *See* Appendix B, App. 10-15; Appendix C, App. p. 32; 48. Thus, if this Court does not grant leave to file an interlocutory appeal of the June 21, 2011 Order of the Trial Court below, the RRNA will forfeit their substantial rights to a contested case hearing on the seven other issues regarding the DNR enterprise this will cause substantial and irreparable injury to the RRNA within the meaning of Wis. Stats. § 808.03(2)(b).

CONCLUSION

The DNR seeks, and the Trial Court has ordered the very severest of results - a dismissal with prejudice - based on a technicality. The RRNA therefore prays, that this Court exercise its discretion and grant permission pursuant to Wis. Stats. § 809.50(1) to the RRNA for leave to file an interlocutory appeal of the June 21, 2011 Order of the

¹³ The RRNA did not intend to delay the September 2011 administrative hearing on the one contested case issue by filing the Supplemental Petition. The RRNA made it clear that if necessary they did not object to staying action on the other contested case issues until a later date. *See* Appendix D, App. p. 065.

Trial Court below dismissing the RRNA's Supplemental Petition in order to clarify further proceedings in this litigation within the meaning of Wis. Stats. § 808.03(2)(a) and in order to protect the RRNA from substantial and irreparable injury within the meaning of Wis. Stats. § 808.03(2)(b).

Dated at Hartland, Wisconsin this 1st day of July, 2011.

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

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§ 809.50(1) CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that the foregoing Brief conforms to the rules contained in § 809.19(8) (b) and (c), Wis. Stats., for a Brief produced using the following font: Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 6,533 words.

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CERTIFICATE OF SERVICE

WILLIAM C. GLEISNER, III, a duly licensed attorney in Wisconsin and an officer of this Court hereby certifies that the following are all counsel associated with case and further certifies that each received service as follows on July 5, 2011:

1. By personal service upon the Justice Department and also by email delivery:
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Assistant Attorney General of Wisconsin
Counsel for the DNR
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P.O. Box 7857
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2. By regular mail and email delivery:
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Counsel for the North Lakes Management District
Reinhart Boerner Van Duren, S.C.
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**APPENDIX TO RRNA PETITION FOR
PERMISSION TO APPEAL JUNE 21, 2011 ORDER**

APPENDIX INDEX

- A. **APPENDIX A: JUNE 21, 2011 ORDER OF THE TRIAL COURT WHICH IS THE SUBJECT MATTER OF THIS PETITION FOR A PERMISSIVE APPEAL TO THE COURT OF APPEALS..... APP. 001**
- B. **APPENDIX B: DECEMBER 3, 2010 RRNA PRIMARY PETITION FOR JUDICIAL REVIEW IN WAUKESHA COUNTY CIRCUIT COURT CASE NO. 2010CV5096..... APP. 003**
- C. **APPENDIX C: JANUARY 11, 2011 RRNA SUPPLEMENTAL PETITION IN WAUKESHA COUNTY CIRCUIT COURT CASE NO. 2010CV5096 APP. 029**
- D. **APPENDIX D: FULL TRANSCRIPT OF HEARING ON THE DNR'S MOTION TO DISMISS, CONDUCTED BEFORE JUDGE RAMIREZ ON JUNE 3, 2011 APP. 50**
- E. **APPENDIX E: EXCERPTS FROM THE DNR BRIEFS FILED IN THE TRIAL COURT APP. 083**

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 3

WAUKESHA COUNTY

NORTH LAKE MANAGEMENT DISTRICT,

Petitioner,

v.

Case No. 10-CV-5085

WISCONSIN DEPARTMENT OF NATURAL
RESOURCES,

Respondent.

FILED
IN CIRCUIT COURT

JUN 21 2011

WAUKESHA CO. WI
CIVIL DIVISION

REDELLEN ROAD NEIGHBORHOOD
ASSOCIATION, INC. ("RRNA"), et al.,

Petitioners,

v.

Case No. 10-CV-5096

STATE OF WISCONSIN DEPARTMENT OF
NATURAL RESOURCES

Respondent.

CLERK OF CIRCUIT COURT
CIVIL DIVISION
2011 JUN 14 AM 9:17

ORDER

The Court heard the Respondent's motion to dismiss the Supplemental Petition filed in Case No. 10-CV-5096 on June 3, 2011. Petitioners Reddellen Road Neighborhood Association, et al., appeared by their attorneys, William C. Gleisner, III, and William Harbeck. Petitioner North Lake Management District appeared by its attorney, Donald P. Gallo. Respondent State of Wisconsin Department of Natural

Appendix A

Resources (DNR) appeared by its attorney, Assistant Attorney General Diane L. Milligan.

Based on the pleadings and the record in this case, based on arguments of counsel on the record, and for the reasons stated by the Court on the record at the hearing,

IT IS ORDERED that the DNR's motion to dismiss the Supplemental Petition is GRANTED.

IT IS FURTHER ORDERED that the Court will hold a telephonic status conference in the above-captioned case on Monday, November 7, 2011 at 9:15 a.m. Counsel for Reddelien Road Neighborhood Association shall initiate the call.

Dated this 21st day of June, 2011.

BY THE COURT:



THE HONORABLE RALPH M. RAMIREZ
Waukesha County Circuit Court, Branch 3

10CV5085

CLERK OF CIRCUIT COURT
CIVIL DIVISION
2011 JUN 14 AM 9:17

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DNR
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SECRETARY *Michelle*

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

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

J. M. DAVIS

CLERK OF COURTS
DEC - 3 2010
THIS IS AN AUTHENTICATED COPY OF AN
ORIGINAL DOCUMENT FILED IN THE CLERK
OF COURTS OFFICE WAUKESHA COUNTY.
The Department of Natural Resources ("DNR"),
an agency of the State of Wisconsin,

Case No.
Case Code: 30607
Administrative Agency Review

10CV05098

FILE

vs.

Respondent.

PETITION FOR JUDICIAL REVIEW

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

Appendix B

I. PRELIMINARY ALLEGATIONS.

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

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

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

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

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

II. THE PARTIES.

A. The Respondent.

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

B. The Petitioners.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40. The Permit thus does not meet the requirements of Wis. Admin. Code NR §151.12(5)(b).
 3. **The Permit does not comply with the requirements of Wis. Stats. §281.15 or Wis. Admin. Code NR §299.04(1)(b).**
 41. The storm water treatment system for the roadway is not designed to remove oils and grease, toxic organic compounds, nitrogen compounds, or de-icing compounds such as salt that are found in roadway runoff. See Appendix B, Exhibit G, ¶4.
 42. The DNR did not account for these effects in issuing the Permit.
 43. DNR's failure to do so violates Wis. Stats. §281.15 and Wis. Admin. Code NR § 299.04(1)(b). The Permit is thus invalid.
- D. The Permit Understates The Area Of Wetlands That Will Be Filled By The Proposed Development In Violation Of Wis. Stats. §23.32(1) And Wis. Admin. Code NR 103.08.**
1. **The DNR incorrectly applied the Legislature's definition of wetlands.**
 44. The Permit should not have been issued because the DNR failed to correctly apply Wisconsin's statutory definition of wetlands, and thus grossly understates the true extent of wetlands affected by the boat launch in the Permit's Findings of Fact ("FOF"). The area marked in green on Exhibit C (a map of the area) of Appendix B ("Disputed Area") contains additional wetland area that would be affected by the proposed development, which area was not identified as wetlands by the DNR in the Permit.

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

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

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

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

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

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

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

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

61. In addition, the single statement in the Permit's FOF #13 does not satisfy the requirements of the DNR to act as an agent for the Environmental Protection Agency in conducting a full water quality certification under Section 401 of the Federal Clean Water Act (33 USC §1341). Nowhere is there any evidence in the Permit that the DNR conducted the type of investigation and certification process customary for such a project.
 62. The DNR thus has not complied with the statutory and regulatory requirements regarding the issuance of a water quality certification for the proposed development authorized by the Permit.
 63. Additionally, if the wetlands are not federal, the DNR has not obtained a permit under Wis. Stats. §281.36.
- F. The Permit Does Not Include A Proper Or Correct Practicable Alternatives Analysis Within The Meaning Of Wis. Admin. Code NR §103.08(3) And (4).**
64. In making water quality determinations for wetlands, Wis. Admin. Code NR §103.08(3)(b) specifies that the DNR shall consider "practicable alternatives to the proposal which will avoid and minimize adverse impacts to wetlands and will not result in other significant adverse environmental consequences." This is essential in order to fulfill Wisconsin's stated policy of protecting wetlands. (See Wis. Admin. Code NR §1.95)

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

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

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

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

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

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

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

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

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

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

70. The DNR's March 1, 2010 Decision is far more detailed and comprehensive than the November 4, 2010 Permit. For instance, the March 1, 2010 Decision has an extensive section on Floristic Diversity (Appendix B, Exhibit J, p. 5), Water Quality (Appendix B, Exhibit J, p. 6), and Wildlife and Wildlife Habitat (Appendix B, Exhibit J, p. 7). The Permit contains no such analysis.
71. On its face, it thus appears as if the DNR is employing an entirely different standard when passing judgment on the permit applications of others (such as the NLMD's "dual-site" proposal addressed in the March 1, 2010 Decision) than it uses when passing judgment where the DNR itself is the applicant. This raises serious questions as to whether the Petitioners have been accorded Due Process under the law in DNR's processing and issuance of the Permit.
72. In addition, as is reflected in the correspondence in Exhibit D of Appendix B, the NLMD and the RRNA were denied reasonable access to the Kraus Site during the growing season and during the period of time when threatened and endangered species would be present so that those experts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WHEREFORE, Petitioners pray for the following relief:

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

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

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

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

12. FOR AN ORDER prohibiting the mowing or other alteration at the Kraus Site during the growing season so that wetlands can be properly delineated;

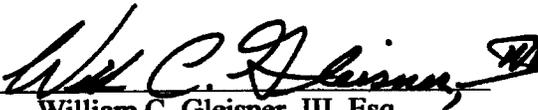
13. FOR AN ORDER vacating the Permit;

14. FOR AN ORDER to the DNR mandating it to conduct navigability tests on the area marked in orange on attached Exhibit E;

15. FOR SUCH OTHER RELIEF AS THE COURT DEEMS APPROPRIATE.

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

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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

Appendix C

APP. 029

“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 DELINATION.**

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://doafp04.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.

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1 STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY

2 -----

3 NORTH LAKE MANAGEMENT
4 DISTRICT,

Case No. 10-CV-5085

Plaintiff,

5

-vs-

6

MOTION HEARING

7 WISCONSIN DEPARTMENT OF
8 NATURAL RESOURCES,

Defendant.

8

9 -----

10 REDDELIEN ROAD NEIGHBORHOOD
11 ASSOCIATION,

Case No. 10-CV-5086

Plaintiff,

11

12

-vs-

13

MOTION HEARING

14 WISCONSIN DEPARTMENT OF
15 NATURAL RESOURCES,

Defendant.

15

16 June 3, 2011

HONORABLE RALPH M. RAMIREZ,
Circuit Court Judge,
Branch III

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A P P E A R A N C E S

20

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WILLIAM GLEISNER and BILL HARBECK, Attorneys at
Law, appeared on behalf of RNNA.

22

23

DON GALLO, Attorney at Law, appeared on behalf
of North Lake Management.

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Appendix D

1 APPEARANCES (Cont'd)

2

DIANE MILLIGAN, Assistant Attorney General,

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appeared on behalf of the Wisconsin DNR.

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Sandra K. Taylor, CRR
Official Court Reporter

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TRANSCRIPT OF PROCEEDINGS

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2 THE COURT: I'll call the matters North
3 Lake Management District versus Wisconsin Department
4 of Natural Resources, 10-CV-5085, and Reddelien Road
5 Neighborhood Association, hereinafter to be referred
6 to as RRNA, versus Department of Natural Resources,
7 hereinafter to be referred to as DNR. That's
8 10-CV-5096.

9 And may I have appearances, please.

10 MS. MILLIGAN: Your Honor, appearing for
11 the DNR, Assistant Attorney General Diane Milligan.

12 MR. GLEISNER: Appearing for the defense
13 for the RRNA is Attorney Bill Gleisner.

14 MR. HARBECK: And also Bill Harbeck,
15 Quarles & Brady.

16 THE COURT: Mr. Harbeck, spell your name
17 for us again.

18 MR. HARBECK: It's H-a-r-b-e-c-k.

19 THE COURT: All right. Thank you.

20 MR. GALLO: Appearing on behalf of North
21 Lake Management District, Don Gallo.

22 THE COURT: Good morning, everybody.

23 MR. GLEISNER: Good morning, Your Honor.

24 THE COURT: The matter is here today for a
25 motion filed by the DNR in regards to the -- well,

1 it's a motion to dismiss.

2 So let's hear from you, Miss Milligan.

3 MS. MILLIGAN: Thank you, Your Honor. As
4 the Court knows, Chapter 227 is a discrete linear
5 process providing for Court review of decisions based
6 on its record; it's a special proceeding, not a civil
7 action. Each decision by the Agency triggers a
8 mandatory and service filing deadline, and each
9 petition triggers the production of the
10 administrative record for the Court's review, and
11 each -- each record is reviewed based on the facts
12 and the law that were applied by the Agency when it
13 made its decision.

14 Reddelien Road, or RRNA, properly commenced Case
15 5096. That was its challenge of DNR's Manual Code
16 Approval in which DNR Water Management Specialist
17 Andrew Hudac determined that DNR's plans to construct
18 a public boat launch complied with waterway and
19 wetland standards related to filling and grading
20 wetlands and lake beds.

21 R and -- RRNA also sought a contested case
22 hearing on the Manual Code Approval, and the DNR
23 Secretary denied that hearing request. So we had
24 this case already before the Court, and challenging
25 the Manual Code Approval, and RRNA filed something it

1 calls a supplemental petition challenging the
2 Secretary's hearing decision denial as part of this
3 judicial review proceeding, and we move to dismiss
4 because it doesn't belong here.

5 A separate decision is being challenged,
6 December 13th, 2010 decision of the Secretary of
7 Department of Natural Resources. The case before the
8 Court is a decision that is challenging a December
9 3rd -- I'm sorry, a November 11th decision on the
10 Manual Code Approval, two separate decisions made by
11 separate people relying on separate records.

12 The Manual Code decision, as we discussed the
13 last time we were before the Court, has a 1,448-page
14 record in which the DNR staff evaluated the boat
15 launch in terms of wetland impacts, waterway impacts.
16 The contested case hearing denial decision has no --
17 no record that I know of other than the petition for
18 contested case hearing and the decision of Department
19 denying that request; and that request, instead of
20 reviewing the substance of wetland law and waterway
21 law, the Court would be looking at whether the
22 petition met the standards for a contested case
23 hearing, right to hearing, set forth in 227.42 of the
24 statutes.

25 And that Statute specifically says at 227.42(2)

1 that any denial of a request for a hearing shall be
2 in writing, shall state the reasons for denial and is
3 an order reviewable under this Chapter. The decision
4 denying the contested case hearing was a separate
5 reviewable order. It should have been challenged in
6 a separate petition for judicial review that would
7 have been -- would have triggered our filing of the
8 record of that decision, as small as it is, and the
9 Court would review it based just applying, seeing if
10 the law in 227.42(1) applied, whether the petition
11 raised disputes of material fact, whether it showed
12 that there was -- that there -- that the parties were
13 aggrieved.

14 the petition was denied, because DNR said that
15 disputes of immaterial fact were being raised and
16 disputes of law were being alleged. So they said
17 that RRNA was not entitled to a contested case
18 hearing. There was nothing to try. That's a
19 different standard for the Court; it's a different
20 analysis. It's a different case and should have been
21 filed as a different case. Since it wasn't filed as
22 a separate case, and since it's too late to properly
23 file that petition as a separate a case, we ask that
24 the Court dismiss it.

25 THE COURT: All right. And I'm going to

1 ask you to respond to some of the things that came up
2 in the other side's briefs. You know, in -- I
3 understand your point, I believe, that 227 and the
4 administrative procedure and the reviews thereof is,
5 you know, clearly very statutorily constructed
6 framework by which we're supposed to follow, and I
7 think the other side in part said, okay, Judge, that
8 may be true, but we're also pretty, you know, liberal
9 in this state in regards to amending pleadings, and
10 whether we call it a supplemental or an amended
11 pleading, you know, it's -- it's related,
12 everything's related to the boat launch. Okay.

13 And there's a different -- I hesitate to say new
14 Answer, because their position, it's a different new
15 Answer. Your position, it's vastly different in
16 terms of issues, but I mean, they're all related,
17 and, you know, let's get it resolved. Why shouldn't
18 I just say, okay, let's take care of everything now,
19 let's have one Judge take care of everything?

20 MS. MILLIGAN: Well, the Legislature has
21 been specific and the Courts have been clear that the
22 State's entitled to sovereign immunity from most
23 suits. You can't just sue the state. The one way in
24 which you can sue the state is you can challenge
25 individual Agency decisions, and that's what Chapter

1 227 sets up.

2 And the respondent -- or the RRNA's brief treats
3 this like it's any old civil case, that anything
4 that's related to the boat launch should be in one
5 case. It's convenient. You know, if this were a
6 tortfeasor's case, that would make sense, but it's
7 not. It's an administrative review procedure that's
8 a special kind of proceeding. And, you know, the
9 annotations here in 227, the case is Richland County
10 v. DHSS, 146 Wis.2d 271. It says, a petition
11 initiates a special proceeding rather than an action.

12 This isn't -- this isn't just a civil action we
13 can liberally amend the pleadings for and pile other
14 issues in. This is -- we need to look -- go decision
15 by decision and just look at that record of that
16 decision and see if DNR properly applied the facts
17 and the law to that when it issued its decision.

18 THE COURT: All right. So, again, help me
19 so I can clearly understand every -- the initial
20 decision was about the impact of the building of the
21 launch on the wetlands, and then the second part of
22 the decision is about storm sewer issues --

23 MS. MILLIGAN: The storm sewer issue --

24 THE COURT: -- more road building.

25 MS. MILLIGAN: That was the case that

1 wasn't consolidated the last time we were here.

2 THE COURT: All right.

3 MS. MILLIGAN: So that's -- that's -- but
4 the first kind of -- the first decision before this
5 Court and the decision that was challenged when the
6 two cases were brought was DNR's decision to issue
7 itself wetland and water -- and lake bed filling
8 permits for this boat launch.

9 THE COURT: All right.

10 MS. MILLIGAN: And when it issued that
11 decision, the petitioners both or like and RRNA
12 challenged that approval decision, challenged that
13 permit approval decision and started this case, and
14 they also asked DNR to hold a contested case hearing
15 so that they could dispute facts related to that
16 decision.

17 THE COURT: All right.

18 MS. MILLIGAN: And that hearing was granted
19 in part and denied in part, and that denial letter
20 was -- is attached to the supplemental petition for
21 judicial review, and it's about four pages long with
22 very small print where the Secretary -- or Mary Ellen
23 Vobrek signed for the Secretary this letter that
24 said, you raised eight issues in your petition. A
25 petition -- a contested case hearing can be granted

1 for, you know, if you meet X, Y, Z criteria, and it
2 goes through the DNR's legal analysis as to why it
3 was denying each aspect.

4 So, while the big case before the Court deals
5 with whether DNR properly issued itself wetland and
6 lake bed filling permits, this -- the supplemental
7 petition deals with this very legalistic --

8 THE COURT: Procedure.

9 MS. MILLIGAN: -- procedural decision.

10 THE COURT: All right. Okay. Anything
11 else?

12 MS. MILLIGAN: No, Your Honor.

13 THE COURT: All right. Mr. Gleisner,
14 Mr. Harbeck?

15 MR. GLEISNER: Mr. Gleisner, Your Honor.

16 THE COURT: All right.

17 MR. GLEISNER: Good morning, Your Honor.
18 May it please the Court. We believe what's happening
19 here is pretty straightforward. On November 22nd,
20 2010 we filed petition for a contested case hearing
21 with respect to the Manual Code permit which was
22 issued on November 4th of 2010. We also filed our
23 main petition in Case No. 5096 for judicial review on
24 the same findings of the Manual Code on December 3rd,
25 2010.

1 We believe there's a very close relationship
2 between our main petition and the contested case
3 petition. As the Court will note by looking at our
4 petition, attached to it is the contested case
5 hearing petition. It is actually made an appendix.
6 It is referenced throughout, and this is because of
7 the nature of the hearing laws.

8 The -- the petition for a judicial review or
9 petition for a contested case hearing must occur
10 within the same 30-day window following the issuance
11 of the Manual Code permit. In effect, the
12 supplemental petition at issue this morning tells the
13 rest of the story, because it's about the contested
14 case petition. It's a supplement or an amendment,
15 precisely because it tells what happened to the
16 contested case petition on December 13th, and we
17 believe that the supplemental petition merely
18 preserves our rights and does require independent
19 action at this time. It can be stayed, just as our
20 main petition has been stayed, until after the
21 decision following the hearing on September 19th
22 2011, which is an administrative law hearing, which
23 is pending at this time, Your Honor.

24 Beyond that, we respectfully submit that there's
25 nothing inherently different about the supplemental

1 petition. It was filed as it was supposed to be with
2 this Court on the 11th of January. It was served as
3 it was supposed to be on the Secretary of the DNR on
4 the 11th of January, and it was filed and served
5 within the 30-day window mandated by Chapter 227.

6 We argue that there's a fair inference from the
7 DNR's initial brief that a strong -- there's a strong
8 suggestion that the supplemental petition would have
9 been proper if the RRNA had sought approval of this
10 Court before filing it. That argument in effect
11 acknowledges in our view that the supplemental
12 petition was appropriate, and if we had filed a
13 motion, it would have been okay. If that's the case,
14 Your Honor, we would be happy to file a formal
15 motion, and but we suggest and we argue that form
16 shouldn't be elevated over substance to deny us our
17 merits review.

18 The DNR also contends that the supplemental
19 petition had to be filed as separate action, and we
20 respectfully submit that this makes no sense on a
21 number of different levels. First, in its reply the
22 DNR complains that Chapter 227 -- and I quote --
23 speaks in terms of a singular Agency decision or
24 action being challenged. Our Supreme Court has
25 relied -- has held that reliance on singular or

1 plural words is not a proper way to discern
2 legislative intent. That is based on the case of
3 State v. Anderson at 219 Wis.2d 739, Your Honor. The
4 Legislature as a consequence, we believe, provided a
5 set of primary cannons and statutory construction,
6 and the first one reads, quote, In construing
7 Wisconsin statutory laws, the singular includes the
8 plural and the plural includes the singular. That's
9 located -- that cannon is located in Section
10 990.001(1) of the Wisconsin Statutes.

11 There is no place in Chapter 227 where the
12 Legislature specifically states that each Agency
13 action must be subject of -- to a separate petition;
14 in fact, each of the sections cited by the DNR at
15 page 3 of its reply brief could be understood as
16 applying to a petition with several subsections or
17 different claims. For example, 227.53(1)(b) --

18 THE COURT: All right. Take a step back.
19 Take a step back. Give us that number again.

20 MR. GLEISNER: Certainly, Your Honor.
21 227.53(1)(b) --

22 THE COURT: Thank you.

23 MR. GLEISNER: Sorry, Your Honor -- states,
24 quote, The petition shall state the grounds specified
25 in 227.57, close quote. In other words, some or all

1 of the grounds in 227.57 can be joined in one
2 petition. All 227 requires is filing in court the
3 service of the DNR within 30 days, and we did that.

4 The DNR concedes on several occasions where
5 Chapter 227 is silent the rules elsewhere in the
6 statutes apply, obviously, also including the Code of
7 Civil Procedure. Petitions and Complaints frequently
8 consist of more than one claim, and 802 -- 803.02(1)
9 of the Code of Civil Procedure, 803.02(1) allows for
10 the joinder of a number of claims in one Complaint.
11 The supplemental petition just adds another claim to
12 the main petition.

13 While we submit that the supplemental petition
14 can be construed as an amendment or a supplement,
15 there is in fact little substantive difference
16 between the two, and we argued how that plays out in
17 our mind in our brief, which the Court is obviously
18 familiar with. However, if it's construed as an
19 amendment, the drafters of the Code of Civil
20 Procedure were so convinced that amendments should be
21 allowed as matter of right that they said in
22 802.09(1) that they should be allowed once as a
23 matter of right within six months of the commencement
24 of the action.

25 By the terms of the supplemental petition on

1 file with this Court, it was intended by the RRNA
2 that it amend the main petition, and that's why the
3 supplemental petition begins with the words, quote,
4 Petitioners hereby file a supplemental petition
5 supplementing their petition for judicial review
6 filed on December 3rd, 2010.

7 As I said a moment ago, 227.53(1)(b) allows
8 amendments to petitions, and that section does not
9 have a time limit in it, Your Honor. A motion to
10 amend by the terms of that statute can be brought at
11 any time. So if the Court deems it appropriate, we
12 would bring that motion following this hearing or at
13 this time. Your Honor, in the alternative, if the
14 Court concludes that the supplemental petition should
15 have been filed separately, then the RRNA
16 respectfully asks the Court to move to sever -- for
17 leave, sorry, to move to sever the supplemental
18 petition from the main petition.

19 Section 803.06 of the Code of Civil Procedure --
20 got that one, good -- provides, quote, Any claim
21 against the party may be severed and proceeded with
22 separately, close quote. If allowed to sever, the
23 RRNA will, in addition, move this Court for an order
24 nunc pro tunc, making the supplemental petition into
25 a separate action with a separate case number, and we

1 would suggest, for example, 5096A, and requiring the
2 payment of a filing fee within five days of opening
3 the new case.

4 In conclusion, Your Honor, we respectfully ask
5 this Court not to elevate form over substance. The
6 petition was in all respects timely filed. We
7 believe that we ought to have the opportunity to go
8 forward with that petition, and I emphasize again,
9 there is no need to take action on that petition at
10 this time, the supplemental petition. The main
11 petition is stayed until after September 19th. We
12 have no objection to the staying of the supplemental
13 petition until after that date.

14 Thank you, Your Honor.

15 THE COURT: All right. Mr. Gallo.

16 MR. GALLO: I support Attorney Gleisner's
17 position, and do not have anything further to add.

18 THE COURT: All right.

19 MR. HABECK: Your Honor, could I just make
20 a couple points? One, I'd like to address --

21 THE COURT: Okay. Here's the way I do
22 this. Just so everybody knows from now on. One
23 attorney for -- per motion or per witness if it's a
24 trial. And I'll let you confer with Mr. Gleisner,
25 because he's obviously representing the party today.

1 So you can confer with him.

2 MR. GLEISNER: May I have a moment, Your
3 Honor --

4 THE COURT: Absolutely.

5 MR. GLEISNER: -- to talk to him?

6 (Off-the-record discussion.)

7 MR. GLEISNER: I think I've got it, Your
8 Honor --

9 THE COURT: Okay.

10 MR. GLEISNER: -- if I may be heard.

11 THE COURT: You're pretty clever,
12 Mr. Gleisner. You probably got it.

13 MR. GLEISNER: Thank you. I hope so.

14 The point counsel is asking me to make is that
15 the supplemental petition relates to the December
16 13th decision of the DNR, which is attached to our
17 supplemental petition. In that supplemental --
18 sorry, strike that -- in that DNR decision of
19 December 13th they granted one of our requests for a
20 contested case hearing and denied seven of them.

21 And so the supplemental petition relates to
22 that, and what we are seeking in the supplemental
23 petition is an opportunity to be heard at some point
24 in the future on the denial of the seven other issues
25 raised in our -- raised in our primary petition for a

1 contested case hearing filed on November 10th; in
2 other words, the November 10th -- sorry, strike
3 that -- the November 22nd petition for a contested
4 case hearing raised eight issues; one was granted in
5 the December 13th decision. The supplemental
6 petition relates back to the petition for a contested
7 case hearing.

8 Do I have it?

9 THE COURT: So the -- and let me just see
10 if I have this time line correct. The original
11 Manual Code permit decision was made on November 4th,
12 2010. The RRNA requested a hearing in regards to
13 that decision on November 22nd, 2010. The petition
14 for review was filed December 3rd, 2010. The DNR
15 decision about the petition was made December 13th,
16 if I have that correct.

17 MR. GLEISNER: That's correct, Your Honor.

18 THE COURT: And then RRNA filed the
19 supplementary document on January 11th of '11.

20 MR. GLEISNER: That's correct, Your Honor.

21 THE COURT: All right. Are there any other
22 important dates that I've missed in anyone's
23 estimation? Miss Milligan?

24 MS. MILLIGAN: No, Your Honor.

25 THE COURT: All right. So -- and the time

1 frame for filing under 227 for a contested hearing
2 is?

3 MS. MILLIGAN: Thirty days after the
4 decision is mailed. Put in the mail.

5 THE COURT: All right. Thirty days after
6 the decision is put in the mail. So, in your
7 estimation then, so let me find -- the decision about
8 the denial of the hearing, that was made December
9 13th, correct?

10 MS. MILLIGAN: Correct.

11 THE COURT: And so I'm clear, the DNR's
12 position is that although this supplemental petition
13 was filed within 30 days, it needed to have been
14 filed as a separate and distinct action?

15 MS. MILLIGAN: Correct, Your Honor. It
16 wasn't properly filed to initiate.

17 THE COURT: Not properly filed, so, all
18 right. All right. And then what about
19 Mr. Gleisner's -- Mr. Gleisner's take on the shotgun
20 approach more or less. There might be something that
21 we can toss out there that the Court might accept.

22 And what about that, correct me if I'm wrong,
23 Mr. Gleisner, one of things that you propose is that,
24 fine, Judge, if you're going to separate these
25 things, this was filed within a timely -- in a time

1 frame within 30 days as applies to the December 13th,
2 decision. Am I gathering that correctly?

3 MR. GLEISNER: You're gathering that
4 correctly, Your Honor. The point is that the DNR is
5 not prejudiced in any way. This is -- relates to the
6 issue of relation back in 809.02(3). The idea here
7 is that we timely filed it. If we got it wrong in
8 terms of the home we found for it, the relief of
9 dismissal on the merits, we would suggest, is a
10 little extreme. We think that it could be severed,
11 or it could otherwise be dealt with so that it
12 doesn't -- so that it relates back, Your Honor.

13 Am I making sense, Your Honor?

14 THE COURT: I don't know if I -- to me,
15 but, yeah, I understand.

16 MR. GLEISNER: Okay.

17 THE COURT: Let me just pause for a second,
18 because I want to look at the general provisions
19 under Chapter 227 for a second here.

20 Mr. Gleisner, I asked this of Miss Milligan. I
21 asked her, you know, under the civil procedure, it
22 seems to be pretty wide open in terms of making
23 amendments and time frames and so on; but, likewise,
24 the converse of that, the other -- the flip side of
25 the coin is under 227, you know, I'm looking at the

1 general provisions, and it's -- there is a veritable
2 plethora of general provisions and specific
3 subsections that talks about the procedure that's to
4 be followed and so on, and we even look at (3),
5 227.01(3).

6 MR. GLEISNER: I'm sorry, Your Honor, what
7 was that citation?

8 THE COURT: 227.01(3). I'll wait till you
9 get there.

10 MR. GLEISNER: Thank you, Your Honor.
11 227.01(3), Your Honor?

12 THE COURT: Correct. The tested case means
13 an Agency proceeding in which the assertion by one
14 party of any substantial interest is denied or
15 controverted by another party in which after a
16 hearing required by law a substantial interest of a
17 party is determined or adversely affected by a
18 decision or order.

19 And so we have this thing that occurred on
20 December 13th, this -- not a hearing, but that
21 decision was made, and we know that that's what's
22 being challenged or contested, I believe. I think
23 I'm not reading anything that isn't there. And then
24 we know that there are 30 days to challenge that as
25 an independent -- and we know it's not the same thing

1 as a Manual Code permit that issues the permits, so
2 why do I not have to -- why am I not compelled to
3 just look at and narrow in on Chapter 227 when I look
4 at procedure, Mr. Gleisner?

5 MR. GLEISNER: Your Honor --

6 THE COURT: I mean, a general rule -- I'm
7 sorry to interrupt. The general rule is that when we
8 get more specific statutes to the subject matters and
9 the issues, we look at the specific statutes.

10 MR. GLEISNER: Well, Your Honor, under
11 227.02, the administrative procedure act in 227
12 supplements itself by any rules that aren't in
13 conflict with the proceedings or the provisions,
14 excuse me, of Chapter 227. And the provision that
15 you just read about contested case hearings relates
16 to a matter that is somewhat beside the point in the
17 sense that we are dealing with a supplemental
18 petition for judicial review.

19 And, also, Your Honor, 227.53(1)(a) states that
20 proceedings for review shall be instituted by serving
21 a petition therefor personally or by certified mail
22 upon the Agency or one of its officials and filing
23 the petition in the office of the Clerk of the
24 Circuit Court of this county in this instance. We
25 did that.

1 THE COURT: All right. And so, you know,
2 practically speaking, and I'm kind of practical guy,
3 too, even if I severed those things, I don't know if
4 that's the correct term, but separated the claims and
5 allowed that claim to stand, judicial economy may
6 call for me to say, well, okay, I'll take that case,
7 I'll review it, I'll keep it in this Court.

8 I mean, but there probably could be a right to
9 subpoena on that as well, but I'm not quite sure.
10 That's -- we don't have to talk about that now. I'm
11 kind of wrestling with the procedural aspects of
12 this. I'm kind of commonsensical, I think, and like
13 to get things done where things need to be done, but,
14 all right. I'm rambling.

15 Miss Milligan, anything else?

16 MS. MILLIGAN: Yes, Your Honor. At the
17 beginning and end of Mr. Gleisner's talk he was
18 talking about how he thinks this should be kept in
19 this case and stayed until after the contested case
20 hearing is over with, and I think that whole logic
21 shows the practical problem associated with what's
22 being asked of the Court.

23 The 12-13 decision denied seven out of eight
24 requests for hearing. The hearing is scheduled for
25 September. If -- if DNR was wrong in denying that

1 request for contested case hearing, the proper thing
2 would have -- it should have been filed separately
3 and resolved prior to that hearing so that those --
4 any of those seven that were denied could have been
5 added to the hearing. It doesn't make any sense to
6 separate out and hold this in abeyance after the case
7 hearing and then say, oh, you should have had a
8 hearing on those things, too. It's supposed to be a
9 quick process.

10 If this would have been filed separately,
11 properly with the Clerk of Courts as a separate case,
12 we would have briefed it probably by now, probably.
13 The Court issues the briefing schedules as soon as
14 the notice of appearance in the record have been
15 filed. That would have been practical. That would
16 have made sense. Mr. Gleisner also said it was filed
17 as it was supposed to be, and it wasn't.

18 227.53(1)(a)1 talks about proceedings for review
19 being instituted by serving the petition on the Clerk
20 of Court. It's starting a proceeding. Just filing
21 it as a pleading in a case that's already going isn't
22 instituting a new -- a separate special proceeding.

23 He also said that since my brief acknowledged
24 that supplemental petitions -- or supplemental
25 pleadings require leave of the Court, he assumed that

1 leave would be granted. I would have objected to
2 that. I put that argument in there, because he
3 called the supplemental petition and I was thinking,
4 where did that come from, how did he get a
5 supplemental petition. You seek leave, so it doesn't
6 belong here, but it wasn't even properly added to
7 this case.

8 As far as singular versus plural, you know, and
9 227, it says -- it doesn't say when the rules are
10 silent, civil rules apply; it says when not in
11 conflict and over and over it's the decision, a
12 decision, a record of the decision. This is about
13 single decisions going through. Taken in its
14 totality, reading it for what it is, this is decision
15 by decision. He's not just adding another claim.
16 He's challenging another decision. It's not
17 substantively the same. It's an entirely different
18 analysis.

19 THE COURT: That doesn't go to the merits,
20 but rather the procedural question, that's your
21 position?

22 MS. MILLIGAN: Correct.

23 THE COURT: All right.

24 MS. MILLIGAN: And his last argument that
25 it should have been filed separately, it should just

1 be severed, and he quoted the severance statute that
2 says any claim against a party, this isn't a claim
3 against a party. This isn't a civil action. This is
4 a petition for a judicial review of an Agency
5 decision, and that's why it can't just be severed and
6 carried on.

7 THE COURT: All right. Thank you very
8 much.

9 Okay. I'm ready to make a decision in this
10 case. I've reviewed the documents submitted by the
11 parties and listened to the statements and arguments
12 and taken them into consideration, and I think it's
13 important, as I've noted the time line in this case,
14 that on November 4th there was Manual Code permit
15 that was at issue on the decision made on November
16 22nd, 2010. The RRNA requested a hearing on December
17 3rd of '10, petition for review filed.

18 December 13th of '10 the DNR made a decision in
19 regards to what would be subject of hearing, and the
20 RRNA on January 11th of '11 filed the
21 supplementary -- the supplement to the petition. And
22 the issues that were decided by the -- at the time of
23 the original hearing, the issues were of the ability
24 to build a boat launch at North Lake, and the issue
25 that pertains to the -- that we're talking about

1 today doesn't go to the substantive issues, but,
2 rather, the procedural appropriateness of the denial
3 of the hearings for those several issues and the
4 appropriateness or the standard that may have been
5 used at the time that decision was made, a contrast
6 between what I have in front of me, a procedural
7 issue, as opposed to a decision-making process by the
8 DNR, and taking into consideration the merits of the
9 case.

10 What's important for me as I make this decision
11 is the distinctions that parties have drawn in
12 regards to the general Rules of Civil Procedure in
13 regards to pleading and the bringing together issues,
14 and then as well Chapter 227, the statutory
15 provisions concerning administrative procedure. And
16 because I believe that the 227 statutes, the
17 administrative procedures, are more particular and
18 more on point, I am going to grant the motion for --
19 and I'm going to set out the reasons why -- by the
20 DNR to dismiss the amended petition -- supplemental
21 petition, excuse me, and I am going to take no
22 further action at this time.

23 Mr. Gleisner's made an appropriately, I said
24 shotgun approach, but it's an appropriate approach to
25 take other actions, to do other things, to consider

1 in the practical sense of doing something else, but I
2 believe that when we look at the nature of Chapter
3 227, the administrative procedures, the ability of a
4 party to challenge a decision made by an
5 Administrative Agency -- in this case, Department of
6 Natural Resources -- the framework, the time lines,
7 the statutory procedures are stated with greater
8 particularity in Chapter 227. And I think, again,
9 appropriately, Mr. Gleisner directs the Court's
10 attention to -- was it 802.06? Sorry. No.

11 MR. GLEISNER: What proposition, Your
12 Honor?

13 THE COURT: About which rules apply, the
14 general rules.

15 MR. GLEISNER: 227.02, Your Honor?

16 THE COURT: I'm sorry. I don't believe so.
17 Bear with me. Right. Thank you. 227.02.

18 MR. GLEISNER: You're welcome.

19 THE COURT: Compliance with this Chapter
20 does not eliminate the necessity of complying with
21 the procedure required by another statute.

22 I think what is asked of me is to take a look at
23 a more -- a broader statute in the Rules of Civil
24 Procedure when the administrative procedures under
25 227 direct the Court to look at a much tighter

1 framework in terms of what needs to be done and how
2 things are brought before the Court. Because I
3 believe that the issue that needs to be -- that is
4 addressed, that is a denial of the hearing, is a
5 separate and distinct complaint or problem as opposed
6 to the Manual Code permit and the substantive issues
7 that were factual issues that were resolved at that
8 time, I believe that the specific provisions of
9 Chapter 227 and the requirement to file a separate
10 and distinct petition or action should be complied
11 with, and because it wasn't complied with, and
12 because we had the supplemental Complaint filed, I'll
13 find that it did not follow the appropriate procedure
14 as set out in Chapter 227; and, therefore, because
15 the proper procedure wasn't followed, that it must be
16 dismissed. This is -- well, no further comment by
17 the Court.

18 Please prepare an order consistent with what
19 I've decided, Miss Milligan.

20 And what does that do for us, otherwise, at this
21 point?

22 MR. GLEISNER: There's a stipulation in
23 place, Your Honor, that there will be no briefing on
24 the merits until after the September 19th decision, I
25 presume, by Judge Bolt, Administrative Law Judge.

1 THE COURT: September 19th, that's going to
2 be a hearing or decision?

3 MS. MILLIGAN: A hearing.

4 MR. GLEISNER: A hearing.

5 THE COURT: How long after that will the
6 decision take?

7 MR. GLEISNER: No time, Judge.
8 Administrative Law Judges march to their own drum.

9 THE COURT: They don't have a commitment as
10 to a time frame they have to make decisions?

11 MS. MILLIGAN: Not statutorily, and I think
12 it depends on how big the record is and how long the
13 hearings is, but he writes fairly long decisions when
14 he has to.

15 THE COURT: What do we have this scheduled
16 for?

17 MR. GLEISNER: I believe is, Your Honor,
18 this is just in a stay mode until after -- I believe
19 there's nothing else to do, Your Honor.

20 THE COURT: Then I think we just waited
21 until today. What I'd like to do to keep track of a
22 case is to set a date.

23 MR. GLEISNER: Sure, Your Honor.

24 THE COURT: And what I'll do, is I'll set a
25 status date.

1 MR. GLEISNER: October 1st, maybe, Your
2 Honor?

3 MS. MILLIGAN: November 1st?

4 THE COURT: I think November 1st probably
5 is too eager, probably, but I'll set a date on or
6 around November 1st just as a status date, and I'll
7 allow the attorney for the State to appear by phone.
8 I just want to find out --

9 MR. GLEISNER: Sure.

10 THE COURT: -- what's going on. I mean,
11 you don't anticipate a decision will be made by that
12 time?

13 MR. GLEISNER: No, I think the decision
14 will be sometime in January or February, myself, but
15 I also -- I've heard a rumor that you might be moving
16 on to greener pastures.

17 THE COURT: Well, after February 1st of the
18 new year, I don't know that I'd call them greener
19 pastures, but I will be moving to Family Court, and
20 Judge Dreyfus will be taking over. That's the plan.
21 That's not an official notification of a new Judge
22 coming in.

23 MR. GLEISNER: Sure.

24 THE COURT: But that's what my
25 understanding is. Whether or not that makes a

1 difference to anybody, that's up to you.
2 MR. GLEISNER: Good luck, Your Honor.
3 Family law is a different beast.
4 THE COURT: Yes, sir.
5 THE CLERK: How about November 7th at 9:15?
6 MR. GLEISNER: Works for us.
7 THE COURT: It's a Monday.
8 MS. MILLIGAN: I'm sure it will work.
9 Thank you.
10 THE COURT: Thank you. Include the date on
11 there, please.
12 MS. MILLIGAN: Yeah, so November 7th at
13 what time?
14 THE CLERK: 9:15.
15 THE COURT: Thank you. Include that you
16 may appear by phone.
17 MS. MILLIGAN: Thank you, Your Honor.
18 THE COURT: And anyone else that wants to
19 appear by phone as well, but I'll leave it up to you.
20 MR. GLEISNER: Thank you, Your Honor.
21 (The proceedings were concluded.)

22
23
24 * * * *
25

On December 13, 2010, DNR approved in part and denied in part RRNA's November 22, 2010, petition for a contested case hearing on DNR's Manual Code Approval. RRNA filed a "Supplemental Petition for Judicial Review" in the Manual Code Approval judicial review proceeding to challenge DNR's hearing denial decision. RRNA did not file a motion seeking permission for it to file a supplemental petition.

ARGUMENT

I. DISMISSAL IS WARRANTED BECAUSE RRNA DID NOT COMPLY WITH WIS. STAT. § 802.09(4).

RRNA's supplemental petition should be dismissed because the Court did not grant it permission to file a supplemental pleading. Wisconsin Stat. § 227.02 provides that chapter 227 judicial review proceedings must comply with procedures required by other statutes, provided that those procedures do not conflict with other provisions of chapter 227. *State v. Walworth County Circuit Court*, 167 Wis. 2d 719, 723, 482 N.W.2d 899 (1992). Wisconsin Stat. § 802.09(4) provides: "Upon motion of a party the court may, upon such terms as are just, permit the party to serve a supplemental pleading" Assuming that the motion to supplement procedure does not conflict with Wis. Stat. ch. 227, and is therefore allowed, RRNA has failed to comply with this procedure by failing to file a motion justifying its supplemental petition and seeking leave to file it. Since RRNA did not properly file its supplemental petition, that petition should be dismissed.

In addition, since leave to file a supplemental pleading is necessary before a court determines whether to order pleadings in response to a supplemental pleading, it is DNR's understanding that it need not file a notice of appearance and statement of position in response to the supplemental petition, nor file a certified copy of the record of the decision sought to be reviewed by the Supplemental Petition, at this time.

**II. THE SUPPLEMENTAL PETITION SHOULD BE DISMISSED
BECAUSE IT DOES NOT COMPLY WITH WIS. STAT. CH. 227**

RRNA's supplemental petition should also be dismissed because a petition challenging a separate and distinct DNR decision should have been filed as a separate petition for judicial review, not as a supplemental pleading in an ongoing judicial review proceeding.

The Wisconsin Administrative Procedure Act, Wis. Stat. ch. 227, sets forth a process through which individual agency decisions may be challenged. Specifically, it provides that "any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review of the decision as provided in this chapter and subject to all of the following procedural requirements." Wis. Stat. § 227.53(1) (emphasis added). The procedural requirements include proper filing in the office of the clerk of circuit court where the proceedings are to be held and proper service upon the agency whose decision is sought to be reviewed, both "within 30 days after personal service or mailing of the decision by the agency," "facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the

enough. *Id.* at 3, 6 & n. 3. It argues that DNR was not prejudiced because it had notice, that it is more efficient to lump the two petitions together because they contain overlapping contentions, and that RRNA was doing the court and the DNR a favor by filing a supplemental petition because it would have just moved to consolidate a separate petition with this case anyway. *Id.* at 4-6.

RRNA's procedural arguments are more convoluted. It makes a passing reference to Wis. Stat. § 227.53(1)(b), which allows petitions to be amended by leave of court, then it reaches to general Wisconsin civil procedure, federal civil procedure and a federal district court decision from Massachusetts to argue that supplemental complaints are really like amended complaints, and the court should freely grant parties leave to file either. *Id.* at 7-11. These arguments ignore the purpose of Wis. Stat. ch. 227.

II. WISCONSIN STAT. CH. 227 REQUIRES SEPARATE REVIEW OF SEPARATE DECISIONS.

The Wisconsin Administrative Procedure Act, Wis. Stat. ch. 227, "provides a comprehensive, fully defined, procedure for judicial review of administrative decisions." *Wis. Environmental Decade v. Public Service Comm.*, 79 Wis. 2d 161, 170, 255 N.W.2d 917 (1977). It allows for persons aggrieved by "a decision" to seek judicial review of "the decision," Wis. Stat. § 227.53(1), in accordance with procedures set forth in Wis. Stat. § 227.53, based on the record of the decision defined by Wis. Stat. § 227.55, and subject to the standards in Wis. Stat. § 227.57. All of the sections dealing with judicial review speak in terms of the singular agency decision or action being challenged. Wis. Stat. §§ 227.53, 227.54, 227.55, 227.56, 227.57.

Nowhere does Wis. Stat. ch. 227 invite a petitioner to amend or supplement its petition to seek review of a separate but related decision. The section pertaining to amendments, Wis. Stat. § 227.53(1)(b), provides for the amendment of a petition that seeks reversal or modification of a singular decision.¹ It does not say that a petition may be supplemented or amended to allege that a subsequent agency decision should be reversed or modified too.

More specifically, the plain language of Wis. Stat. ch. 227 provides that an agency decision denying a request for a contested case hearing "is an order reviewable under this chapter." Wis. Stat. § 227.42(2). If the legislature had intended to allow a petition for judicial review of a contested case hearing denial to piggyback onto a petition for judicial review of the original agency action, it could have done so. The fact that the statute expressly states that the denial of the hearing is an order reviewable under Wis. Stat. ch. 227 shows that a contested case hearing denial is an agency action that should be reviewed on its own merits.

The process is simple and linear. Each agency decision triggers a separate 30-day time period for seeking judicial review (Wis. Stat. §§ 227.53(1)(a)2. and 3.), and each decision is reviewed on its record. Wis. Stat. § 227.57(1). Each petition for judicial review must therefore be filed as a separate case.

¹ Wisconsin Stat. § 227.53(1)(b) provides:

The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired.

III. THE SUPPLEMENTAL PETITION IN THIS CASE WAS NOT PROPERLY FILED AS A SEPARATE PETITION FOR JUDICIAL REVIEW, AND IT IS TOO LATE TO FILE SUCH A PETITION, SO THE SUPPLEMENTAL PETITION MUST BE DISMISSED.

A. The allegations raised in the two petitions belong in separate proceedings.

RRNA attempts to blur and muddle the two decisions it seeks to challenge in this proceeding by emphasizing the similarities between several allegations in each petition. Br. in Opp. at 5. In doing so, RRNA ignores the separate purposes for its two petitions, the separate records of the two DNR decisions being challenged, the separate standards that inform the Court's review, and the separate relief each petition seeks. Teasing apart one cluster of proffered allegations in the context of what RRNA is asking the Court to do shows why these petitions must be separate.

In its petition for judicial review, RRNA asserts that the wetland delineation DNR relied on when it issued the Manual Code approval for its public access project should be declared invalid because DNR incorrectly applied the statutory definition of wetlands and failed to follow certain alleged "policies and practices" concerning wetlands by mowing the public access site. RRNA's Pet. for Judicial Review (Pet.) ¶¶ 44-53. The Court will evaluate these allegations in accordance with the standards in Wis. Stat. § 227.57 using the 1448-page record filed in this case.

In its Supplemental Petition, RRNA seeks a contested case hearing related to the wetland delineation for the public access site. RRNA's Supp. Pet. for Judicial Review (Supp. Pet.) at 3, ¶¶ 5.a), c)-e) & 20. DNR denied the hearing request because the request

failed to establish a dispute of material fact as required by Wis. Stat. § 227.42(1)(d), among other reasons. Supp. Pet. Ex. 1 at 1. DNR stated that any alleged disputed facts regarding wetland delineation are immaterial because the United States Army Corps of Engineers, not DNR, is the agency that made the final delineation and jurisdictional determinations. *Id.*

To review the allegations in the Supplemental Petition, the Court will review RRNA's petition for a contested case hearing and DNR's December 13, 2010 decision approving and denying that petition.² Whether someone is entitled to a contested case hearing is a question of law. *Metro. Greyhound Mgt. Corp. v. Racing Bd.*, 157 Wis. 2d 678, 688, 460 N.W.2d 802 (Ct. App. 1990). The Court's review would be conducted in accordance with Wis. Stat. § 227.57(5).

RRNA has repeated the same general allegations and complaints regarding the North Lake boat launch in a variety of pleadings and petitions. There are overlapping contentions and arguments in the Petition for Judicial Review and the Supplemental Petition for Judicial Review filed in this case, in the petition for judicial review that commenced *RRNA v. DNR*, Waukesha County Case No. 10-CV-5341, and in the complaint that commenced *RRNA v. DNR*, Waukesha County Case No. 10-CV-3792, an injunction case assigned to Judge Hassin. Just because allegations overlap does not mean every allegation belongs in each petition or that the petitions should be heard together.

² While there may not be an administrative record for the hearing denial decision (i.e. no documents or memoranda supporting the decision), this is not to say, as RRNA suggests at page 5 of its brief, that there is no "record" on which the Court may consider the validity of DNR's decision. As noted in *Shearer*, the record for a contested case hearing denial decision generally consists of the request and the denial. See 151 Wis. 2d at 164.

To the contrary, since Wis. Stat. § 227.53 provides for judicial review of individual agency decisions based on the record of each decision, only cases that involve the same decision and record belong together. The Supplemental Petition seeking judicial review of DNR's hearing denial decision should have been separately filed.

B. The Supplemental Petition was not properly filed, so it must be dismissed.

RRNA did not properly file its Supplemental Petition as a separate action. As RRNA notes, this would have required RRNA to pay a separate filing fee in accordance with Wis. Stat. § 801.02(6), and it would have caused the Clerk of Court to issue a new case number. Had the petition been properly filed, DNR would have filed its notice of appearance and statement of position, in accordance with Wis. Stat. § 227.53(2), and it would have produced the record of the decision being reviewed, in accordance with Wis. Stat. § 227.55. If RRNA would have moved to consolidate the two cases, as it suggests (Br. at 6), DNR would have objected, as it did to the request to consolidate RRNA's petition to review DNR's storm water permit coverage decision for the boat launch (*RRNA v. DNR*, Waukesha County Case No. 10-CV-5341). None of these things happened because RRNA did not properly file its petition.

In order to challenge DNR's decision partially denying its request for a contested case hearing, RRNA was required to properly file a separate petition for judicial review within 30 days. Wis. Stat. § 227.53(1). Since RRNA did not strictly comply with the Wis. Stat. § 227.53(1) by filing its petition within 30 days of the decision being challenged, and because that 30-day time period has passed, the Court must dismiss the

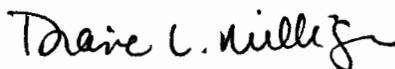
Supplemental Petition. Although dismissal may seem harsh, Wisconsin's Supreme Court has consistently confirmed that strict compliance with the procedures required for invoking the Court's jurisdiction is necessary "to maintain a simple, orderly, and uniform way of conducting legal business in our courts." *All Star Rent a Car v. Wis. Dept. of Transp.*, 2006 WI 85, ¶ 53, 292 Wis. 2d 615, 716 N.W.2d 506, quoting *519 Corp. v. Wis. Dept. of Transp.*, 92 Wis. 2d 276, 288, 284 N.W.2d 643 (1979). This new petition for judicial review filed in an ongoing judicial review proceeding must be dismissed.

CONCLUSION

For the reasons set forth here and in its initial brief, DNR respectfully requests that this Court dismiss RRNA's Supplemental Petition for judicial review.

Dated this 24th day of May 2011.

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