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for Joint Committee
for Administrative
Rules

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

WISCONSIN BUILDERS ASSOCIATION,
4868 High Crossing Boulevard
Madison, WI 53704-7403,

Case No. 02CV3599

Plaintiff,

Civil Action: Declaratory Judgment 30701

vs.

WISCONSIN DEPARTMENT OF TRANSPORTATION,
and
THOMAS CARLSON, SECRETARY OF THE
WISCONSIN DEPARTMENT OF TRANSPORTATION,

State of Wisconsin
Office of the Secretary of the Wisconsin Department of Transportation
4802 Sheboygan Avenue, Room 120B
P.O. Box 7910
Madison, WI 53707-7910,

Defendants.

THIS IS AN AUTHENTICATED COPY OF THE
ORIGINAL DOCUMENT FILED WITH THE DANE
COUNTY CLERK OF CIRCUIT COURT.

JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

CIRCUIT COURT
Nov 15 3:10 PM '02
DANE COUNTY, WI

SUMMONS

THE STATE OF WISCONSIN TO: The Defendants above-named:

You are hereby notified that the Plaintiff named above, Wisconsin Builders Association, has filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the above Court, whose address is:

Dane County Clerk of Circuit Court
City-County Building
210 Martin Luther King, Jr. Boulevard
Madison, WI 53703

and to plaintiff's attorneys:

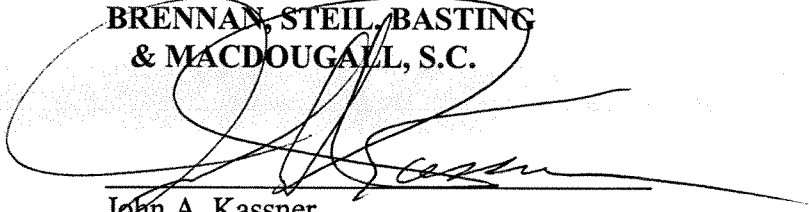
Brennan, Steil, Basting & MacDougall, S.C.
Attention: John A. Kassner
22 East Mifflin Street, Suite 400 [53703]
P.O. Box 990
Madison, Wisconsin 53701-0990

You may have an attorney help or represent you. If you require assistance of auxiliary aids or services because of a disability, call 608-266-4678 (TDD 608-266-9138) and ask for the Court ADA Coordinator.

If you do not provide a proper answer within forty-five (45) days, the Court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 15 day of November, 2001.

**BRENNAN, STEIL, BASTING
& MACDOUGALL, S.C.**



John A. Kassner
Attorney for Plaintiff
Wisconsin Builder's Association
State Bar Number: 01014336

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STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

WISCONSIN BUILDERS ASSOCIATION,
4868 High Crossing Boulevard
Madison, WI 53704-7403,

Case No. 02CV3589

Plaintiff,

Civil Action: Declaratory Judgment 30701

vs.

WISCONSIN DEPARTMENT OF TRANSPORTATION,
and
THOMAS CARLSON, SECRETARY OF THE
WISCONSIN DEPARTMENT OF TRANSPORTATION,
State of Wisconsin
Office of the Secretary of the Wisconsin Department of Transportation
4802 Sheboygan Avenue, Room 120B
P.O. Box 7910
Madison, WI 53707-7910,

Defendants.

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COUNTY CLERK OF CIRCUIT COURT.

JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

COMPLAINT

COMES NOW the Plaintiff, Wisconsin Builders Association, by Brennan, Steil, Basting & MacDougall, S.C., its attorneys, by John A. Kassner, and as and for a complaint, alleges as follows:

1. Plaintiff, Wisconsin Builders Association, is a Wisconsin not for profit corporation, organized in the State of Wisconsin with its offices located at 4868 High Crossing Boulevard, Madison, Wisconsin 53704-7403. It is, by occupation, a trade association.
2. Defendant, State of Wisconsin Department of Transportation, has its principal offices at 4802 Sheboygan Avenue, Madison, Wisconsin 53707-7910.

WISCONSIN DEPARTMENT OF TRANSPORTATION
MAY 15 3 15 PM '02
CIRCUIT COURT

3. Defendant, Thomas Carlson, is the Secretary of the Wisconsin Department of Transportation, whose office is located at 4802 Sheboygan Avenue, Room 120B, Madison, Wisconsin 53707-7910.

NATURE OF ACTION

4. This is an action for a declaratory judgment pursuant to Wis. Stats. §806.04 and §227.40.
5. The purpose of this action is to obtain a judicial declaration that the Department of Transportation unlawfully exceeded its authority in enacting amendments to TRANS 233; that it violated constitutional provisions in enacting amendments to TRANS 233; and, the Defendants did not comply with statutory rule-making procedures in adopting TRANS 233.

STANDING OF PLAINTIFF

6. The Wisconsin Builders Association (hereinafter "WBA") is a non-profit trade association comprised of more than 6,500 separate businesses across the State of Wisconsin engaged in residential and light commercial construction, remodeling and related industries.
7. Collectively, WBA's members employ more than 250,000 persons in the State of Wisconsin.
8. One of WBA's principal policy goals is the promotion of legal and public policies that lead to greater availability, quality and affordability of housing and commercial property for the people and businesses of Wisconsin.
9. The ownership, development, and division of parcels of land, and the creation of condominiums are fundamental parts of the housing and residential construction industry in Wisconsin.

10. TRANS 233.02(1) states that TRANS 233 is applicable:

“ . . . to all land division maps reviewed by a city, village, town or county, the department of administration and the department of transportation. This chapter applies to any land division that is created by plat or map under s. 236.12 or 236.45, Stats., by certified survey map under s. 236.34, Stats., or by condominium plat under s. 703.11, Stats., or other means not provided by statute, and that abuts a state trunk highway, connecting highway or service road.”

11. It is a routine part of the business of the members of the Plaintiff Wisconsin Builders Association to own, develop and divide land into parcels, and to create condominiums on land that abuts state trunk highways, connecting highways, or service roads within the State of Wisconsin. Consequently, compliance with the provisions of TRANS 233 is a routine part of doing business in the State of Wisconsin for the members of the Association.

12. Enforcement by the Defendant of the provisions of TRANS 233, as currently drafted, is interfering with and impairing the legal rights and privileges of, and is causing injury to, the property interests of the members of the Wisconsin Builders Association who own such lands.

13. Enforcement of the provisions of TRANS 233, as currently drafted, is interfering with and is causing injury to the achievement of the stated goals and objectives of the Wisconsin Builders Association by increasing the amount of lands necessary to provide housing and commercial development in proximity to certain highways, resulting in sprawl and environmental waste, and substantially increasing the cost to the Plaintiff's members of providing housing and commercial development. All of this adversely affects the cost of providing housing and commercial property to the consuming public in the State of Wisconsin.

14. Clarification of the laws applicable to the ownership, development and division of land and to the creation of condominiums on such land is needed to prevent confusion and harm to the interests of the Plaintiff and of its members.

FIRST CAUSE OF ACTION

15. Paragraphs 1 through 14 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.
16. Land division law in Wisconsin is principally governed by the provisions of Chapter 236 of the Wisconsin Statutes.
17. Wisconsin Statute §236.12(2)(a) reads, in relevant part, as follows:

(2) Within 2 days after a preliminary or final plat is submitted for approval, legible **copies**, together with a list of the authorities to which the plat must be submitted for approval under s. 236.10 or objection under this subsection, furnished by the subdivider at the subdivider's expense, **shall be sent**, by the clerk or secretary of the approving authority to which the plat is submitted, **to the following agencies which have authority to object to the plat:**

(a) **Two copies for each of the state agencies required to review the plat to the department which shall examine the plat for compliance with ss. 236.15, 236.16, 236.20 and 236.21(1) and (2). If the subdivision abuts or adjoins a state trunk highway or connecting highway, the department shall transmit 2 copies to the department of transportation so that agency may determine whether it has any objection to the plat on the basis of its rules as provided in s. 236.13. . . . (Emphasis supplied.)**

18. Wisconsin Statute §236.13 sets forth the Basis for Approval of a preliminary or final plat of a subdivision. Subsection (1)(e) of that section reads as follows:

(1) **Approval of the preliminary or final plat shall be conditioned upon compliance with:**

.....

(e) The rules of the department of transportation relating to provision for the safety of entrance upon and departure from the abutting state trunk

highways or connecting highways and for the preservation of the public interest in such highways.

19. Subsection (3) of that Section reads as follows:

(3) No approving authority or agency having the power to approve or object to plats shall condition approval upon compliance with, or base an objection upon, any requirement other than those specified in this section. (Emphasis supplied.)

20. TRANS 233, DIVISION OF LAND ABUTTING A STATE TRUNK HIGHWAY OR CONNECTING HIGHWAY, is a chapter of the Wisconsin Administrative Code enacted by the Defendant, State of Wisconsin Department of Transportation on February 1, 1999.

21. §TRANS 233.012(1) reads as follows:

233.012(1) In accordance with ss. 86.07 (2), 236.12, 236.34 and 236.45, Stats., this chapter applies to all land division maps reviewed by a city, village, town or county, the department of administration and the department of transportation. **This chapter applies to any land division that is created by plat or map under s. 236.12 or 236.45, Stats., by certified survey map under s. 236.34, Stats., or by condominium plat under s. 703.11, Stats., or other means not provided by statute, and that abuts a state trunk highway, connecting highway or service road. (Emphasis supplied.)**

22. By enacting this provision, the Defendant exceeded its statutory authority by attempting to regulate the division of lands by certified survey map, under Wis. Stat. §236.34.

23. By enacting this provision, the Defendant exceeded its statutory authority by attempting to regulate the creation of condominium plats under Wis. Stat. §703.11.

24. By enacting this provision, the Defendant exceeded its statutory authority by attempting to regulate the division of lands abutting service roads, if such service roads do not comprise state trunk highways or connecting highways.

SECOND CAUSE OF ACTION

25. Paragraphs 1 through 24 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.
26. §TRANS 233.012(2) and (3) read as follows:
- 233.012(2) Structures and improvements lawfully placed in a setback area under ch. Trans 233 prior to February 1, 1999, or lawfully placed in a setback area before a land division, are explicitly allowed to continue to exist. Plats that have received preliminary approval prior to February 1, 1999, are not subject to the standards under this chapter as first promulgated effective February 1, 1999, if there is no substantial change between the preliminary and final plat, but are subject to ch. Trans 233 as it existed prior to February 1, 1999. Plats that have received final approval prior to February 1, 1999, are not subject to the standards under this chapter as first promulgated effective February 1, 1999, but are subject to ch. Trans 233 as it existed prior to February 1, 1999. Land divisions on which the department acted between February 1, 1999 and February 1, 2001 are subject to ch. Trans 233 as it existed February 1, 1999.
- 233.012(3) Any structure or improvement lawfully placed within a setback area under ch. Trans 233 prior to February 1, 1999, or lawfully placed within a setback area before a land division, may be kept in a state of repair, efficiency or validity in order to preserve from failure or decline, and if unintentionally or tortiously destroyed, may be replaced substantially in kind.
27. By enacting TRANS 233.012(2) and (3), the Defendant exceeded its statutory authority, by attempting to regulate the continuing use of lands which have previously been divided, and which are not now the subject of a proposal for land division.

THIRD CAUSE OF ACTION

28. Paragraphs 1 through 27 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.

29. TRANS 233.017 reads as follows:

Trans 233.017 Other abutments.

For purposes of this chapter, land shall be considered to abut a state trunk highway or connecting highway if the land is any of the following:

(1) Land that contains any portion of a highway that is laid out or dedicated as part of a land division if the highway intersects with a state trunk highway or connecting highway.

(2) Separated from a state trunk highway or connecting highway by only unplatted lands that abut a state trunk highway or connecting highway if the unplatted lands are owned by, leased to or under option, whether formal or informal, or under contract or lease to the owner.

(3) Separated from a state trunk highway or connecting highway by only a service road.

30. By enacting TRANS 233.017, the Defendant exceeded its statutory authority, by attempting to regulate the division of lands which do not abut or adjoin either a state trunk highway or a connecting highway.

FOURTH CAUSE OF ACTION

31. Paragraphs 1 through 30 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.

32. TRANS 233.05(1) reads, in relevant part, as follows:

Trans 233.05 Direct access to state trunk highway or connecting highway.

(1) No land divider may divide land in such a manner that a private road or driveway connects with a state trunk highway or connecting highway or any service road lying partially within the right-of-way of a state trunk highway or connecting highway, unless the land divider has received a special exception for that purpose approved by the department, district office or reviewing municipality under s. Trans 233.11.

...

Note: The denial of a special exception for access or connection purposes is not the functional equivalent of the denial of a permit under s. 86.07(2), Stats. Appeal of disapproval of a plat (and thus disapproval of a special exception) is available only by certiorari under s. 236.13(5), Stats. There is no right to a contested case hearing under ss. 227.42 or 227.51 (1) for the denial of a special exception.

33. By enacting TRANS 233.05, the Defendant exceeded its statutory authority, by attempting to regulate the division of lands which do not abut or adjoin either a state trunk highway or a connecting highway.
34. By enacting TRANS 233.05, the Defendant is attempting to deprive property owners of due process rights guaranteed to them under the State and Federal Constitutions.

FIFTH CAUSE OF ACTION

35. Paragraphs 1 through 34 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.
36. TRANS 233.08(1) and (2) read, in relevant part, as follows:

Trans 233.08 Setback requirements and restrictions.

(1) Except as provided in this section or in s. Trans 233.11 or, with respect to connecting highways, as provided in s. 86.16 (1), Stats., **no person may erect, install or maintain any structure or improvement within a setback area determined under sub. (2) or (3).**

(2) (a) Except as provided in par. (b), the setback area is the area within 110 feet of the centerline of a state trunk highway or connecting highway or within 50 feet of the nearer right-of-way line of a state trunk highway or connecting highway, whichever is furthest from the centerline.

(b) If an applicable ordinance allows structures or improvements to be located closer to the right-of-way of a state trunk highway or connecting highway than is provided under par. (a), the setback area is the area between the right-of-way and the more restrictive of the following:

1. The distance allowed under the ordinance.
2. 42 feet from the nearer right-of-way line.
3. 100 feet from the centerline.

(c) At least once every 2 years, the department shall produce general reference maps that generally identify major intersections and the highways specified in pars. 1. to 5. The department may reduce or extend, by not more than 3 miles along the highway, the area subject to a setback established under par. (a) or (b) to establish logical continuity of a setback area or to terminate the setback area at a readily

identifiable physical feature or legal boundary, including a highway or property boundary. Persons may seek special exceptions to the setback requirement applicable to these major intersections and highways, as provided in s. Trans 233.11 (3). The setback area established under par. (a) or (b) applies only to major intersections and to highways identified as:

1. State trunk highways and connecting highways that are part of the national highway system and approved by the federal government in accordance with 23 USC 103(b) and 23 CFR 470.107(b).
2. State trunk highways and connecting highways that are functionally classified as principal arterials in accordance with procedure 4-1-15 of the department's facilities development manual dated July 2, 1979.
3. State trunk highways and connecting highways within incorporated areas, within an unincorporated area within 3 miles of the corporate limits of a first, second or third class city, or within an unincorporated area within 1½ miles of a fourth class city or a village.
4. State trunk highways and connecting highways with average daily traffic of 5,000 or more.
5. State trunk highways and connecting highways with current and forecasted congestion projected to be worse than level of service "C," as determined under s. Trans 210.05(1), within the following 20 years. (Emphasis supplied.)

37. TRANS 233.015(2) reads as follows:

(2) "Improvement" means any permanent addition to or betterment of real property that involves the expenditure of labor or money to make the property more useful or valuable. "Improvement" includes parking lots, driveways, loading docks, in-ground swimming pools, wells, septic systems, retaining walls, signs, buildings, building appendages such as porches, and drainage facilities. "Improvement" does not include sidewalks, terraces, patios, landscaping and open fences.

38. By enacting TRANS 233.08(1) and (2), the Defendant exceeded its statutory authority, by attempting to regulate activities which do not relate to the provision for the safety of entrance upon and departure from the abutting state trunk highways or connecting highways, nor which relate to the preservation of the public interest and investment in such highways.

39. By enacting TRANS 233.08(1), the Defendant exceeded its statutory authority, by attempting to absolve itself of its duty, pursuant to Chapter 32 of the Wisconsin Statutes, Eminent Domain, to compensate property owners when taking property for a public purpose.
40. By enacting TRANS 233.08(1) and (2), the Defendant attempts to violate constitutional rights guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and under Article 1, Section 13 of the Wisconsin Constitution to those it regulates by unlawfully taking a development easement without just compensation.
41. By enacting TRANS 233.08(1) and (2), the Defendant attempts to violate constitutional rights to equal protection of the laws guaranteed to those it regulates under the Fourteenth Amendment to the United States Constitution and under Article 1, Section 1 of the Wisconsin Constitution.

SIXTH CAUSE OF ACTION

42. Paragraphs 1 through 41 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.
43. TRANS 233.08(3) reads, in relevant part, as follows:

(3) If any portion of a service road right-of-way lies within the setback area determined under sub. (2), the setback area shall be increased by the lesser of the following:

(a) The width of the service road right-of-way, if the entire service road right-of-way lies within the setback area. Any increase under this paragraph shall be measured from the boundary of the setback area determined under sub. (2).

(b) The distance by which the service road right-of-way lies within the setback area, if the entire service road right-of-way does not lie within the setback area. Any increase under this paragraph shall be measured from the nearer right-of-way line of the service road.

44. By enacting TRANS 233.08(3), the Defendant exceeded its statutory authority, by attempting to regulate activities which do not relate to the provision for the safety of entrance upon and departure from the abutting state trunk highways or connecting highways, nor which relate to the preservation of the public interest and investment in such highways.
45. By enacting TRANS 233.08(3), the Defendant exceeded its statutory authority, by attempting to absolve itself of its duty, pursuant to Chapter 32 of the Wisconsin Statutes, Eminent Domain, to compensate property owners when taking property for a public purpose.
46. By enacting TRANS 233.08(3) the Defendant attempts to violate constitutional rights guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and under Article 1, Section 13 of the Wisconsin Constitution to those it regulates by unlawfully taking a development easement without just compensation.
47. By enacting TRANS 233.08(3), the Defendant attempts to violate constitutional rights to equal protection of the laws guaranteed to those it regulates under the Fourteenth Amendment to the United States Constitution and under Article 1, Section 1 of the Wisconsin Constitution.

SEVENTH CAUSE OF ACTION

48. Paragraphs 1 through 47 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.
49. TRANS 233.08(3m) reads, in relevant part, as follows:
 - (3m) (a) Notwithstanding sub. (1), a public utility may erect, install or maintain a utility facility within a setback area.
 - (b) If the department acquires land that is within a setback area for a state trunk highway, as provided by this chapter, and on which a utility facility is**

located, the department is not required to pay compensation or other damages relating to the utility facility, unless the utility facility is any of the following:

1. Erected or installed before the land division map is recorded.
2. Erected or installed on a recorded utility easement that was acquired prior to February 1, 1999.
3. Erected or installed after the land division map is recorded but with prior notice in writing, with a plan showing the nature and distance of the work from the nearest right-of-way line of the highway, to the department's appropriate district office within a normal time of 30 days, but no less than 5 days, before any routine, minor utility erection or installation work commences, nor less than 60 days, before any major utility erection or installation work commences, if any utility work is within the setback.
4. Erected or installed before the land division map is recorded but modified after that date in a manner that increases the cost to remove or relocate the utility facility. In such a case, the department shall pay compensation or other damages related to the utility facility as it existed on the date the land division map was recorded, except that if the modification was made with prior notice in writing, with a plan showing the nature and distance of the work from the nearest right-of-way line of the highway, to the department's appropriate district office within a normal time of 30 days, but no less than 5 days, before any routine, minor utility erection or installation work commences, nor less than 60 days, before any major utility erection or installation work commences, if any utility work is within the setback, then the department shall pay compensation or other damages related to the utility facility as modified.

(c) If a local unit of government or the department acquires land that is within a setback area for a connecting highway as provided by this chapter and on which a utility facility is located, **the department is not required to pay compensation or other damages relating to the utility facility, unless the utility facility is compensable under the applicable local setbacks and the utility facility is in any of the categories described in sub. (b)1. to 4.**

Note: A "connecting highway" is not a state trunk highway. It is a marked route of the state trunk highway system over the streets and highways in municipalities which the Department has designated as connecting highways. Municipalities have jurisdiction over connecting highways and are responsible for their maintenance and traffic control. The Department is generally responsible for construction and reconstruction of the through lanes of connecting highways, but costs for parking lanes and related municipal facilities and other desired local improvements are local responsibilities. See ss. 84.02 (11), 84.03 (10), 86.32 (1) and (4), and 340.01 (60), Stats. A listing of connecting highways and geographic end

points are available in the department's "Official State Trunk Highway System and the Connecting Highways" booklet that is published annually as of December 31.

(d) The department shall review the notice and plan to determine whether a planned highway project within a 6-year improvement program under s. 84.01 (17), Stats., or a planned major highway project enumerated under s. 84.013 (3), Stats., will conflict with the planned utility facility work. If the department determines a conflict exists, it will notify the utility in writing within a normal time of 30 days, but no more than 5 days, after receiving the written notice and plan for any routine, minor utility erection or installation work, nor more than 60 days, after receiving the written notice and plan for any major utility erection or installation work, and request the utility to consider alternative locations that will not conflict with the planned highway work. The department and utility may also enter into a cooperative agreement to jointly acquire, develop and maintain rights of way to be used jointly by WISDOT and the public utility in the future as authorized by s. 84.093, Stats. **If the department and utility are not able to make arrangements to avoid or mitigate the conflict, the utility may proceed with the utility work, but notwithstanding pars. (b) and (c), the department may not pay compensation or other damages relating to the utility facility if it conflicts with the planned highway project.** In order to avoid payment of compensation or other damages to the utility, the department is required to record a copy of its written notice to the utility of the conflict, that adequately describes the property and utility work involved, with the register of deeds in the county in which the utility work or any part of it is located. (Emphasis supplied.)

50. By enacting TRANS 233.08(3m), the Defendant exceeded its statutory authority, by attempting to regulate activities which do not relate to the provision for the safety of entrance upon and departure from the abutting state trunk highways or connecting highways, nor which relate to the preservation of the public interest and investment in such highways.
51. By enacting TRANS 233.08(3m), the Defendant exceeded its statutory authority, by attempting to absolve itself of its duty, pursuant to Chapter 32 of the Wisconsin Statutes, Eminent Domain, to compensate property owners when taking property for a public purpose.

EIGHTH CAUSE OF ACTION

52. Paragraphs 1 through 51 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.

53. TRANS 233.08(5) reads, in relevant part, as follows:

(5) The owner shall place the following restriction upon the same sheet of the land division map that shows the highway setback line:

“No improvements or structures are allowed between the right-of-way line and the highway setback line. Improvements and structures include, but are not limited to, signs, parking areas, driveways, wells, septic systems, drainage facilities, buildings and retaining walls. It is expressly intended that this restriction is for the benefit of the public as provided in section 236.293, Wisconsin Statutes, and shall be enforceable by the Wisconsin Department Transportation or its assigns. Contact the Wisconsin Department of Transportation for more information. The phone number may be obtained by contacting the County Highway Department.”

If on a CSM there is limited space for the above restriction on the same sheet that shows the setback line, then the following abbreviated restriction may be used with the standard restriction placed on a subsequent page: “Caution - Highway Setback Restrictions Prohibit Improvements. See sheet----.” (Emphasis supplied.)

54. By enacting TRANS 233.08(5), the Defendant exceeded its statutory authority, by attempting to regulate activities which do not relate to the provision for the safety of entrance upon and departure from the abutting state trunk highways or connecting highways, nor which relate to the preservation of the public interest and investment in such highways.

55. By enacting TRANS 233.08(5) the Defendant attempts to violate constitutional rights guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and under Article 1, Section 13 of the Wisconsin Constitution to those it regulates by unlawfully taking a development easement without just compensation.

56. By enacting TRANS 233.08(5), the Defendant attempts to violate constitutional rights to equal protection of the laws guaranteed to those it regulates under the Fourteenth

Amendment to the United States Constitution and under Article 1, Section 1 of the Wisconsin Constitution.

57. By enacting TRANS 233.08(5), the Defendant exceeded its statutory authority, by attempting to absolve itself of its duty, pursuant to Chapter 32 of the Wisconsin Statutes, Eminent Domain, to compensate property owners when taking property for a public purpose.

NINTH CAUSE OF ACTION

58. Paragraphs 1 through 57 are repeated in their entirety as if fully set forth herein and are made a part of this cause of action.
59. TRANS 233.11 reads, in relevant part, as follows:

Trans 233.11 Special exceptions.

...

(3) (a) Special exceptions for setbacks allowed. The department, district office or, if authorized by a delegation agreement under sub. (7), reviewing municipality may authorize special exceptions from this chapter only in appropriate cases when warranted by specific analysis of the setback needs, as determined by the department, district office or reviewing municipality. A special exception may not be contrary to the public interest and shall be in harmony with the general purposes and intent of ch. 236, Stats., and of this chapter. The department, district office or reviewing municipality may grant a special exception that adjusts the setback area or authorizes the erection or installation of any structure or improvement within a setback area only as provided in this subsection. The department, district office or reviewing municipality may require such conditions and safeguards as will, in its judgment, secure substantially the purposes of this chapter.

...

(d) Allow in setback - removal does not affect viability. The department, district office or reviewing municipality may authorize the erection of a structure or improvement within a setback area only if the department, district office or reviewing municipality determines that any required removal of the structure or improvement, in whole or in part, will not affect the continuing viability or conforming use of the business, activity, or use associated with the proposed structure or improvement, and will not adversely affect the community in which it is located. **Any owner or user who erects a structure or improvement under a special exception granted under this paragraph assumes the risk of future department-required removal of the structure or improvement and waives any right to compensation, relocation assistance or damages associated with the department's acquisition of that land for a transportation improvement,**

including any damage to property outside the setback caused by removal of the structure or improvement in the setback that was allowed by special exception. The department, district office or reviewing municipality may not grant a special exception within an existing setback area, unless the owner executes an agreement or other appropriate document required by the department, binding on successors and assigns of the property, providing that, should the department need to acquire lands within the setback area, the department is not required to pay compensation, relocation costs or damages relating to any structure or improvement authorized by the special exception. The department, district office or reviewing municipality may require such conditions and safeguards as will, in its judgment, secure substantially the purposes of this chapter. The department, district office or reviewing municipality shall require the executed agreement or other appropriate document to be recorded with the register of deeds under sub. (7) as part of the special exception. (Emphasis supplied.)

60. By enacting TRANS 233.11, the Defendant exceeded its statutory authority, by attempting to regulate activities which do not relate to the provision for the safety of entrance upon and departure from the abutting state trunk highways or connecting highways, nor which relate to the preservation of the public interest and investment in such highways.
61. By enacting TRANS 233.11 the Defendant attempts to violate constitutional rights guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and under Article 1, Section 13 of the Wisconsin Constitution to those it regulates by unlawfully taking a development easement without just compensation.
62. By enacting TRANS 233.11, the Defendant attempts to violate constitutional rights to equal protection of the laws guaranteed to those it regulates under the Fourteenth Amendment to the United States Constitution and under Article 1, Section 1 of the Wisconsin Constitution.
63. By enacting TRANS 233.11, the Defendant exceeded its statutory authority, by attempting to absolve itself of its duty, pursuant to Chapter 32 of the Wisconsin Statutes, Eminent Domain, to compensate property owners when taking property for a public purpose.

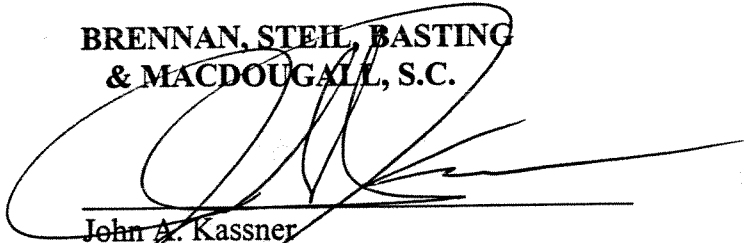
WHEREFORE, the Plaintiff demands judgment against the Defendants:

- A. Declaring that those provisions of TRANS 233 which attempt to regulate the division of land by certified survey map are void and unenforceable.
- B. Declaring that those provisions of TRANS 233 which attempt to regulate the creation of condominium plats are void and unenforceable.
- C. Declaring that those provisions of TRANS 233 which attempt to regulate the division of land abutting service roads by virtue of that abutment are void and unenforceable.
- D. Declaring that those provisions of TRANS 233 which attempt to regulate the use of lands which are not currently the subject of a subdivision plat approval under Wis. Stat. §236.12 are void and unenforceable.
- E. Declaring that those provisions of TRANS 233 which deny a means of review to a property owner, whose request for a special exception permit to obtain access to a state trunk highway or connecting highway has been disapproved, are void and unenforceable.
- F. Declaring that those provisions of TRANS 233 which attempt to regulate activities which do not relate to the provision of a safe entrance upon and departure from abutting state trunk highways or connecting highways, nor which relate to the preservation of the public interest and investment in such highways, are void and unenforceable.
- G. Declaring that those provisions of TRANS 233 which attempt to regulate the use of land adjacent to certain enumerated highways in order to reduce the cost of future exercises of eminent domain by the Defendant are void and unenforceable.
- H. Declaring that those provisions of TRANS 233 which attempt to limit the compensation payable by the Defendant under Chapter 32, Wisconsin Statutes, are void and unenforceable.

- I. Declaring that those provisions of TRANS 233 which attempt to preclude uses of land subject to regulation under TRANS 233 so as to limit the compensation that will be payable under Chapter 32, Wisconsin Statutes, are void and unenforceable.

Dated this 15 day of November, 2002.

**BRENNAN, STEEL, BASTING
& MACDOUGALL, S.C.**



John A. Kassner
Attorney for Plaintiff
Wisconsin Builder's Association
State Bar Number: 01014336

22 E. Mifflin Street, Suite 400 [53703]
P.O. Box 990
Madison, WI 53701-0990

TEL: (608) 251-7770
FAX: (608) 251-6626

STATE OF WISCONSIN CIRCUIT COURT
BRANCH: _____

DANE COUNTY

WISCONSIN MANUFACTURERS
AND COMMERCE
501 East Washington Avenue
Madison, WI 53703,

WISCONSIN PAPER COUNCIL
250 North Green Bay Road
Post Office Box 718
Neenah, WI 54957-0718,

and

PRINTING INDUSTRIES
OF WISCONSIN
13005 West Bluemound Road
Post Office Box 126
Elm Grove, WI 53122,

Plaintiffs,

v.

STATE OF WISCONSIN
DEPARTMENT OF
NATURAL RESOURCES
101 South Webster Street
Madison, WI 53703,

and

DARRELL BAZZELL, in his
official capacity as Secretary of
the Wisconsin Department of
Natural Resources,
101 South Webster Street
Madison, WI 53703,

Defendants.

Case No.: 02CV3941

Declaratory Judgment - 30701
Other Injunction or Restraining
Order - 30704

THIS IS AN AUTHENTICATED COPY OF THE
ORIGINAL DOCUMENT FILED WITH THE DANE
COUNTY CLERK OF CIRCUIT COURT.

JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

If you require the assistance of
auxiliary aids or services because
of a disability, call 608/266-4241
(TDD 608/266-4625) and ask for
the Court ADA Coordinator.

DANE COUNTY, WI
DEC 20 10 34 AM '02
CIRCUIT COURT

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

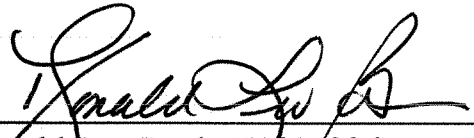
Within forty-five (45) days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709, and to Plaintiffs' attorneys, DeWitt Ross & Stevens s.c., whose address is Two East Mifflin Street, Suite 600, Madison, WI 53703. You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five (45) days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 20th day of December, 2002.

DEWITT ROSS & STEVENS s.c.

By: _____


Donald Leo Bach (#1014386)
Henry J. Handzel, Jr. (#1014587)
Todd Palmer (#1020197)
Two East Mifflin Street, Suite 600
Madison, WI 53703-2865
608-255-8891

ATTORNEYS FOR PLAINTIFFS WISCONSIN
MANUFACTURERS AND COMMERCE,
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PRINTING INDUSTRIES OF WISCONSIN

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CO-COUNSEL FOR PLAINTIFF WISCONSIN
MANUFACTURERS AND COMMERCE

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

BRANCH: _____

WISCONSIN MANUFACTURERS
AND COMMERCE
501 East Washington Avenue
Madison, WI 53703,

WISCONSIN PAPER COUNCIL
250 North Green Bay Road
Post Office Box 718
Neenah, WI 54957-0718,

Case No.: 02CV3941

and

PRINTING INDUSTRIES
OF WISCONSIN
13005 West Bluemound Road
Post Office Box 126
Elm Grove, WI 53122,

Declaratory Judgment - 30701
Other Injunction or Restraining
Order - 30704

Plaintiffs,

v.

STATE OF WISCONSIN
DEPARTMENT OF
NATURAL RESOURCES
101 South Webster Street
Madison, WI 53703,

and

DARRELL BAZZELL, in his
official capacity as Secretary of
the Wisconsin Department of
Natural Resources,
101 South Webster Street
Madison, WI 53703

Defendants.

THIS IS AN AUTHENTICATED COPY OF THE
ORIGINAL DOCUMENT FILED WITH THE DANE
COUNTY CLERK OF CIRCUIT COURT.

JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

The amount in controversy exceeds
the amount set forth in Wis. Stat.
§ 799.01(1)(d)

DANE COUNTY, WI
DEC 20 10 34 AM '02
CIRCUIT COURT

COMPLAINT

Plaintiff Wisconsin Manufacturers and Commerce ("WMC") by their attorneys DeWitt Ross & Stevens S.C. and Foley & Lardner, and Plaintiffs Wisconsin Paper Council ("WPC") and Printing Industries of Wisconsin ("PIW") by their attorneys, DeWitt Ross & Stevens S.C., respectfully bring this action for declaratory judgment pursuant to Wis. Stats. §§ 227.40 and 806.04.

SYNOPSIS OF CLAIMS

The Wisconsin Department of Natural Resources ("WDNR," "Department" or "Defendant") maintains a policy that if a regulated permittee seeks an administrative hearing on any part of a WDNR proposed air pollution control permit, the entire permit (and, therefore, any planned improvement or project for which it was issued), is held in abeyance until that hearing process is completed (hereinafter the "Statement of Policy" or "Policy"). Administrative resolution can take months (or even years) during which time WDNR's Statement of Policy prevents the permittee from constructing its project and proceeding in compliance with the unchallenged parts of the permit.

WDNR's Policy is in direct conflict with Wis. Stat. § 285.81(1) which grants a permittee the right to seek an administrative hearing on just part of a proposed permit but which also provides that the remainder of the permit not challenged becomes effective. Specifically, it also illegally prevents a permittee

from commencing construction on any part of a project for which it applied for a permit, and effectively coerces permit holders to accept unreasonable, illegal, burdensome or unnecessary permit conditions (or accept permits lacking necessary conditions) if the permittee cannot sustain the lengthy delay involved in the permit challenge process. Furthermore, the Statement of Policy was never promulgated as a rule pursuant to Wis. Stat. Chapter 227.

This Complaint brings two claims. The first claim seeks a declaration from the Court that under the express terms of Wis. Stat. § 285.81(1), an air pollution control permit holder or applicant can seek a hearing on any "part of a permit" without staying the effectiveness of the remaining unchallenged parts of the permit. In the alternative, the second claim seeks entry of a judgment declaring that the Statement of Policy is invalid and void for the failure to promulgate such policy as a rule pursuant to Wis. Stat. Chapter 227.

PARTIES

1. WMC is a statewide, non-profit association representing Wisconsin businesses. Currently, the association has approximately 4,300 members that include both large and small manufacturers, service companies, local chambers of commerce and specialized trade associations. WMC's principal place of business is at 501 East Washington Avenue, Madison, Wisconsin 53703. Many

of WMC's members apply for, receive, construct and operate sources pursuant to the terms of air pollution control permits issued by the WDNR. Accordingly, the rights, status or legal relations of WMC and its members are directly and substantially affected by WDNR's Statement of Policy and the requested declaratory relief involves a legally protectible interest of such persons and entities.

2. WPC is a non-profit trade association representing the pulp, paper and allied industries within the State of Wisconsin. Currently, WPC represents approximately 25 member firms and 114 associate members. WPC's principal place of business is 250 North Green Bay Road, Post Office Box 718, Neenah, Wisconsin 54957-0718. Many of WPC's members apply for, receive, construct and operate sources pursuant to the terms of air pollution control permits issued by the WDNR. Accordingly, the rights, status or legal relations of WPC and its members are directly and substantially affected by WDNR's Statement of Policy and the requested declaratory relief involves a legally protectible interest of such persons and entities.

3. PIW is a non-profit association which represents the graphic arts and printing industries throughout the State of Wisconsin. PIW membership consists of a wide range of both small and large printing business enterprises in

the State. PIW's principal place of business is 13005 West Bluemound Road, Post Office Box 126, Elm Grove, Wisconsin 53122. Many of PIW's members apply for, receive, construct and operate sources pursuant to the terms of air pollution control permits issued by the WDNR. Accordingly, the rights, status or legal relations of PIW and its members are directly and substantially affected by WDNR's Statement of Policy and the requested declaratory relief involves a legally protectible interest of such persons and entities.

4. WDNR is an agency of the State of Wisconsin created by Wis. Stat. § 15.34 and has its principal place of business at 101 South Webster Street, Madison, Wisconsin 53703. Among other things, WDNR is charged with implementing the air pollution control permitting program in Wisconsin. *See*, Wis. Stat. §§ 285.11, 285.13, 285.60, 285.61 and 285.62. WDNR has an interest in contesting the interpretation of Wis. Stat. § 285.81(1) and has an interest in that matter which is adverse to Plaintiffs and their members.

5. Defendant Darrell Bazzell is the Secretary of WDNR and is joined in this action in his official capacity as Secretary of WDNR.

JURISDICTION

6. Wis. Stat. § 806.04 grants this Court jurisdiction, among other things, to declare rights, status and other legal relations under the terms of a statute.

7. Wis. Stat. § 227.40 grants this Court jurisdiction, among other things, to determine the validity of a "rule" issued by a Wisconsin agency. Wis. Stat. § 227.01(13) defines the term "rule" to include a "...statement of policy" such as the WDNR's Statement of Policy interpreting Wis. Stat. § 285.81(1).

FIRST CLAIM - DECLARATORY JUDGMENT

A. The Declaration Sought From the Court

8. WMC, WPC and PIW seek a declaration construing Wis. Stat. § 285.81(1) which pertains to the effect of challenging an air pollution control permit issued by WDNR. The statute provides in relevant part:

PERMIT HOLDER; PERMIT APPLICANT; ORDER RECIPIENT. Any permit, part of a permit, order, decision or determination by the department under ss. 285.39, 285.60 to 285.69 or 285.75 shall become effective unless the permit holder or applicant or the order recipient seeks a hearing on the action in the following manner: . . .(emphasis added)

9. DNR maintains a policy that if a regulated permittee seeks an administrative hearing on any part of a WDNR proposed air pollution control permit, the entire permit (and, therefore, any planned improvement or project for which it was issued), is held in abeyance until that hearing process is

completed (the "Statement of Policy" or "Policy"). *See*, Letter dated July 13, 2001 from WDNR Secretary Darrell Bazzell to Todd Palmer [Exhibit A]; and Letter dated December 7, 2001 from WDNR Attorney Marcia Penner to Henry J. Handzel, Jr. [Exhibit B]. Administrative resolution can take months (or even years) during which time WDNR's Statement of Policy prevents the permittee from constructing its project proceeding in compliance with the unchallenged parts of the permit.

10. Despite the express directives of Wis. Stat. § 285.81(1) that "Any ... part of a permit ... shall become effective unless" challenged, WDNR's Statement of Policy purports to stay the effectiveness of *all terms* in an air permit, and therefore the entire permit itself, even if the recipient seeks a hearing on just *one part* of the permit.

11. WMC , WPC and PIW seek a declaration that under the express terms of Wis. Stat. § 285.81(1), an air pollution control permit holder or applicant can seek a hearing on just one "part of a permit" without staying the effectiveness of the remaining unchallenged parts of the permit. In other words, a declaration that all provisions of an air permit become effective upon permit issuance - except those specific "part[s] of a permit" for which the permit holder or applicant seeks a hearing.

B. Need for the Requested Declaration

12. The requested declaration is necessary because:

A. WDNR has created a comprehensive air pollution control permitting program that is very broad in terms of its application. Under that program, businesses cannot construct, reconstruct or modify certain types of emission sources without first obtaining permission from the WDNR in the form of a required air pollution control permit. *See, Wis. Admin. Code §§ NR 405.01, 406.03 and 408.03.* Thus, in Wisconsin, a business cannot perform even the most basic of construction activities (*e.g.* site clearance, grading, etc.) without first being issued a WDNR air permit. *See, Wis. Admin. Code § NR 400.02(44).*

B. WDNR's air permitting program applies to many more activities than required by the federal Clean Air Act or similar programs in other mid-western states. As a consequence, Wisconsin businesses are forced to obtain permits for relatively minor and routine activities that would not otherwise require advance permitting if the source were located in another state. This negatively affects the ability of Wisconsin businesses to timely respond to market conditions and compete timely on a national, as well as international level.

C. One of the practical consequences of WDNR's expansive permitting program is that Wisconsin businesses must file a relatively large number of permit applications. This requirement has created delays in the permit issuance process. It is not uncommon for a business to wait several months, and in some cases more than a year, for a WDNR air permit.

D. Because businesses are prevented from even clearing a site without prior WDNR permit authorization, they are often under severe time pressure to start a project once they do receive an air permit. After months or years of waiting for WDNR to act, businesses lose market opportunities or are otherwise placed at a competitive disadvantage.

E. Once a business finally does receive a permit, it may contain terms or provisions that are arbitrary and capricious, beyond WDNR statutory authority, or simply wrong. The permit may also lack conditions or provisions needed by the applicant to operate under the permit without violating the same. In such circumstances, Wis. Stat. § 285.81(1) allows the permit recipient to seek a hearing on the entire "permit" or alternatively, challenge just "part of a permit."

F. If the permit holder seeks a hearing on just "part of a permit," Wis. Stat. § 285.81(1) clearly directs that the remainder of the permit becomes effective. Accordingly, a business can seek a hearing on a particular term of a permit and leave unchallenged the remaining parts of the permit which authorize construction and/or operation of the source. In that way the permit recipient can proceed with construction without further delays while a hearing on specific terms proceeds in parallel. This is exactly what was intended by the Legislature in Wis. Stat. § 285.81(1).

G. Wis. Stat. § 285.81(1) serves an important purpose. An air permit is typically about 20-30 pages long (some exceed 100 pages) and contains numerous emission limitations. Each individual emission limitation will in turn have multiple sub-requirements including, at a minimum, those concerning compliance demonstration, test methods, record keeping, and monitoring.

H. A permittee may take issue with only one of the multitude of permit requirements. For example, the permit may impose a requirement to keep daily records of the amount of coatings used at a facility. A source that uses hundreds of coatings in a day (such as a printer) may believe that such a requirement is extremely burdensome, unnecessary,

arbitrary and capricious. However, if the permittee seeks a hearing on that one record-keeping requirement, under its Statement of Policy the WDNR holds the entire permit in abeyance and all of the numerous other remaining terms and conditions in the permit which are not challenged — including the authorization to commence construction. Such a result is in direct conflict with Wis. Stat. § 285.81(1).

I. As another example, a permittee may believe that a condition should be added to a permit and therefore challenge the permit for failing to include such a condition. In that circumstance, the WDNR and permittee are in agreement with all of the terms in the permit. Yet, under the WDNR's Statement of Policy, all of the mutually-agreed upon terms are held in abeyance — including authorization to commence construction — even though the permittee simply wants the addition of a condition. The clear language of Wis. Stat. § 285.81(1) was designed to avoid such a situation.

J. Under the Statement of Policy, WDNR forces businesses to face an inappropriate and harsh dilemma: (A) seek a hearing on arbitrary and capricious permit terms, then wait additional months (or years) for completion of the hearing process before commencing construction; or

(B) waive the right to seek a hearing and simply acquiesce in any term demanded by WDNR so that construction can finally commence; or
(C) invest capital outside the state.

K. The proper interpretation of Wis. Stat. § 285.81(1) is ripe for judicial determination since WDNR has committed to implementation of its Statement of Policy [*See*, Exhibits A and B] and many of Plaintiffs' members have faced and will continue to face the dilemma described above.

C. WDNR's Statement of Policy Conflicts
with Wis. Stat. § 285.81(1)

13. WDNR's Statement of Policy conflicts with the plain language of Wis. Stat. § 285.81(1). In this regard, Wis. Stat. § 285.81(1) draws a distinction between the effect of seeking a hearing on a "permit" and seeking a hearing on just a "part of a permit:"

PERMIT HOLDER; PERMIT APPLICANT; ORDER RECIPIENT. **Any permit, part of a permit, order, decision or determination by the department under ss. 285.39, 285.60 to 285.69 or 285.75 shall become effective unless the permit holder or applicant or the order recipient seeks a hearing on the action in the following manner: . . .(emphasis added)**

14. The phrase "part of a permit" is not unintentional, superfluous verbiage. The legislature amended Wis. Stat. § 285.81(1) [formerly § 144.403]

in 1980 for the sole purpose of adding that phrase. 1979 Wis. Laws 221 § 144.403.

15. WDNR's Statement of Policy wholly ignores the word "any" and the phrase "part of a permit," thereby negating the clear legislative policy that unchallenged permit terms take effect immediately. This is improper. *See, County of Jefferson v. Renz*, 231 Wis. 2d 293, 305, 603 N.W. 2d 541 (1999); *Landis v. Physicians Insurance Company of Wisconsin, Inc.*, 2001 WI 86, 245 Wis. 2d 1, ¶ 16, 628 N.W.2d 893.

16. Indeed, WDNR's Statement of Policy improperly interprets Wis. Stat. § 285.81(1) as if it read in the following manner (which it does not):

PERMITHOLDER; PERMIT APPLICANT; ORDER RECIPIENT. ~~Any~~ [A] permit, ~~part of a permit~~, order, decision or determination by the department under ss. 285.39, 285.60 to 285.69 or 285.75 shall become effective unless the permit holder or applicant or the order recipient seeks a hearing on the action in the following manner: . . .(emphasis added).

SECOND CLAIM

WDNR's Statement of Policy Was Created Without Compliance With Wis. Stat. ch. 227 Rule-Making Mandates

17. Wis. Stat. § 227.10(1) mandates that any statement of policy and interpretation of law be promulgated as a "rule" by an agency:

Each agency *shall promulgate as a rule each statement of general policy and each interpretation of a statute* which it specifically adopts to govern its enforcement or administration of that statute. (Emphasis added).

With this provision, the Legislature has directed that agency policies which affect rights and conduct will be tested through public input and legislative review. Rule-making procedures also prevent agencies from arbitrarily creating policies to suit their own interests as they define them, to eliminate the potential for selective enforcement of "policies" to suit an agency agenda, and to inform regulated sources of the standard which they must meet.

18. WDNR's Statement of Policy qualifies as a "rule" for purposes of the mandatory rule-making procedures set forth in Wis. Stat. ch. 227. In this regard, Wis. Stat. § 227.01(13) defines "rule" to expressly include an agency's "...statement of policy..." of "general application":

"Rule" means a regulation, standard, *statement of policy* or general order of **general application** which has the **effect of law** and which is issued by the **agency to implement, interpret or make specific legislation enforced or administered by the agency** or to govern the organization or procedure of the agency. (Emphasis added).

19. The Wisconsin Supreme Court has held that a rule is:

- (1) a regulation, standard, statement of policy or general order,
- (2) of general application,
- (3) having the effect of law,
- (4) issued by an agency,
- (5) to implement, interpret or make specific legislation enforced or administered by said agency to govern the interpretation or procedure of such agency.

Wisconsin Electric Power Co. v. WDNR, 93 Wis. 2d 222, 232, 287 N.W.2d 113 (1980). This holding tracks the language of Wis. Stat. § 227.01(13).

20. WDNR's Statement of Policy is a matter of general application. The Statement of Policy is an official position of the Department implementing a statute which has been memorialized in separate documentation from the WDNR Secretary and the agency's legal counsel. See, Exhibits A and B. The Statement of Policy is used "consistently" against all permit holders and applicants who seek a hearing on a permit term. That is evidenced in correspondence from WDNR legal counsel to a statewide trade association:

As you know, **DNR has consistently taken the position** that if the applicant for an air pollution control permit seeks a contested case hearing on the permit under s. 285.81(1), Wis. Stats., **the permit does not go into effect** while the appeal is pending. You have recently expressed concern about this long-standing DNR position, and this was one of the items discussed at our recent meeting with you and PIW¹ representatives. Ex. B. (Emphasis added).

21. The Statement of Policy has been issued by the WDNR to interpret § 285.81(1) and is intended to have the effect of law. The WDNR uses the Policy against permit holders and applicants to suspend legal authorization to commence construction until a challenge to a permit term has been resolved. That is evident from correspondence issued by the WDNR Secretary to a permittee who sought a hearing on several parts of an air permit:

¹ PIW stands for Printing Industries of Wisconsin, a state trade association. Many members of PIW are also members of WMC.

Also please note that under s. 285.81(1), Wis. Stats., the air permit does not become effective if the applicant seeks a contested case hearing under this statute. Therefore, since your request for a contested case hearing is granted, the construction permit is not in effect and the **applicant may not undertake any construction or modification authorized by the permit.** Ex. A. (Emphasis added).

22. Contrary to the mandates of Wis. Stat. § 227.10(1), the Statement of Policy was created without compliance with the following mandatory rule-making procedure:

- A. The small business considerations of Wis. Stat. § 227.114;
- B. The statement of scope requirements of Wis. Stat. § 227.135;
- C. The rule preparation and analysis requirements of Wis. Stat. § 227.14;
- D. The legislative council filing requirements of Wis. Stat. § 227.15;
- E. The notice and public hearing requirements of Wis. Stat. §§ 227.16 through 227.18;
- F. The filing requirements of Wis. Stat. § 227.19;
- G. The publication requirements of Wis. Stat. § 227.21; and
- H. The legislative review requirements of Wis. Stat. § 227.26.

23. It is well settled that an agency's action must be based on logic, be rational, and founded upon proper legal standards. *Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994). Where an agency bases its decision on an improperly promulgated rule, the decision is deemed arbitrary and an abuse of discretion. *State ex rel. Clifton v. Young*, 133 Wis. 2d 193, 200, 394 N.W.2d 769 (Ct. App. 1986) and *State ex rel. Richard v. Traut*, 145 Wis. 2d 677, 680, 429 N.W.2d 81 (Ct. App. 1988).

24. As a consequence of WDNR's refusal to subject its policy to the rule-making process set forth in Wis. Stat. § 227, the public has not provided input nor has the legislature been able to review the Department's policy.

25. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs respectfully request the Court grant the following relief:

A. Entry of a judgment declaring that under the express terms of Wis. Stat. § 285.81(1), an air pollution control permit holder or applicant can seek a hearing on any "part of a permit" without staying the effectiveness of the remaining unchallenged parts of the permit;

B. In the alternative, entry of a judgment declaring that the Statement of Policy is invalid and void for failure to promulgate such policy as a rule pursuant to Wis. Stat. chapter 227 and enjoining WDNR from following such

policy until such time as it complies with the rule-making requirements of Wis. Stat. chapter 227;

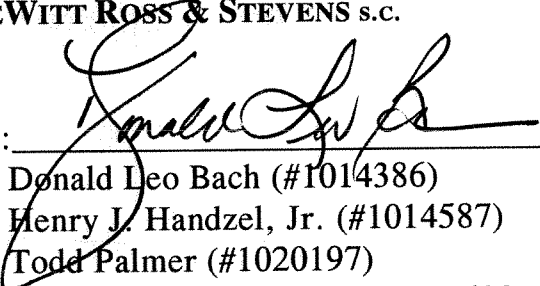
C. Awarding Plaintiffs their attorneys' fees, costs and disbursements incurred by Plaintiffs to the extent permitted by law; and

D. Awarding Plaintiffs such further and other relief that the Court deems proper and equitable under the circumstances.

Dated this 20th day of December, 2002.

DEWITT ROSS & STEVENS s.c.

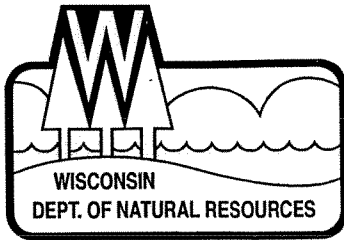
By: _____


Donald Leo Bach (#1014386)
Henry J. Handzel, Jr. (#1014587)
Todd Palmer (#1020197)
Two East Mifflin Street, Suite 600
Madison, WI 53703-2865
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ATTORNEYS FOR PLAINTIFFS WISCONSIN
MANUFACTURERS AND COMMERCE,
WISCONSIN PAPER COUNCIL AND
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Milwaukee, WI 53202-5367
414-297-5832

CO-COUNSEL FOR PLAINTIFF WISCONSIN
MANUFACTURERS AND COMMERCE



State of Wisconsin \ DEPARTMENT \ NATURAL RESOURCES

Scott McCallum, Governor
Darrell Bazzell, Secretary

101 S. Webster St.
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Telephone 608-266-2621
FAX 608-267-3579
TTY 608-267-6897

July 13, 2001

RECEIVED
JUL 17 2001

TODD PALMER
DEWITT ROSS AND STEVENS
2 E MIFFLIN STREET SUITE 600
MADISON WI 53703-2865

DEWITT
ROSS & STEVENS

Subject: Petition for Contested Case Hearing regarding Air Construction Permit Issued to Hoard Printing Company

Dear Mr. Palmer:

DNR has received the Petition for a Contested Case hearing filed on behalf of Hoard Printing Company regarding the air pollution control construction permit issued on June 8, 2001. The Petition was filed in a timely manner.

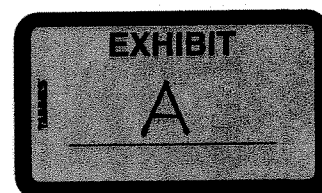
The Petition for Contested Case hearing is hereby granted regarding issuance of the air pollution control construction permit to Hoard Printing Company. I note that your Petition also seeks review of an air operation permit. The permit issued on June 8, 2001, was a construction permit only. The air operation permit for this facility has not yet been issued, and therefore, cannot be appealed at this time. Also please note that under s. 285.81(1), Wis. Stats., the air permit does not become effective if the applicant seeks a contested case hearing under this statute. Therefore, since your request for a contested case hearing is granted, the construction permit is not in effect and the applicant may not undertake any construction or modification authorized by the permit.

You will be notified of the time, date and location of the contested case hearing or any pre-hearing conference scheduled on this matter. If you have questions or could like to discuss this matter further, please contact DNR attorney Marcia Penner at 266-2132.

Sincerely,

Darrell Bazzell
Secretary

Cc: Biren Patel-SCR
Dean Packard-SCR-Poynette
Lloyd Eagan-AM/7
Jeff Hanson-AM/7





State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Scott McCallum, Governor
Darrell Bazzell, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY 608-267-6897

December 7, 2001

DEC 10 2001

MR. HANK HANDZEL, JR.
DEWITT ROSS AND STEVENS
2 E. MIFFLIN ST SUITE 600
MADISON, WI 53703-2865

Subject: Concerns of Printing Industries of Wisconsin

Dear Mr. Handzel:

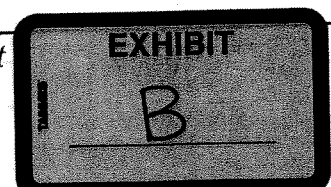
This letter is in follow-up to our recent meeting with you and members of the Printing Industry of Wisconsin (PIW) regarding your concerns with air management permitting activities. As promised at that meeting, I am writing to describe DNR's position regarding requests for contested case hearings on air pollution control permits.

As you know, DNR has consistently taken the position that if the applicant for an air pollution control permit seeks a contested case hearing on the permit under s. 285.81(1), Wis. Stats., the permit does not go into effect while the appeal is pending. You have recently expressed concern about this long-standing DNR position, and this was one of the items discussed at our recent meeting with you and PIW representatives.

As we have discussed previously on the phone and at the recent meeting, there are other ways to deal with changes to permit conditions that a permit applicant finds unacceptable. First, we encourage permit applicants to work with DNR during the permit application process to devise permit conditions acceptable to DNR and the applicant. Second, we suggest that the permit applicant carefully review the draft permit during the public comment period and convey any concerns about the permit to DNR at that time. Third, if a permit is issued with conditions the permit applicant finds unacceptable, the applicant may then seek revision of the permit under the revision procedures set forth in chs. NR 406 (for construction permits) and NR 407 (for operation permits).

Such revision requests, unlike requests for contested case hearings, do not stay the effectiveness of the permit. If DNR ultimately approves the revision request, a revised permit is issued and the matter is resolved. If DNR denies the revision request in whole or in part, the applicant may then seek review of any denial under s. 285.81(1), Wis. Stats. or may seek judicial review under ss. 227.52 and 227.53, Wis. Stats. While such a process does not guarantee that the permit applicant will get every revision to the permit which it seeks, it does allow the originally issued permit to become effective while the revisions to the permit are reviewed and decided upon. In addition, the permit applicant preserves its right to legal recourse if the revisions it seeks are ultimately denied.

DNR believes that this process adequately protects the rights of permit applicants, as well as recognizing that appeals filed by the permit applicant under s. 285.81(1), Wis. Stats., do result in a stay of the effectiveness of the permit. Another variation on the above described approach is the one you and I

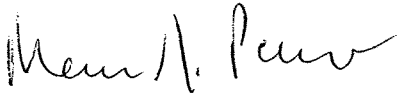


dealt with in the Hoard Printing matter. While DNR took the position that the permit was stayed pending appeal, once DNR agreed with Hoard on the necessary revisions to the permit, Hoard could have withdrawn its request for a contested case hearing while the revision was being processed. This would have allowed Hoard to start construction under its permit, with the knowledge that the revision was being processed. This would have reduced the time period that Hoard had to wait to start its construction under that permit.

DNR believes the procedures outlined above provide adequate opportunities for permit applicants to seek changes to their permits without the necessity of filing a request for a contested case hearing. If the permit applicant still believes an appeal must be filed, they should do so with the understanding that DNR would take the position that such an appeal stays the permit. Nevertheless, we are always willing to work with permit applicants to resolve these appeals in a timely manner.

I hope that this letter clearly explains DNR's position on this matter. If you would like to discuss this letter further, please contact me.

Sincerely,



Marcia J. Penner
Attorney at Law
Bureau of Legal Services

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