

State ex rel. Reddelien Road Neighborhood Association, Inc.
("RRNA"), et al.

Petitioners,

vs.

Case No. 10CV5341

The Department of Natural Resources ("DNR"),
Respondent.

RRNA BRIEF IN OPPOSITION TO DNR'S
MOTION TO STRIKE PARTS OF DR. O'REILLY'S AFFIDAVIT

INTRODUCTION

The DNR seeks to strike a portion of Dr. O'Reilly's affidavit on the grounds that Dr. O'Reilly's affidavit somehow falls short of the new *Daubert* standard incorporated into Wis. Stats. § 907.02(1) while apparently assuming that the experts who drafted the Gestra and Kapur Reports will not be subjected to the same scrutiny.

That assumption is very much misplaced. In fact, by bringing the Motion to Strike portions of Dr. O'Reilly's affidavit which are critical of and take issue with the Kapur and Gestra Reports, the DNR has inadvertently underscored the importance of determining the bona fides and reliability of the Kapur and Gestra experts who authored the Reports upon which Engineer Hartsook relied in issuing his storm water permit.

However, before further addressing the implications of the DNR Motion to Strike, the RRNA wishes to note the following. Dr. O'Reilly did testify on

behalf of the RRNA for the better part of a day at a hearing before Administrative Law Judge (ALJ) Boldt (conducted from the 19th to the 21st of September) concerning another very closely related issue which is presently pending between the parties. A true and correct copy of the Official CD containing that testimony is attached to this Brief as Exhibit A.

At no time during the direct examination of Dr. O'Reilly by RRNA Counsel or during cross-examination of Dr. O'Reilly by DNR Counsel was any mention made of the objections which have now been raised by the DNR for the first time in the pending Motion to Strike. There were no objections to Dr. O'Reilly's qualifications as an expert (including that he is a Professor at the Marquette University School of Engineering and at UWM), his extensive knowledge of the Kraus Site, the 16 years he worked for the DNR or any of the other issues raised in the DNR's Motion to Strike. Thus, the RRNA submits that the DNR has waived the objections referenced in the pending Motion to Strike.

In addition, Dr. O'Reilly has also prepared a Counter-Affidavit. The original of that affidavit is included in attached Exhibit B. The Counter-Affidavit more than answers the objections raised in the DNR's pending Motion to Strike.

ARGUMENT

I. BY BRINGING THIS MOTION, THE DNR IN EFFECT CONCEDES THAT THIS MATTER SHOULD BE SENT TO AN ALJ.

It is hard to understand why the DNR chose to attack Dr. O'Reilly's credentials, expertise and knowledge of the Kraus Site by means of a Motion to Strike portions of his affidavit. Perhaps they were angry because of the damaging

testimony he was going to give against the DNR before ALJ Boldt. Or perhaps they hope that if they can sufficiently diminish the well regarded and very experienced¹ Dr. O'Reilly in the eyes of this Court they might persuade this Court to refrain from remanding the storm water permit for a Contested Case Hearing. Whatever their motivation, the DNR's Motion to Strike strongly "makes the case" as to why a remand of the storm water permit for a Contested Case Hearing is so necessary.

If the DNR was convinced that a remand was indeed inappropriate or unnecessary, then the RRNA suggests that it would have made sense for the DNR to have dismissed Dr. O'Reilly's affidavit as irrelevant to the issue of remand. However, the DNR is moving to strike Dr. O'Reilly's affidavit because it is critical of the Kapur and Gestra Reports. And those Reports are the only alleged basis for Hartsook's November 4, 2010 decision to issue a storm water permit. The RRNA submits that the DNR knows that a remand is appropriate for the reasons set forth in the RRNA's Briefs in support of its Motions under §§ 227.57(1) & (7) and so it appears the DNR is seeking to head off any challenge to the Kapur and Gestra Reports by trying to convince this Court to strike portions of the O'Reilly affidavit before remand occurs. Quite simply, the DNR

¹ In addition to his lengthy 16 year career at the DNR, Dr. O'Reilly's Counter Affidavit in Exhibit B details the scope of his experience. According to the attached Counter Affidavit: "As I testified to at length during the hearing before ALJ Boldt, since leaving the DNR my entire professional career has involved environmental issues, particularly related to water and hydrology. I have worked regularly with and against the DNR during the almost 20 years since I left the DNR on behalf of individual, corporate and government clients. I regularly assist those clients in understanding DNR regulations and at least 50% of my professional activity involves assisting those clients with 'due diligence' preparation concerning DNR regulations." Ex. B, p. 5 at ¶ 11.

wouldn't move to strike the O'Reilly affidavit if it had confidence in either its arguments against remand or in the correctness of the Kapur and Gestra Reports and the reliability of the methodology employed by the authors of those Reports.

II. A MOTION TO STRIKE IS NOT THE CORRECT METHOD BY WHICH TO RAISE A *DAUBERT* CHALLENGE.

It is a good thing that Wisconsin has at long last adopted the standards set forth in the landmark decision of *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579 (1993) and the closely related case of *Kumho Tire Co. v. Carmichael*, 526 US 137 (1999). There is no place for “junk” science in litigation and the standards embraced in those cases will be good for Justice in Wisconsin.

However, the science of water management and the credentials of Dr. O'Reilly to evaluate and offer opinions concerning storm water issues are the polar opposite of “junk” science and Dr. O'Reilly's testimony before ALJ Boldt demonstrates that he went to great pains to apply his training in that science reliably to all the water issues in this case. In addition to that, the law that has developed since *Daubert* was decided makes it very clear that the DNR has failed to assert a *Daubert* challenge at the correct time or in the correct manner.

A. *Daubert* Challenges should be Addressed to the Judge who will Officiate at Trial.

A *Daubert* challenge must be evaluated in the context of all the facts in a case. Professor Daniel Blinka, regarded by many as Wisconsin's Dean of Evidence Law, has addressed Wisconsin's adoption of the *Daubert* standard in his most recent Pocket Part to his evidence treatise at 7 Wisconsin Practice Series: Wisconsin Evidence (3d Edition 2011). According to Professor Blinka:

In January 2011 the legislature amended § 907.02 to adopt the *Daubert* reliability standard found in Federal Rule of Evidence 702 and a majority of states... **The trial court** has discretion in determining how best to resolve foundational issues under [amended] § 907.02. Options include the following:

- A **pretrial** evidentiary hearing featuring the expert's testimony.
- A **pretrial** hearing based on a paper record, e.g., affidavits, depositions, expert reports, memoranda by counsel (Such motions may often accompany a motion for summary judgment in civil litigation).
- Testimony **at trial**... [Emphasis supplied].

Blinka, *Id.*, 2011 Pocket Part, p. 75.

Two points are clear. First, under *Daubert* the trial judge must consider an expert's proffer within the context of all the facts of a case. Second, it is assumed that the *Daubert* principles will be applied by the trial Judge who will actually officiate at trial. "The trial judge must... make the findings required by § 907.02..." *Id.* However, under Chapter 227, the Judicial Official who officiates at "trial" is not a Circuit Court Judge; it is a duly appointed ALJ.

Therefore, the RRNA submits that the proper place to make a *Daubert* challenge in a Chapter 227 proceeding is before the ALJ assigned to hear a Contested Case Hearing and not before the Circuit Court Judge. Admittedly, the Circuit Court Judge, sitting as an appellate court under § 227.52, may review what the ALJ does, but the first and primary place to mount a *Daubert* challenge is before the ALJ, who can conduct an evidentiary hearing (i.e., conduct a voir dire) of the expert, or entertain other motions before or at the hearing concerning the proffered expert testimony.

**B. The RRNA also has a Right to
Test the DNR's Experts under *Daubert*.**

There is another reason why any *Daubert* challenge to Dr. O'Reilly should occur before the ALJ. The authors of the Kapur and Gestra Reports are also experts, and there is nothing which prevents the application of the reliability standards of *Daubert* or *Kumho Tire* to such experts.

For example, the Kapur Report apparently reached conclusions based on the Gestra Report. According to *General Electric Co. v. Joiner*, 522 US 136 (1997) a proper area of exploration of an expert under *Daubert* is whether or not the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion (“Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *Id.* at 146).

The fact that an expert may draft a report with the intent of actually implementing the report does not mean that he or she is immune from meeting the *Daubert* standards before his testimony and his report may be received in evidence. In the 2000 Advisory Committee Notes to Federal Rule of Evidence 702, the Advisory Committee states:

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply ‘taking the expert's word for it.’

Put another way, as the US Supreme Court said in *Kumho Tire*, “[i]n certain cases, it will be appropriate for the trial judge to ask... how often an engineering expert’s experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community.” *Kumho Tire, id.*, 526 US at 151.

CONCLUSION

Dr. O’Reilly is a PhD with a very extensive CV and practical experience concerning water law which stretches from 1976 (where he was a water resource specialist with the DNR for 16 years) down to today and his work as Vice President of Hey & Associates, a company dedicated to water resource planning and conservation. His training and background are very relevant to the opinions he has expressed concerning all facets of the existing dispute with the DNR. In addition, as his CV, his testimony before ALJ Boldt and his attached Counter Affidavit make clear, he has carefully applied his training in a very reliable manner to the facts of this case. He has reviewed hundreds of pages of documents generated by the US Army Corps of Engineers and the DNR and he has made at least seven visits to the Kraus Site, as well as conducting tests and preparing reports based on his training, experience and study of all of the facts of this case.

Moreover, even assuming without in any way conceding that a *Daubert* challenge will lie as to Dr. O’Reilly, it should not be conducted by means of a Motion to Strike one isolated affidavit. A *Daubert* challenge should be conducted by the Judicial Official (here, the ALJ) who will officiate at the actual hearing

regarding the storm water permit. The DNR is asking this Court to preempt the authority of the ALJ and enter an Order without a record.

Finally, the DNR's Motion to Strike makes it clear that the DNR is primarily concerned about the Kapur and Gestra Reports. **So is the RRNA.** Therefore, the RRNA respectfully asks that the DNR's Motion to Strike be denied and that this matter be remanded for a Contested Case Hearing for the reasons set forth in the RRNA's Briefs in Support of its Motions for a remand under § 227.57(1) and § 227.57(7). Upon remand, the ALJ can take up any *Daubert* challenges the DNR may have to Dr. O'Reilly and the RRNA can likewise take up any *Daubert* challenges it may have to the authors of the Kapur and Gestra Reports, upon which Engineer Hartsook relied in issuing the storm water permit which is clearly at issue before this Court.

Dated at Hartland, Wisconsin this 10th day of October, 2011.

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EXHIBIT A
[WHICH IS A CD OF TESTIMONY]

EXHIBIT B

- a. My knowledge of the DNR's proposal is based on review of site development plans prepared for the Wisconsin Department of Natural Resources by Kapur and Associates, Inc. dated July 10, 2008 and December 22, 2010, permit application and associated environmental documents submitted to the U. S. Army Corps of Engineers (USACOE), and attendance at a public hearing conducted by the DNR on September 30, 2010. The 2008 site plans and USACOE permit application and associated environmental documents were acquired through a Freedom of Information Act request to USACOE dated July 19, 2010. Information for the WDNR was obtained through an Open Records Request dated September 20, 2010.
 - b. Regarding who the DNR purchased the property from, this information is public record and the information is available from the Waukesha County Land Register of Deeds Office. Waukesha County also maintains an online Land Information system, which is an official government system located online at <http://maps.waukeshacounty.gov/imf/sites/waukesha/jsp/launch.jsp>. The Land Information system includes Tax Key records going back to 2006 and indicates the parcel of land purchased by the WDNR was recorded January 23, 2006.
 - c. Exhibit 2 is based on property boundary information from the Waukesha County Land Information System online Geographical Information System site located at <http://maps.waukeshacounty.gov/imf/sites/waukesha/jsp/launch.jsp>.
4. My personal and professional knowledge of the drainage pattern on the Kraus Site and the foundation for Exhibit 3 are as follows:

I have personally visited the site on seven occasions. In November 2007 I and my staff at Hey and Associates, Inc. at the request of the Reddelien Road Neighborhood Association, Inc., prepared a watershed delineation map of the area that drains through

the proposed DNR boat launch site to define the drainage patterns. The watershed delineation map was developed based on two-foot contour maps purchased from Waukesha County. The mapping was done in the software ArcGIS. The watershed boundary was then field verified by walking the watershed in November 2007.

5. I know that the area of the Kraus Site is in a 100-year floodplain and the foundation for Exhibit 4 is as follows:

Hey and Associates Inc. maintains a detailed file of all of the official Flood Insurance Rate Maps (FIRM) for Waukesha County in our Brookfield office. The boundaries of the 100-year floodplain are also maintained on Waukesha County Land Information System online Geographical Information System (GIS) site located at <http://maps.waukeshacounty.gov/imf/sites/waukesha/jsp/launch.jsp>. Exhibit 4 is based on an output from the Waukesha County GIS site.

6. My personal and professional knowledge of the channel on the north side of the DNR's property and that it carries enough water to float a boat is as follows:

I have observed the channel on seven site visits and witnessed defined bed and banks on each site visit and flowing water on five of the seven visits. During each of the five site visits with flowing water the depth of water was adequate to float a recreation craft such as a canoe or kayak. I have reviewed a video shot on June 23, 2010, provided to me by the Reddelien Road Neighborhood Association, Inc., showing an individual named Paige Hanson kayaking in the channel on the north side of the DNR's property while conducting a "navigability in fact" test. Based on personal conversations with the neighbors to the North (Peters) and South (Hanson), I have been told that the channel on the north side of the DNR's property floods to the level on June 23, 2010 on an annual basis.

7. The basis for my familiarity with the Kraus Site and the site visits and filed work I have performed (and the literature review I have conducted) include:

My familiarity with the Kraus Site is based on seven site visits and review of documents provided by the USACOE and DNR through open record requests. My familiarity of the DNR's proposal is based on review of site development plans prepared for the DNR by Kapur and Associates, Inc. dated July 10, 2008 and December 22, 2010, permit application and associated environmental documents submitted to the U. S. Army Corps of Engineers (USACOE), and attendance at a public hearings conducted by the DNR on September 30, 2010. The 2008 site plans and USACOE permit application and associated environmental documents were acquired through a Freedom of Information Act request to USACOE dated July 19, 2010. The USACOE provided 584 pages of documents related to the site development proposal. Information for the WDNR and the 2010 site plan was obtained through an Open Records Request dated September 20, 2010 and a review of DNR's files on October 13, 2010 at their Waukesha office. On October 13, 2010 142 pages of documents were scanned from the DNR files. I have reviewed all 726 pages of documents received from the USACOE and DNR.

8. I believe that I am an expert regarding the DNR's property for the following reasons:

I have visited the DNR's property on seven dates; I have reviewed over 700 pages of documents provided by the USACOE and DNR related to the site development plans and environmental assessment of the proposed site. I have prepared a permit application, Environmental Assessment and Practical Alternatives Analysis for an alternative boat launch at the Kuchler site of STH 83 where I compared the environmental impacts of both the DNR property and the Kuchler site.

9. At p. 4 of the DNR's Motion to Strike, questions are raised about my knowledge of the existing site condition on the Kraus Site and my knowledge that the DNR driveway will

be 36000 square feet in size. The foundation for that knowledge and that calculation is as follows:

The length of the roadway was measured off the July 10, 2008 site plans prepared for the DNR by Kapur and Associates, Inc. The proposed width of the road is shown on the site plans and documented in the Environmental Assessment for the project. The area is a simple algebraic calculation by multiplying length times width.

10. My personal and professional knowledge of redevelopment is derived from the following sources:

I have prepared dozens of storm water management plans under Wisconsin Administrative Codes NR 216 and NR 151. My experience with the definitions of "Development" and "Redevelopment" come directly from the definitions Wis. Adm. Code NR 151.002 (11) and (12).

11. Although I left the DNR's employment in 1992, I know of the DNR's interpretation of the code and its storm water regulations because:

I have attended training sessions conducted by WDNR staff, and have thoroughly read the administrative code. As I testified to at length during the hearing before ALJ Boldt, since leaving the DNR my entire professional career has involved environmental issues, particularly related to water and hydrology. I have worked regularly with and against the DNR during the almost 20 years since I left the DNR on behalf of individual, corporate and government clients. I regularly assist those clients in understanding DNR regulations and at least 50% of my professional activity involves assisting those clients with "due diligence" preparation concerning DNR regulations.

12. The purpose of my observations in Paragraph 4 and the basis for them are as follows:

The fact that is being raised in paragraph 4 is that the DNR in its storm water management plan did not comply with section NR 151.12(5)(b) and did not address

peak flood discharges from their site and the storm water plan is inadequate to comply with the standards of NR 151.

13. With regard to Paragraph 5 of my affidavit, my expert analysis is based on the following facts and data, and is the product of reliable principles and methods, which I have applied reliably to the facts of the Kraus Site.

My analysis of peak flows off the watershed that drains through the DNR property is based on a watershed delineation prepared by myself and my staff in 2007, land cover from 2007 aerial photographs from Waukesha County, and soil permeability from soil maps from the Natural Resource Conservation Service (NRCS). The peak flow was calculated using the NRCS curve method outlined in *Urban Hydrology for Small Watersheds – Technical Release -55 (Second Release, 1986)*, prepared by the NRCS Conservation Engineering Division. The calculations were done in the software WinTR55 (version 1.10). A peak flow calculation of the drain tile shown on the DNR site plans was done using Manning’s Equation.

14. Exhibit 6 is the type of information I would rely on as an expert.

15. Concerning paragraphs 6, 7 & 8, my qualifications for providing an opinion about geotechnical engineering concepts is as follows:

With advanced degrees in Geology and Civil Engineering I have extensive training in reading and analysis of soil boring reports. In my 34 year career in natural resource management I have read dozens of soil reports and have worked with soil scientists and geotechnical engineers who have also expanded my knowledge of soils. The Gestra soil’s report is quite easy to read and understand. In the soil boring logs Gestra uses narrative terms to summarize the soil characteristics as ranging from stiff (Boring B-1) to very soft (boring B-4). However, the most important factor that Gestra recorded was the “SPT Blows” which is a standard penetration test where a 140-pound weight is

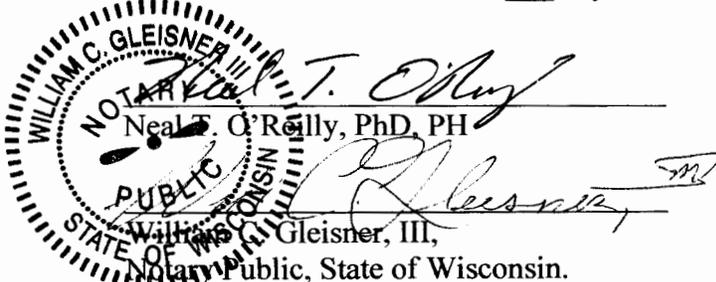
dropped and the number of blows to advance the point one (1) foot is counted. Obviously the more the blows the harder the soil. Loose or soft soils will show blow counts of less than 10. Blow counts of 10 to 50 blows per foot usually mean the ground will be fairly easily excavated but can support structures. When blow counts exceed 100, the ground is very hard may be very difficult to excavate. In the area of the wetland crossing for the access roadway the "SPT Blows" were 0 (Boring B-4) indicating soil that cannot provide any resistance to a dropped 140 pound weight.

16. My basis for providing opinions concerning problematic soil and storm water treatment is as follows:

The storm water treatment systems are designed based on specific slopes and elevations, if the components of the system shift due to settling in the soft soil, they may not function as designed. Based on the Gestra soils report the likelihood of settlement in the "very soft/very loose soil" is high. There are no details in the Kapur site design on how they plan to deal with any potential settling of the storm water systems. In Kapur's storm water plan they provide a level of treatment for pollutant removal (total suspended solids), if the storm water systems operate optimally. If the system shifts due to physical settling then the systems may no longer operate as design and not meet state standards.

Further the affiant sayeth not.

Subscribed and Sworn to this 7 day of October, 2011.


Neal T. O'Reilly, PhD, PH
William C. Gleisner, III,
Notary Public, State of Wisconsin.
My Commission is Permanent.
State Bar No. 1014276