

FILED

JAN 07 2008

STATE OF WISCONSIN      CIRCUIT COURT      <sup>Clerk of Circuit Court</sup> POLK COUNTY  
<sub>Lois Hoff - Polk County</sub>

FRIENDS OF L.O.G. GREENWAY, INC,  
and RICHARD ROOS,

*Petitioners,*

*DECISION*

vs.

WISCONSIN DEPARTMENT OF  
NATURAL RESOURCES,

*Respondent.*

File No. 07 CV 177

*This is a decision on a Petition for Judicial Review in Friends of L.O.G. Greenway, Inc., et al vs. Wisconsin Department of Natural Resources, File No. 07 CV 177.*

*After careful review of the record, the briefs submitted by counsel and the applicable law, the court is granting the relief petitioners request.*

Standard of Review

*The parties agree that the question for the court is whether the DNR's determinations are based on a reviewable record and are "reasonable under the circumstances." City of New Richmond vs. DNR, 145 Wis. 2d 535, 542, 428 N.W. 2d 279 (Ct. App. 1988). The facts are essentially agreed upon.*

Decision

*The logical place to begin this analysis is with the statute. Wis. Stat. § 23.175(2)(a) plainly limits state trails to non-motorized use. It outlines the duties of the department to:*

*Designate a system of state trails as part of the state park system for use by equestrians, bicyclists, riders of electric personal assistive mobility devices, cross-country skiers or hikers.*

FILED

JAN 07 2008

Clerk of Circuit Court  
Lois Hoff - Polk County

*Respondent argues that because the list does not include either of the words "means" or "includes," it is ambiguous and a rule of statutory interpretation allows the court to look to the agency's interpretation and accord deference to that interpretation. Further, that the DNR's interpretation, (that the statute allows ATV and snowmobile use) is reasonable and should be given great weight even in the face of another reasonable interpretation.*

*Frankly, the court is troubled by this argument. The statute does address motorized use and limits it to "electric personal assistive mobility devices." If the intent was to allow the use of any motorized conveyance, including snowmobiles and ATV's, there would be no reason to specifically include electric personal assistive mobility devices as they could be covered under a broad definition of "motorized devices." Therefore, the DNR's decision to certify the EA and to conclude it had adequately addressed the legal basis for authorizing motorized uses on state trails is unreasonable because neither Wis. Stat. § 23.175 nor Wisconsin Administrative Code § NR 51.70 – 51.75 grant the DNR the authority to allow the trail to be developed or opened for use by motorized devices other than the specific exception set forth in the statute.*

*The next issue raised is whether the EA is based on controlling state and federal law? While the Wisconsin case cited by both parties is factually distinguishable, it provides some guidance. Wis. Environmental Decade, Inc. vs. DNR, 94 Wis 2d 263, 288 N.W. 2d 168 (Ct. App. 1979)*

*offers a framework for deciding whether a group of segments should be treated as a single project. The DNR failed to apply that analysis to the facts or the record in this case and simply reached the conclusion that it is a "self sufficient local trail."*

*This is in spite of the fact that the EA seems to support the notion of the trail being a "connective link," when it states, "As additional segments are added to the system, we would expect use to increase. Popularity of trails would be expected to increase with expanded opportunity for long distance touring." (EA @ 20). In the summary of public comments, they also refer to a "trail system" and of "analysis of overall system impacts." This language denotes an integrated system with multiple segments – not merely a local route. The DNR fails to identify anything in the record or the EA to support its conclusion that the Amery to Dresser trail's primary purpose is to fulfill a "local need" which was the rationale for the sewer-line segment in the "Decade II" case. Please remember that the Amery to Dresser trail is but one of several interconnected state trail segments which are part of the Wisconsin State Trails Strategic Plan (1993) and the State Trails Network Plan*

*Finally, the petitioners question whether the DNR's decision making violates the earlier stipulated court order in Friends of L.O.G. Greenway vs. Wisconsin Department of Natural Resources, Polk County case number 05 CV 195. The petitioners contend that the stipulation which resolved the prior lawsuit, nullified the DNR-approved Polk County Master*

*Plan for the Amery to Dresser trail. The DNR argues otherwise. Their interpretation is that the order was directed at DNR's adoption of the master plan without first completing an environmental review, and was not directed at the lawfulness or unlawfulness of the master plan itself.*

*This strikes the court as disingenuous at best. The DNR has no authority under state statute to accept a motorized master plan prepared by Polk County for a state trail segment, and therefore is in violation of the stipulated court order. Furthermore, how does DNR expect the court to find it complied with Wis. Stat. § 23.091(2), which provides that master planning must be done pursuant to WEPA and approved by the natural resources board when that simply did not occur in this case.*

#### Conclusion

*While there is no doubt that DNR has created a reviewable record, its determinations are not reasonable under the circumstances. The respondent failed to adequately address the legal basis for authorizing motorized uses on state trails; improperly segmented the project and erred by concluding that Polk County's proposed master plan for the trail was not nullified by the order in 05 CV 195 and therefore remains viable.*

*This matter is remanded to DNR for further proceedings consistent with Wis. Stats. § 1.11 and Wisconsin Administrative Code Ch. NR 150. The DNR is specifically ordered to prohibit use of motorized vehicles on*

*the trail unless they meet the limited exceptions found in Wis. Stat. § 23.175 or Wisconsin Administrative Code § NR 51.70 to 51.75.*

*Dated this 7th day of January, 2008.*

BY THE COURT:

*Molly E. Galsworthy*  
Molly E. Galsworthy



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Raymond P. Taffora  
Deputy Attorney General

17 W. Main Street  
P.O. Box 7857  
Madison, WI 53707-7857  
www.doj.state.wi.us

Philip Peterson  
Assistant Attorney General  
petersonpp@doj.state.wi.us  
608/267-2061  
FAX 608/266-2250

September 28, 2007

**VIA OVER-NIGHT DELIVERY**

The Honorable Molly E. GaleWyrick  
Polk County Circuit Court, Branch 1  
1005 West Main Street, Suite 600  
Balsam Lake, WI 54810-4406

Re: Friends of L.O.G. Greenway, Inc. v. DNR  
Case No. 07-CV-177

Dear Judge GaleWyrick:

Enclosed for filing is the Wisconsin Department of Natural Resources Responding Brief in Opposition to Judicial Review. It is filed under the briefing schedule set by the Court. Also enclosed is an extra copy of the first page that brief. Please arrange to have it date-stamped and then returned to me in the enclosed self-addressed envelope.

As shown below, a copy of both this letter and the enclosed brief is also being sent today to opposing counsel.

Finally, please also arrange to add my name as counsel for respondent DNR.

Sincerely,

Philip Peterson  
Assistant Attorney General

PP:msu

Enclosure

c: Glenn M. Stoddard  
Michael Lutz

FRIENDS OF L.O.G. GREENWAY,  
INC., and RICHARD MOOS,

Petitioners,

v.

Case No. 07-CV-0177

WISCONSIN DEPARTMENT  
OF NATURAL RESOURCES,

Respondent.

---

WISCONSIN DEPARTMENT OF NATURAL RESOURCES  
RESPONDING BRIEF IN OPPOSITION TO JUDICIAL REVIEW

---

**ISSUES PRESENTED**

To decide and fully dispose of this case, the Court needs to address three main issues framed and stated as follows:

- **No EIS.** Under Wisconsin law, an environmental assessment ("EA") concluding that an environmental impact statement ("EIS") is not required should be upheld if it is based on a reviewable record and is reasonable. The EA with its appendices for the Amery-Dresser Trail, which is found in the record, provides an extensive reviewable record showing that both cumulative effects and health risks resulting from the trail are reasonable. Is the EA for the Amery-Dresser Trail reasonable and, therefore, legally sufficient?

The Court should answer this question "yes." The record is thorough, extensive, and reviewable. Under the law, DNR's no-EIS decision follows reasonably from that record. In the circumstances, the no-EIS decision is reasonable, and so it should be affirmed.

- **Earlier Court Order.** An earlier stipulated Court order expressly recognizes DNR's broad authority to follow the applicable law. Has DNR violated the earlier Court order?

The Court should answer this question "no." DNR has not violated any Court order here. Nothing that L.O.G. and Moos argue shows otherwise.

- **Legal Basis for ATVs on the Trail.** Under Wisconsin law, DNR need not in its EA consider whether its nonregulatory actions conform with the law. In allowing state trail property to be used by Polk County, this case involves a DNR proprietary action, not a regulatory action. Besides DNR in its EA, in fact, did address whether allowing motorized all-terrain vehicles ("ATVs") and snowmobiles on the Amery-Dresser Trail conforms with applicable law. Is the EA adequate?

The Court should answer this question "yes." The L.O.G. and Moos argument on this point fails for any one of three reasons: (1) By law, no legal-basis analysis in the EA is required here. (2) But, in fact, a legal-basis analysis is, nonetheless, included in the EA. (3) All the L.O.G. and Moos arguments against the EA fail.

## STATEMENT OF FACTS

Friends of L.O.G. Greenway, Inc., and Richard Moos ("L.O.G. and Moos"), as petitioners, state the facts in their brief. L.O.G. & Moos 1st brief at pp. 3-6. DNR accepts the L.O.G. and Moos statement of the facts except only for the modifications noted in the next paragraph of this brief.

Although the L.O.G. and Moos brief refers to a "Draft EA," Wis. Admin. Code ch. NR 150 does not provide for a draft EA. L.O.G. & Moos 1st brief at pp. 5, 6. The EA that DNR first released for public review was the EA for the Amery-Dresser Trail. It was not just a draft EA (R. – Document 3 – Environmental Analysis and Decision dated

2/17/06 on p. 26).<sup>1</sup> The certified EA (R. – Document 1) differs from the EA released for public comment (R. – Document 3) only because the certified EA also includes both a summary of the public comments and the changes resulting from those comments, including an additional analysis of health effects (R. – Document 4). Under Wis. Admin. Code §§ NR 150.20 and NR 150.21, this is proper.

### STANDARD OF REVIEW

In their brief, L.O.G. and Moos set forth the standard of review for a court when it reviews a state agency decision determining that no EIS is necessary. L.O.G. & Moos 1st brief at pp. 6-7. As L.O.G. and Moos show, the question for a court on review of a no-EIS decision is whether DNR's determination that no EIS is necessary is "reasonable under the circumstances." *City of New Richmond v. DNR*, 145 Wis. 2d 535, 542, 428 N.W.2d 279 (Ct. App. 1988), *rev. denied*, 145 Wis. 2d 918, 430 N.W.2d 352 (1988) (*quoting Wis. Environmental Decade v. Public Service Comm.*, 79 Wis. 2d 409, 421, 256 N.W.2d 149 (1977)).

A court's determining on judicial review whether a no-EIS determination is reasonable involves a two-part test: (1) Has DNR developed a reviewable record?

---

<sup>1</sup> By an April 24, 2007, cover letter addressed to Polk County Clerk of Circuit Court Lois Hoff, Wisconsin Assistant Attorney General Thomas J. Dawson submitted the administrative record for this case to the Court. Wis. Stat. § 227.55. This submittal included an enclosed index to the record. That index listed in order the documents included in the record. Although the documents in the record were not given a number when submitted, for easy reference throughout this brief, the documents are referred to in the order listed in the index as Document 1, Document 2, Document 3, etc.

(2) Does DNR's no-EIS decision follow from that record in a way showing that DNR used reasonable judgment and complied with the Wisconsin Environmental Policy Act, Wis. Stat. § 1.11 ("WEPA"). L.O.G. & Moos 1st brief at pp. 6-7. *City of New Richmond*, 145 Wis. 2d at 542-43.

Applying this two-part test here, DNR's no-EIS determination is reasonable. As shown throughout this brief, the record on this judicial review confirms that DNR developed a substantial record in this case. This Court itself can review that record: DNR prepared a 27-page EA with over 350 pages of attachments, and DNR prepared a 48-page response to public comments (R. – Document 3 – Environmental Analysis and Decision dated 2/17/06; R. – Document 4 – Summary of Public Comments & Department Responses dated February 19, 2007; R. – Appendices 1 to 23).

All these documents (taken together in the record before the Court here on this judicial review) cover the full range of subject matter required for either an EA or an EIS. Significantly, under Wisconsin law, no content difference exists between an EA and an EIS. Wis. Admin. Code § NR 150.22(2). Although under Wis. Admin. Code ch. NR 150 a hearing is optional for an EA, DNR held a public hearing on the Amery-Dresser Trail to provide an additional opportunity for public comments (R. – Document 4 at p. 1). The public hearing that is required for an EIS is the primary difference between the EA process and the EIS process. Here DNR largely followed the EIS process (R. – Document 1).

## ARGUMENT

- I. THE EA FOR THE AMERY-DRESSER TRAIL, WHICH CONCLUDED THAT AN EIS IS NOT REQUIRED, SHOULD BE UPHOLD BECAUSE IT IS BASED ON AN ADEQUATE REVIEWABLE RECORD SHOWING THAT BOTH THE CUMULATIVE EFFECTS AND HEALTH RISKS OF THE AMERY-DRESSER TRAIL ARE REASONABLE.

DNR properly analyzed the need for an EIS for the Amery-Dresser Trail. It proceeded as required by law, properly considering the cumulative effects and health risks of the Amery-Dresser Trail.

- A. The Amery-Dresser Trail was properly segmented.
  1. Under controlling caselaw, there was no unlawful segmenting.

L.O.G. and Moos argue that it is "improper for a reviewing agency to 'segment' a proposed project." L.O.G. & Moos 1st brief at p. 7. As authority, they cite *Wis. Environmental Decade, Inc. v. DNR*, 94 Wis. 2d 263, 288 N.W.2d 168 (Ct. App. 1979) ("*Decade II*"). But *Decade II* actually supports DNR's decisionmaking here.

WEPA is silent about segmenting, so Wisconsin courts are left to determine whether any particular segmenting is proper. Impermissible segmenting defines a project too narrowly for purposes of preparing an EA for the project. But segmenting does not *ipso facto* violate WEPA. *Decade II*, 94 Wis. 2d at 279.

"In deciding whether a group of segments should be treated as a single project, courts look at 'a multitude of factors, including the manner in which [the segments] were

planned, their geographic locations, and the utility of each in the absence of the other." *Id.* (quoting Professor William H. Rodgers, Jr., Handbook on Environmental Law § 7.9 at 791 (1977)). Another factor to look at is whether the segment being considered has an "independent significance." *Decade II*, 94 Wis. 2d at 279. Other factors include whether the segment seems to fulfill important state and local needs and whether it is an extension or a connective link. *Id.*, 94 Wis. 2d at 280.

Applying these principles here, it is reasonable to conclude that the Amery-Dresser Trail is an independent and mainly self-sufficient, local trail route, despite its link to the statewide system of trails. *Decade II's* segmentation analysis does not turn on whether a specific project is physically connected to another project. Rather it turns on the intent of the agency when it identifies the scope of the project and on the inherent characteristics of the project. Since a person may use and enjoy the Amery-Dresser Trail without using any other state trail, the L.O.G. and Moos arguments against segmenting all fail.

To summarize by analogy, every highway is part of the statewide highway system. Similarly, every trail is part of the statewide trail system. So what? No other, larger, ongoing project is at issue here—just the Amery-Dresser Trail. There has been no unlawful segmenting.

2. The relevant facts concerning the Amery-Dresser Trail match those in *Decade II*, so *Decade II* supports a holding that the Amery-Dresser Trail was not unlawfully segmented.

*Decade II* involved a sewer-line system extending from Milwaukee to Hales Corners, Wisconsin. All parties understood that the adjacent-to-the-west City of New Berlin would ultimately also connect its sewer system to the Milwaukee to Hales Corners system. *Decade II*, 94 Wis. 2d at 269-70. But DNR limited its consideration to the Milwaukee to Hales Corners sewer segment and did not look at the New Berlin segment. Yet the Wisconsin Court of Appeals found this reasonable. *Id.*, 94 Wis. 2d at 280-81. The court did so in *Decade II* because the Milwaukee to Hales Corners project had "independent utility[, and r]egardless if the remaining segment is constructed, the [sewer line] will serve [a] useful and vital purpose." *Id.*, 94 Wis. 2d at 281.

Similarly, this is also true for the Amery-Dresser Trail. It too has an independent use, and regardless whether any other portions of the state trail system are constructed or used, the Amery-Dresser Trail has a separate use and a separate purpose.

In holding that the segmenting done in *Decade II* was proper, the court there concluded that the "segment terminating at Hales Corners not only fulfills a local need at Hales Corners but that is its primary purpose." *Id.*, 94 Wis. 2d at 282. The court further concluded that "[t]he sewage and development problems of Hales Corners are separate and distinct from those of New Berlin." *Id.*, 94 Wis. 2d at 283. That is also true for the Amery-Dresser Trail. It too fulfills a local need for a trail. It too is separate and distinct

from other segments of the state trail system. It has a use in Polk County that is distinct from the use of other portions of the state trail elsewhere.

The court in *Decade II* concluded that the "decision to limit the scope of investigation to the environmental impact of the segment terminating at Hales Corners. . . . was a reasonable exercise of judgment." *Id.*, 94 Wis. 2d at 285. Similarly, that is true here also. DNR could reasonably limit its EA investigation to the Amery-Dresser Trail.<sup>2</sup>

B. The L.O.G. and Moos argument that DNR failed to evaluate cumulative effects fails.

Although L.O.G. and Moos argue that DNR has not evaluated the cumulative effects of the Amery-Dresser Trail, the record shows otherwise. L.O.G. & Moos 1st brief at p. 11. In fact, the EA analyzes cumulative effects (R. – Document 1 – Environmental Analysis and Decision signed on 2/17/06 and 2/20/07 at ¶ 21 on p. 20).

Any effects on the state-trail network are cumulative only in the sense that the same effect may occur on multiple segments of the network, but those effects still remain local on the trail segments where they occur. A local effect on one trail segment does not tend to affect another trail segment.

---

<sup>2</sup> In their brief, L.O.G and Moos also cite *Mountaineers v. U.S. Forest Service*, 445 F. Supp. 2d 1235 (W.D. Wash. 2006). L.O.G. & Moos 1st brief at pp. 8-9. But as a federal case from the Western District of Washington State, *Mountaineers* is at most merely persuasive authority, not controlling authority. On the other hand, *Decade II*, which is cited and discussed above in the text of this brief, is controlling authority in Wisconsin on segmenting and WEPA. *Mountaineers* is not controlling.

For example, trespassing on private land along one trail segment would not cause trespassing on private land along another trail segment. It only affects that property owner on whose property a trespass occurs. No system-wide trespass occurs other than the sum of local trespasses on local segments of the trail network. (R. – Document 1 – Environmental Analysis and Decision signed on 2/17/06 and 2/20/07 at ¶ 21 on p. 20; R. – Document 4 – Summary of Public Comments and DNR Responses on the EA at pp. 5-6).

C. DNR properly considered the health risks.

The EA mentions the possibility of cumulative health risks associated with increased trail use, but none were found. There is no reason to believe that this is different for other trail segments, but in any case, each new trail will be evaluated for these concerns. If contamination is found on another trail and if it poses a health risk, the contamination areas found there will be avoided or will be cleaned up to eliminate the health risk (R. – Document 1 at p. 17).

Although L.O.G. and Moos argue that DNR failed to consider health risks adequately, DNR has done what is required. L.O.G. & Moos 1st brief at p. 10. DNR agreed with the public comment that additional health analysis was needed, so it did that additional health analysis. The results showed no health concern from contaminated soil. Although the effect of dust on neighbors along the trail was identified as a nuisance, it was not a health risk. DNR's additional analysis did not find any health concerns, but DNR did recommend minimizing the nuisance dust (R. – Document 4 – Summary of

Public Comments and DNR Responses on the EA at pp. 15-20). No further health-risk analysis is needed.

D. The EA is extensive, complete, and reviewable, and it is reasonable and, therefore, sufficient under the law.

When it finds that no EIS is required, DNR must prepare a reviewable record showing that it took a hard look at the environmental effects of the action in question. *Wis. Environmental Decade*, 79 Wis. 2d at 420, 425. DNR satisfies that requirement here in the form of its EA.

Although L.O.G. and Moos argue that "DNR merely accepted the County's master plan as the 'proposed action' for the Trail," that argument is demonstrably false. L.O.G. & Moos 1st brief at p. 13. When the Court considers the EA, which is before the Court here as the extensive administrative record on judicial review, it will see that this L.O.G. and Moos argument is erroneous. DNR has created the reviewable record required by law to support its no-EIS decision.

## II. DNR'S DECISIONMAKING DOES NOT VIOLATE THE EARLIER STIPULATED COURT ORDER.

L.O.G. and Moos argue that DNR has violated the earlier stipulated order of this Court issued in *Friends of L.O.G. Greenway, Inc. v. Wisconsin DNR*, No. 05-CV-195 (Wis. Cir. Ct. Polk County, June 8, 2005). In so arguing, L.O.G. and Moos contend that the earlier stipulated court order nullified the DNR-approved Polk County Master Plan for the Amery-Dresser Trail. L.O.G. & Moos 1st brief at pp. 11, 12. But this is untrue.

Polk County's master plan was not nullified by the earlier stipulated court order. L.O.G. and Moos erroneously label it a "voided master plan." L.O.G. & Moos 1st brief at p. 13. It was DNR's "*decision to agree* to a master plan for the Trail" that was "declared null, void, and without effect," not the master plan itself. L.O.G. and Moos Petition for Judicial Review, Exhibit A at p. 5, ¶ 3.(intro.) and c (italics added). A copy of this earlier Stipulation and Order for Judgment is attached to this brief as Exhibit A.

As the words from the earlier stipulated court order quoted at page 12 of L.O.G. and Moos's first brief say, the earlier order was directed at DNR's agreeing to the master plan without completing an environmental review under Wis. Admin. Code ch. NR 150. That order was not directed at the lawfulness or unlawfulness of that master plan itself.

Significantly, under the stipulated court order, DNR expressly retains its broad legal authority to act under the law. That earlier stipulated order expressly recognizes DNR's authority as follows:

Nothing in the parties' stipulation or this order shall be construed to preclude Respondent WDNR from making any decisions or taking any actions in the future within its authority and jurisdiction with respect to the Trail, provided such decisions and actions are taken in compliance with WEPA, Wis. Admin. Code ch. NR 150, and other applicable laws[.]

*Friends of L.O.G. Greenway, Inc. v. Wisconsin DNR*, No. 05-CV-195 (Wis. Cir. Ct. Polk County, June 8, 2005) (June 2005, Stipulation and Order for Judgment at p. 6, ¶ 5). See the copy of that earlier Stipulation and Order for Judgment attached to this brief as Exhibit A.

L.O.G. and Moos argue that "DNR merely accepted the County's master plan as the 'proposed action' for the Trail." L.O.G. & Moos 1st brief at p. 13. Certainly this is an option available to DNR. As shown above, the master plan itself was never invalidated by the Court. The Court only invalidated DNR's decision to transfer the trail to Polk County.

DNR was never enjoined from evaluating a new decision to transfer the trail. That evaluation is the essence of the EA process. It must be emphasized that DNR has made no such decision. Rather it has only evaluated the environmental effects of a possible decision that is yet to be made.

III. THE EA IS BOTH ADEQUATE AND REASONABLE BECAUSE NOTHING REQUIRES THAT THE EA FOR THE AMERY-DRESSER TRAIL MUST INCLUDE A LEGAL BASIS FOR ALLOWING MOTORIZED ATVs OR SNOWMOBILES ON THE AMERY-DRESSER TRAIL.

The third and final L.O.G. and Moos argument fails for any one of three reasons. First, under the law, the EA need not include a legal analysis of whether a nonregulatory action, such as exists here, conforms with the law. Second, the EA in fact does include a legal analysis. Third, none of the L.O.G. and Moos objections to the trail is supported by the law. All fail on their merits.<sup>3</sup>

---

<sup>3</sup> L.O.G. and Moos argue that the EA is "unreasonable and inadequate." L.O.G. & Moos 1st brief at p. 14, Argument III. They do not argue as a separate claim that ATVs and snowmobiles may not be allowed on the Amery-Dresser Trail. Thus, any such separate claim is abandoned and waived. *State v. Johnson*, 184 Wis. 2d 324, 344-45, 516 N.W.2d 463 (Ct. App. 1994).

- A. The EA analysis for a nonregulatory action like the Amery-Dresser Trail decision need not include a discussion of the legal basis for that action.

Wisconsin law lists specifically what an EA must include. Wis. Admin. Code § NR 150.22(2)(intro.). Unless the EA is for a regulatory action, nothing requires that the EA must include an analysis of whether the action conforms with the law. Wis. Admin. Code § NR 150.22(2)(f).

In most directly relevant part, Wis. Admin. Code § NR 150.22(2)(f) reads as follows: "Where an environmental analysis is prepared on a proposal involving multiple state or federal *regulatory actions*, [the EA] will address each of the approvals and indicate the conformance or nonconformance of the project with applicable statutes, rules, and regulations" (italics added). And so, by its express language, this rule applies only to regulatory actions; it does not apply to nonregulatory actions.

This matter involving the Amery-Dresser Trail is not a regulatory action. "Regulation" is defined as the "act or process of controlling by rule or restriction." *Black's Law Dictionary* 1311 (8th ed. 2004). Under this commonly accepted definition of "regulation," which also pertains to "regulatory"—the adjectival form of the noun "regulation"—this case is not about a DNR regulatory action. Rather it is about managing property for which DNR has some responsibility. Wis. Stat. § 23.33(8); Wis. Admin. Code § NR 1.61. See also the argument below under subheading C. The statement of the facts in the L.O.G. and Moos first brief conclusively shows that this case is about DNR's or Polk County's managing the Amery-Dresser Trail and that it is not about any regulatory action. L.O.G. & Moos 1st brief at 3-6.

Thus, under Wis. Admin. Code § NR 150.22(2)(f), which in most relevant part is quoted above, no legal-basis analysis is required for the DNR nonregulatory action that is in question here.

- B. Even if a legal-basis analysis were required in the EA, DNR has done an analysis of the legal basis for allowing ATVs and snowmobiles on the trail.

In the EA, DNR has done a legal analysis of whether motorized ATVs and snowmobiles may be used on the Amery-Dresser Trail. This analysis appears in the EA (R. – Document 1 – Environmental Analysis and Decision signed on 2/17/06 and 2/20/07 at pp. 3-4; R. – Document 3 – Environmental Analysis and Decision signed on 2/17/06 at pp. 3-4).

Admittedly L.O.G. and Moos dispute the legal conclusions that DNR reaches in the EA, but the EA includes a legal-basis analysis of whether allowing ATVs or snowmobiles on the Amery-Dresser Trail conforms with the law.

- C. Even beyond the flawed L.O.G. and Moos arguments for requiring a legal-basis analysis in the EA and beyond DNR's actually including that legal analysis in the EA, the L.O.G. and Moos arguments on the merits also fail under the law.

DNR has broad authority to promote ATV and snowmobile trails. Wisconsin law reads in relevant part as follows:

[DNR] shall encourage and supervise a system of all-terrain vehicle routes and trails. [DNR] may establish standards and procedures for certifying the designation of all-terrain vehicle routes and trails.

Wis. Stat. § 23.33(8)(a).

A town, village, city, county or [DNR] may designate corridors through land which it owns or controls, or for which it obtains leases, easements or permission, for use as all-terrain vehicle trails.

Wis. Stat. § 23.33(8)(c). So under these just-quoted statutes, although DNR has no obligation to allow ATV or snowmobile use on its properties, it has the express statutory authority to do so.

Other Wisconsin law is also in accordance with a broad use of state property in the public interest:

Except as prohibited or regulated by rule or statute, all [DNR] land shall be open for:

(2) Other types of recreational uses, including camping, bicycling, equestrian uses, field trials, and *snowmobiling or other motorized activities*, as authorized on a property by the property master plan.

Wis. Admin. Code § NR 1.61(intro.) and (2) (italics added).

Under these Wisconsin authorities quoted and cited in the preceding two paragraphs, DNR may allow ATVs and snowmobiles on DNR lands just as it may allow other lawful uses there. ATVs or snowmobiles neither need be favored nor need be avoided. The use of ATVs and snowmobiles on DNR land is a land management and policy decision for DNR and others.<sup>4</sup> It is not a legal decision for this Court to make in this case. All the L.O.G. and Moos arguments to the contrary fail.

---

<sup>4</sup> In Polk County, the land management and policy decision whether to open the Amery-Dresser Trail to ATVs and snowmobiles was closely contested. In January 2005, the Polk County Board of Supervisors voted 11 to 10 to allow ATV and snowmobile use on the trail. L.O.G. & Moos 1st brief at p. 5.

## CONCLUSION

For the reasons argued above, respondent Wisconsin Department of Natural Resources asks the Court to deny the L.O.G. and Moos petition for judicial review and asks the Court to affirm the DNR decisions that are before the Court here on judicial review.

Dated this 28th day of September 2007.

Respectfully submitted,

J.B. VAN HOLLEN  
Attorney General

A handwritten signature in black ink that reads "Philip Peterson". The signature is written in a cursive style with a long horizontal flourish extending to the right.

PHILIP PETERSON  
Assistant Attorney General  
State Bar #1013295

Attorneys for Respondent  
Wisconsin Department of Natural Resources

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 267-2061

*Writing Copy*

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 2

POLK COUNTY

**FRIENDS OF L.O.G. GREENWAY, INC.,  
RICHARD ROOS, and  
LOTUS LAKE ASSOCIATION,**

**Petitioners,**

v.

**WISCONSIN DEPARTMENT OF  
NATURAL RESOURCES,**

**Respondent.**

**AUTHENTICATED**

**Case No. 05-CV-195**

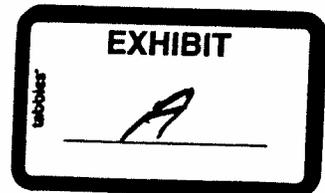
**Administrative Agency Review:  
30607**

**FILED**

**STIPULATION AND ORDER FOR JUDGMENT** JUN 08 2005

Clerk of Circuit Court  
Lisa Hoff - Polk County

WHEREAS, Petitioners have alleged three Claims & Causes of Action and seek judicial review of decisions by the Respondent Wisconsin Department of Natural Resources ("WDNR"), including: (1) the decision not to prepare an environmental assessment ("EA") or environmental impact statement ("EIS") for the Amery to Dresser State Trail ("Trail"); (2) the decision to allow Polk County to determine whether or not motorized vehicles may be used on the Trail; (3) the decision and action to convey an easement to Polk County for the Trail; (4) the decision to agree to a master plan which may allow the Trail to be developed and used by motorized vehicles; and (5) the decision to enter into a memorandum of understanding between WDNR and Polk County ("MOU"), which includes an agreement by WDNR to complete an environmental review of the Trail; and



**WHEREAS**, the parties have agreed that the aforementioned decisions by the WDNR are subject to Wis. Stat. § 1.11 (Wisconsin Environmental Policy Act or “WEPA”), Wis. Admin. Code ch. NR 150, and other applicable laws; and

**WHEREAS**, the WDNR has not prepared an environmental review in compliance with WEPA and Wis. Admin. Code ch. NR 150, with respect to the aforementioned decisions; and

**WHEREAS**, the parties have agreed that the WDNR maintains ownership and jurisdiction over the Trail as a “State Trail”; and

**WHEREFORE**, the parties hereby stipulate and agree that:

1. Judgment shall be entered in favor of Petitioners on their first Claim & Cause of Action, namely that Respondent WDNR failed to fulfill its duties under WEPA and Wis. Admin. Code ch. NR 150, to conduct an environmental review of the Trail; and
2. Petitioners’ second and third Claims & Causes of Action shall be dismissed without prejudice; and
3. The following decisions and actions of Respondent WDNR shall be and are hereby declared null, void, and without effect because Respondent WDNR has not complied with the provisions of WEPA and Wis. Admin. Code ch. NR 150:
  - a. The decision not to conduct an environmental review of the Trail under WEPA and Wis. Admin. Code ch. NR 150;
  - b. The decision and action to convey an easement to Polk County for the Trail, attached as Exhibit 1;
  - c. The decision to agree to a master plan for the Trail which provides for use of the Trail by motorized vehicles, attached as Exhibit 2; and

d. The decision to enter into the MOU between WDNR and Polk County, as incorporated in the easement between WDNR and Polk County, attached as Exhibit 3; and

4. As part of its environmental review process in this matter, Respondent WDNR shall hold a public hearing to seek public input under WEPA and Wis. Admin. Code ch. NR 150; and

5. Nothing in this stipulation or the Court's order shall be construed to preclude Respondent WDNR from making any decisions or taking any actions in the future within its authority and jurisdiction with respect to the Trail, provided such decisions and actions are taken in compliance with WEPA, Wis. Admin. Code ch. NR 150, and other applicable laws; and

6. The Trail will be closed to the public pending environmental review and DNR decisions on the easement, master plan, and MOU, the Respondent WDNR shall inform Polk County of the effect of this stipulation and of the Court's order and judgment, and the WDNR shall prohibit all brushing, development activities, and use of the Trail by Polk County and any person(s) until at least sixty (60) days after all subsequent final decisions with respect to the Trail have been made, in compliance with WEPA, Wis. Admin. Code ch. NR 150, and any other applicable laws; and

7. Judgment shall be entered and this matter shall be remanded to the WDNR for action not inconsistent with this stipulation and judgment without costs or further notice to the parties.

Dated this 30 day of June, 2005.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER  
Attorney General



Thomas J. Dawson  
Assistant Attorney General  
State Bar #1016134  
Attorneys for Respondent

Wisconsin Department of Justice  
P.O. Box 7857  
Madison, WI 53707-7857  
(608)266-8987

Dated this 30 day of June, 2005.

GARVEY & STODDARD, S.C.



Glenn M. Stoddard  
State Bar No. 1020964  
Attorneys for Petitioners

Garvey & Stoddard, S.C.  
634 W. Main Street, Suite 101  
Madison, Wisconsin 53703  
(608)256-1003

## ORDER FOR JUDGMENT

Based upon the above stipulation of the parties,

**IT IS HEREBY ORDERED**, that

1. Judgment shall be entered in favor of Petitioners on their first Claim & Cause of Action, namely that Respondent WDNR failed to fulfill its duties under WEPA and Wis. Admin. Code ch. NR 150, to conduct an environmental review of the Trail; and
2. Petitioners' second and third Claims & Causes of Action are hereby dismissed without prejudice; and
3. The following decisions and actions of Respondent WDNR shall be and are hereby declared null, void, and without effect because Respondent WDNR has not complied with the provisions of WEPA and Wis. Admin. Code ch. NR 150:
  - a. The decision not to conduct an environmental review of the Trail under WEPA and Wis. Admin. Code ch. NR 150;
  - b. The decision and action to convey an easement to Polk County for the Trail, attached as Exhibit 1;
  - c. The decision to agree to a master plan for the Trail which provides for use of the Trail by motorized vehicles, attached as Exhibit 2; and
  - d. The decision to enter into the MOU between WDNR and Polk County, as incorporated in the easement between WDNR and Polk County, attached as Exhibit 3; and
4. As part of its environmental review process in this matter, Respondent WDNR shall hold a public hearing to seek public input under WEPA and Wis. Admin. Code ch. NR 150; and

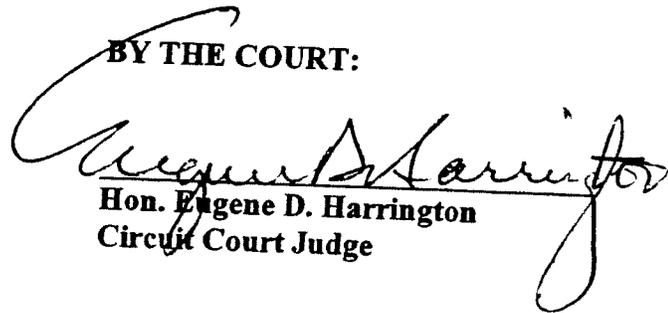
5. Nothing in the parties' stipulation or this order shall be construed to preclude Respondent WDNR from making any decisions or taking any actions in the future within its authority and jurisdiction with respect to the Trail, provided such decisions and actions are taken in compliance with WEPA, Wis. Admin. Code ch. NR 150, and other applicable laws; and

6. The Trail will be closed to the public pending environmental review and DNR decisions on the easement, master plan, and MOU, the Respondent WDNR shall inform Polk County of the effect of this order, and the WDNR shall prohibit all brushing, development activities, and use of the Trail by Polk County and any person(s) until at least Sixty (60) days after all subsequent final decisions with respect to the Trail have been made, in compliance with WEPA, Wis. Admin. Code ch. NR 150, and any other applicable laws; and

7. Judgment shall be entered and this matter remanded to the WDNR for action not inconsistent with this stipulation and judgment without costs or further notice to the parties.

Dated this 7 day of June, 2005.

**BY THE COURT:**



Hon. Eugene D. Harrington  
Circuit Court Judge

Mike

**GLENN M. STODDARD**  
ATTORNEY AT LAW

130 S. BARSTOW STREET  
SUITE 2C  
EAU CLAIRE, WI 54701

www.stoddardlawoffice.com

TELEPHONE: (715) 852-0345  
FACSIMILE: (715) 852-0349  
glennstoddard@charter.net

March 27, 2007

*Copies to*  
*Bright Brown -*  
*PR/G*  
*Jim Pardee OE/T*  
*Tim Miller - NOR*

VIA CERTIFIED MAIL

Scott Hassett, Secretary  
Wisconsin Department of Natural Resources  
101 South Webster Street - AD/5  
P.O. Box 7921  
Madison, WI 53703-7921

Re: Service of Petition for Judicial Review  
*Friends of L.O.G. Greenway, Inc., et al, v. Wisconsin Department of*  
*Natural Resources*  
Polk County Circuit Court, Case No. 07-CV-177

RECEIVED

APR 06 2007

Dear Secretary Hassett:

OFFICE OF ENERGY

Enclosed for service upon you, pursuant to Wis. Stat. § 227.53, is an authenticated copy of the Petition for Judicial Review in the above-captioned case, which was filed today in Polk County Circuit Court.

Sincerely,

Glenn M. Stoddard

Enclosure  
cc: Clients

*To reviewers - Feel free to*  
*comment on anything on*  
*everything but focus on those*  
*for which I wrote your name*  
*next to their allegation. DOJ*

*has to file an answer*  
*by April 20.*  
*where I used It, that*  
*means insufficient*  
*knowledge. M Lutz*

RECEIVED  
APR 2 2007

RECEIVED

APR 02 2007  
OFFICE OF THE  
SECRETARY

STATE OF WISCONSIN

CIRCUIT COURT

POLK COUNTY

**FRIENDS OF L.O.G. GREENWAY, INC.**  
654 115<sup>th</sup> Street  
Amery, Wisconsin 54001, and

**RICHARD ROOS**  
654 150<sup>th</sup> Street  
Amery, Wisconsin 54001,

Petitioners,

v.

**WISCONSIN DEPARTMENT OF  
NATURAL RESOURCES,**  
Scott Hassett, Secretary  
101 South Webster Street  
P.O. Box 7921  
Madison, WI 53707-7921,

Respondent.

AUTHENTICATED

07CV 177

BY. *[Signature]*

Case No. \_\_\_\_\_

Case Code: 30607

Administrative Agency Review

**FILED**

MAR 27 2007

Clerk of Circuit Court  
Lois Hoff - Polk County

**PETITION FOR JUDICIAL REVIEW** 

Petitioners, Friends of L.O.G. Greenway, Inc., and Richard Roos, by their attorney, Glenn M. Stoddard, petition the Court for judicial review of certain decisions of Respondent Wisconsin Department of Natural Resources ("DNR") relative to the Amery to Dresser State Trail under Wis. Stat. Ch. 227, as follows:

**PETITIONERS**

1. Petitioner Friends of L.O.G. Greenway, Inc. ("Friends") is a Wisconsin nonstock corporation organized under the provisions of Wis. Stat. Ch. 181. The registered office of Friends is located at 654 115<sup>th</sup> Street, Amery, Wisconsin 54001. The

President of Friends is Brook Waalen, who resides at 25 First Street North, Luck, Wisconsin 54853. Friends has three classes of members: Individual Members, Business or Corporate Members, and Honorary Members. The members of Friends are interested in, concerned about, and aggrieved by the proposed use of the Amery to Dresser Trail ("Trail") in Polk County, Wisconsin for motorized uses. The purposes of Friends include the "promotion of quiet recreational opportunities for all residents of and visitors to Polk County, Wisconsin." A major focus of Friends for the past seven years has been to secure the abandoned railroad corridor between Amery and Dresser, Wisconsin as a "nonmotorized Greenway." Friends actively participated in the development of a "Master Plan" for the Trail and Friends has consistently taken the position that the Trail should be limited to nonmotorized uses for environmental, cultural, and social reasons. Friends was one of the petitioners that successfully challenged DNR's previous decision not to conduct an environmental review of the Trail in *Friends of L.O.G. Greenway, et al. v. Wisconsin Department of Natural Resources*, Polk County Circuit Court, Case No. 05-CV-195. Friends has specifically advocated that the Trail be developed only as a nonmotorized Greenway to: a) provide a safe, peaceful place for residents to walk or bike; b) attract visitors and tourists; and c) protect wildlife and its habitat. The quality of life, aesthetic and cultural interests, and property rights of Friends and its members will be adversely affected if the Trail is open to use by motorized vehicles. Friends has consistently taken the position that an adequate and reasonable environmental review of the Trail must be done by DNR before the Trail may be developed and opened for any uses, because of the existence of burial sites, special wildlife habitat and nesting sites, rare native plant communities, and other environmental factors along the Trail corridor

IK

Admit

IK

that merit further study and special protection. In addition, Friends takes the position that a full Environmental Impact Statement ("EIS") rather than an EA is required, because numerous issues must be examined under Wis. Stat. § 1.11 (the "Wisconsin Environmental Policy Act" or "WEPA"). These issues include analysis of the connection of the Trail (which is designated as a "State Trail") with other trails in the State Trail system; short-term and long-term environmental effects; cumulative effects of repeated actions of the same type; the degree to which the action may foreclose future options, including plans of local government; the degree of controversy over the effects on the quality of the human environment; the positive and negative effects of the proposed action as it relates to the physical, biological and socioeconomic environment; and the evaluation of alternatives, particularly those that might avoid all or some of the adverse environmental effects of the proposed action. Friends is aggrieved by the final decision of the DNR to certify the EA (and not prepare an EIS for the Trail), because this decision is unreasonable and would allow the Trail to be used for motorized uses, as more fully described in the EA (attached hereto as Exs. C & D and also available at [www.wiparks.net/amd\\_ea](http://www.wiparks.net/amd_ea)) and related documents. Friends has standing under Wis. Stats. §§ 1.11, 23.175, 157.70 and 227.52, and *Waste Management of Wisconsin v. DNR*, 144 Wis. 2d 499, 424 N.W.2d 685 (1988), to bring this action.

IK

2. Petitioner Richard Roos ("Roos") is an adult resident of the State of Wisconsin who resides at 654 150<sup>th</sup> Street, Amery, Wisconsin 54001. Roos is an Individual Member of Friends and is interested in, concerned about, and aggrieved by the proposed use of the Trail for motorized uses. Five generations of the Roos family have lived on farmland contiguous to the Trail. In 2003 Roos built a new home within 150

IK

yards of the Trail and he believes it should be designated as a "nonmotorized Greenway."

The property owned by Roos, and his quality of life, will be adversely affected if the Trail is opened to motorized uses. Roos one of the petitioners that successfully challenged DNR's previous decision not to conduct an environmental review of the Trail in *Friends of L.O.G. Greenway, et al. v. Wisconsin Department of Natural Resources*,

Polk County Circuit Court, Case No. 05-CV-195. Roos has specifically advocated that the Trail be developed only as a nonmotorized Greenway to: a) provide a safe, peaceful place for residents to walk or bike; b) attract visitors and tourists; and c) protect wildlife and its habitat. The quality of life, aesthetic and cultural interests, and property rights of Roos will be adversely affected if the Trail is open to use by motorized vehicles.

Roos has consistently taken the position that an adequate and reasonable environmental review of the Trail must be done by DNR before the Trail may be developed and opened for any uses, because of the existence of burial sites, special wildlife habitat and nesting sites, rare native plant communities, and other environmental factors along the Trail corridor that merit further study and special protection.

In addition, Roos takes the position that a full EIS rather than an EA is required, because numerous issues must be examined under WEPA. These issues include analysis of the connection of the Trail with other trails in the State Trail system; short-term and long-term environmental effects; cumulative effects of repeated actions of the same type; the degree to which the action may foreclose future options, including plans of local government; the degree of controversy over the effects on the quality of the human environment; the positive and negative effects of the proposed action as it relates to the physical, biological and socioeconomic environment; and the evaluation of alternatives, particularly those that might avoid all or some of the

IK

Admit

IK

adverse environmental effects of the proposed action. Roos is aggrieved by the final decision of the DNR to certify the EA (and not prepare an EIS for the Trail), because this decision is unreasonable and would allow the Trail to be used for motorized uses, as more fully described in the EA (attached hereto as Exs. C & D and also available at [www.wiparks.net/amd\\_ea](http://www.wiparks.net/amd_ea)) and related documents. Roos has standing under Wis. Stats. §§ 1.11, 23.175, 157.70 and 227.52, and *Waste Management of Wisconsin v. DNR*, 144 Wis. 2d 499, 424 N.W.2d 685 (1988), to bring this action.

Ik

### RESPONDENT

3. Respondent DNR is an agency of the State of Wisconsin, created under Wis. Stat. § 15.34, whose principal office is located at 101 South Webster Street, P.O. Box 7921, Madison, WI 53707-7921. The DNR has jurisdiction over the Trail as a "State Trail" under Wis. Stat. § 23.175, and Wis. Admin. Code § NR 51.73. The DNR has a legal responsibility under Wis. Stat. § 1.11 and Wis. Admin. Code Ch. NR 150, to conduct an adequate and reasonable environmental review of the proposed Trail. The DNR has a responsibility to evaluate the full range of environmental impacts to the Trail that may be caused by the development of the Trail and the proposed uses of the Trail, including use of the Trail by any motorized vehicles, and connecting the Trail to a statewide trail system. The decisions by DNR to designate the Trail as a "State Trail" under Wis. Stat. § 23.175 and Wis. Admin. Code § NR 51.73., to certify the EA to be in compliance with Wis. Stat. § 1.11, and Wis. Admin. Code Ch. NR 150, without the need for an EIS; to state and decide in the EA that the Master Plan for the Trail, dated October 2004, remains in full force and effect, notwithstanding the Court's Order for Judgment dated June 8, 2005, in *Friends of L.O.G. Greenway, et al. v. Wisconsin Department of*

admit

legal conclusion

deny

*Natural Resources*, Polk County Circuit Court, Case No. 05-CV-195; and to state and decide in the EA that the Trail may be developed and opened for motorized vehicle use as described in the Master Plan for the Trail are decisions encompassed within the decision to certify the EA that are subject to judicial review under Wis. Stats. §§ 227.52 & 227.57, Wis. Stat. § 1.11, and Wis. Admin. Code Ch. NR 150. The decision by DNR to allow the Trail to be developed and opened for motorized vehicle use may be enjoined under Wis. Stats. §§ 1.11, 157.70(8) and 227.57.

deny

**FACTS**

might check all of these (1-9)

4. The Trail right-of-way was acquired from the Wisconsin Central Limited Railroad in 2003 by DNR under the Wisconsin Stewardship Program.

admit

5. The Trail consists of a 13.48-mile railroad corridor located in Polk County ("County"), Wisconsin.

admit

6. The Trail is located on a former Wisconsin Central Limited Railroad right-of-way which begins two miles east of Dresser, Wisconsin and extends into the City of Amery, Wisconsin.

admit

7. Within the City of Amery, the Trail corridor width ranges from 60 feet wide to 180 feet wide, whereas in the rural branch of the corridor, the Trail width is consistently 100 feet wide.

?

8. The Trail consists of approximately 174 acres and generally runs in a west to east direction.

admit

9. In early 2004, a citizens advisory committee ("CAC") was convened by Polk County to receive input from various sources for the purpose of developing a Master Plan for the Trail.

admit

Tim  
??

10. At the March 10, 2004 CAC meeting, Tim Miller ("Miller") of DNR explained the master planning process with a visual presentation. As part of this presentation, Miller stated that in phase 4 of the master planning process, DNR would prepare a draft master plan and environmental document, i.e., either an environmental assessment ("EA") or environmental impact statement ("EIS").

deny -  
I presume  
we  
never  
promised  
a  
DNR  
master  
plan

11. Miller subsequently informed the CAC chairperson that the environmental review would be conducted following selection of a preferred alternative by the CAC but before a final decision was made as to whether the Trail would be opened to motorized uses by the County. That conversation was reported by the CAC chairperson at the May 20, 2004 CAC meeting.

?  
deny

12. In the autumn of 2004, following conclusion of deliberations of the CAC, the Polk County Property, Forestry and Recreation Committee ("Property Committee") determined, by a 3-2 vote, that the Trail would be opened to motorized vehicle uses on a year-round basis. By October 2004, Polk County, with approval by DNR, had developed a final Master Plan for the Trail. The Master Plan was intended to represent the strategy of Polk County and DNR, as well as certain user groups, for the development, operation, and maintenance of the Trail. The Master Plan determined that the Trail would have a dual surface to handle activities such as hiking, bicycling and horseback riding in the summer, snowmobiling in the winter, and motorized all-terrain vehicle ("ATV") use on a year-round basis, with the possible availability of cross-country skiing and snowshoeing.

admit

?

admit

13. A Memorandum of Understanding ("MOU") relative to the Trail was subsequently entered into between DNR and Polk County in November 2004.

admit

14. The MOU required DNR to grant a Trail easement to Polk County and designate the Trail as a "State Trail" under Wis. Admin. Code § NR 51.73. The DNR granted the Trail easement to the County on or before March 18, 2005.

admit  
speaks for itself

15. The MOU required, under Art. IV. 2., relating to "Obligations of the Department," that DNR shall "complete the environmental review process pursuant to s. 1.11, Stats., and Chapter NR 150, Wis. Adm. Code."

↓  
same

16. In addition, the MOU required, under Article IV. 3., that DNR shall work with Polk County to identify funding sources for the development and repair of the Trail.

17. Under Article V of the MOU, Polk County was responsible for the development, operation, repair, and maintenance of the Trail.

same

18. The MOU required, under Article V. 4., that Polk County would establish a recreational trail on the corridor within a period of five years from the date of conveyance of the easement.

same

19. The MOU required that the County, with the assistance of DNR, to coordinate and prepare a Master Plan for the Trail.

same

20. The Master Plan developed for the Trail provided that, "[t]he initial development phase of the trail should be completed in 2005. Basic improvements and safety considerations should be in place so that the entire trail is open for use in early fall of 2005," but also provided that initial development is to be determined after an engineering analysis is done. To date, no engineering analysis has been done for the Trail.

same

IK



21. In January 2005, Polk County decided (on a vote of 11 to 10 by the Polk County Board of Supervisors ("Board")) that the Trail would be opened on a year-round basis for use by motorized vehicles, including ATVs and snowmobiles. admit

22. On April 15, 2005, Friends and Roos, among others, filed a Petition for Review in *Friends of L.O.G. Greenway, et al. v. Wisconsin Department of Natural Resources*, Polk County Circuit Court, Case No. 05-CV-195, challenging DNR's actions up to that date with respect to environmental review, development, and planning for the Trail. admit

23. On June 8, 2005, a Stipulation and Order for Judgment was entered in *Friends of L.O.G. Greenway, et al. v. Wisconsin Department of Natural Resources*, Polk County Circuit Court, Case No. 05-CV-195. (Ex. A.) admit

24. During early 2006, DNR prepared a Draft EA on which it held a public hearing and accepted public comments. More than 100 people commented on the Draft EA. admit

25. In February 2007, DNR notified Friends and Roos via letter from Miller that it had certified a Final EA for the Trail. Although dated February 20, 2007, the letter was postmarked February 28, 2007. (Ex. B.) admit

26. The Final EA for the Trail certified by DNR in February 2006 is essentially the same as the Draft EA that DNR had released for public review and comments in early 2006; however, DNR simultaneously issued its response to public comments on the Draft EA when it certified and issued the Final EA. ?

27. A copy of DNR's certified Final EA is attached hereto as Exhibit C. (Ex. C.) admit

Jim Pandec -  
Is this a fair  
statement? 9

28. A copy of DNR's response to public comments on the Draft EA is attached hereto as Exhibit D. (Ex. D.)

*admit*

29. The certified Final EA issued by DNR, when read in conjunction with the response to public comments determines, among other things, that:

*speaks for itself*

a) An EIS is not required and the EA need not consider cumulative impacts beyond those considered in the Draft EA (Ex. D at 6) and that the EA is sufficient as is (Ex. D at 28 & 30.);

b) "The master plan was not nullified by the court order" (Ex. D at 28), and thus the Master Plan remains viable; and

c) "[T]he Department is of the view that it has adequately addressed the issue of the legal basis for authorizing motorized uses on state trails." (Ex. D at 21.)

30. The decision by DNR to certify the Final EA, not prepare an EIS or consider the statewide cumulative impacts of the addition of the Trail as a motorized trail connected to the State Trails system, and to address the above issues in a reasonable manner, is an agency action subject subject to judicial review under Wis. Stats. §§ 227.52 & 227.57, and Wis. Stat. § 1.11.

*admit*

*deny*

### CLAIMS & CAUSES OF ACTION

**I. DNR acted unreasonably and failed to adequately and properly fulfill its duties under WEPA and Wis. Admin. Code Ch. NR 150, when it certified the Final EA and decided not to prepare a Full EIS for the Trail.**

31. Petitioners incorporate by reference all allegations set forth in the preceding paragraphs.

32. DNR acted unreasonably and failed to fulfill its duties under WEPA, Wis. Admin. Code Ch. NR 150, when it certified the Final EA and decided that an EIS is not

*deny*

required, that it need not consider cumulative impacts beyond those considered in the Draft EA (Ex. D at 6), and that the EA is sufficient as is. (Ex. D at 28 & 30.)

**II. DNR acted unreasonably and failed to adequately and properly fulfill its duties under WEPA and Wis. Admin. Code Ch. NR 150, when it certified the Final EA and decided that the Master Plan was not nullified by the Court, and that Polk County was free to make its own plans for the Trail.**

33. Petitioners incorporate by reference all allegations set forth in the preceding paragraphs.

34. DNR acted unreasonably and failed to fulfill its duties under WEPA and Wis. Admin. Code Ch. NR 150, when it certified the Final EA and decided that, “[t]he master plan was not nullified by the court order” (Ex. D at 28) and thus the Master Plan remains viable, because DNR’s decision was inconsistent with the Order for Judgment in entered June 8, 2005 in *Friends of L.O.G. Greenway, et al. v. Wisconsin Department of Natural Resources*, Polk County Circuit Court, Case No. 05-CV-195. (Ex. A.)

deny  
Master plan was not subject to the court order

**III. DNR acted unreasonably and failed to adequately and properly fulfill its duties under WEPA and Wis. Admin. Code Ch. NR 150, when it certified the Final EA and decided that it had adequately addressed the issue of the legal basis for authorizing motorized uses on state trails.**

35. Petitioners incorporate by reference all allegations set forth in the preceding paragraphs.

36. DNR acted unreasonably and failed to fulfill its duties under WEPA and Wis. Admin. Code Ch. NR 150, when it certified the Final EA and decided that it had “adequately addressed the issue of the legal basis for authorizing motorized uses on state trails.” (Ex. D at 21.)

deny

37. As set forth above, the DNR has designated the Trail as a “State Trail” pursuant to Wis. Stat. § 23.175 and Wis. Admin. Code § NR 51.73.

Bright - have we?

38. Wis. Stat. § 23.175(2) sets forth the duties of the DNR relative to the administration and regulation of designated State Trails, including the Trail at issue in this case. The first of these duties requires the DNR to: “(a) Designate a system of state trails as part of the state park system for use by equestrians, bicyclists, riders of electric personal assistive mobility devices, cross-country skiers or hikers.” Wis. Stat. § 23.175(2)(a).

*legal  
conclusion*

39. Wis. Admin. Code §§ NR 51.70 to 51.75 are administrative rules promulgated by the DNR to implement Wis. Stat. § 23.175.

*admit*

40. Wis. Admin. Code § NR 51.70(1) provides, in relevant part, as follows: “The purpose of this subchapter is to encourage and provide for the establishment of a balanced system of state trails, for use by equestrians, bicyclists, cross-country skiers or hikers as provided in s. 23.175, Stats....” Wis. Admin. Code § NR 51.70(1).

*speaks  
for  
itself*

41. Neither Wis. Stat. § 23.175 nor Wis. Admin. Code §§ NR 51.70 to 51.75 grant the DNR any discretion or authority to allow the Trail to be developed or opened for use by motorized vehicles.

*deny*

42. The DNR has an affirmative and clearly expressed duty under Wis. Stat. § 23.175 to strictly limit the uses of the Trail to only “equestrians, bicyclists, riders of electric personal assistive mobility devices, cross-country skiers or hikers.”

*deny*

43. Pursuant to Wis. Stat. § 227.57(8), the DNR’s decision to allow the Trail to be developed and opened for motorized vehicle use as described in the Final EA, and the Master Plan, must be reversed or remanded by the Court to the DNR because the DNR acted outside the range of discretion delegated to it by law, and its action was inconsistent with Wis. Stat. § 23.175 and Wis. Admin. Code §§ NR 51.70 to 51.75.

*deny*

44. Pursuant to Wis. Stat. § 227.57(9), the DNR must be ordered not to allow the Trail to be developed or opened for use by motorized vehicles (or allow it to be developed or opened for such uses by Polk County).

deny

**RELIEF REQUESTED**

**WHEREFORE**, Petitioners respectfully request that the Court order the following relief, pursuant to Wis. Stats. §§ 1.11, 23.175, 157.70(8) and Wis. Stats. §§ 227.52 to 227.58:

1. Declare that DNR's decision to certify the Final EA and not prepare a full EIS to address cumulative impacts beyond those considered in the Final EA was unreasonable and inadequate, because DNR acted outside the range of discretion delegated to it by law, and its action was inconsistent with WEPA and Wis. Admin. Code Ch. NR 150;

2. Declare that DNR's decision to certify the Final EA and to determine that, "[t]he master plan was not nullified by the court order" (Ex. D at 28) and thus the County was free to make its own plans for the trail was unreasonable and inadequate, because DNR's decision was inconsistent with the Order for Judgment in entered June 8, 2005 in *Friends of L.O.G. Greenway, et al. v. Wisconsin Department of Natural Resources*, Polk County Circuit Court, Case No. 05-CV-195 (Ex. A.);

3. Declare that the Court declare DNR's decision to certify the Final EA and to determine that it had "adequately addressed the issue of the legal basis for authorizing motorized uses on state trails" (Ex. D at 21) was unreasonable and inadequate, because neither Wis. Stat. § 23.175 nor Wis. Admin. Code §§ NR 51.70 to 51.75 grant the DNR

any discretion or authority to allow the Trail to be developed or opened for use by motorized vehicles;

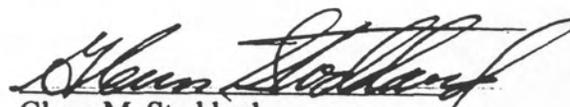
4. Void DNR's decision to certify the Final EA and remand this matter to DNR for preparation of a full EIS and further proceedings consistent with Wis. Stat. § 1.11 and Wis. Admin. Code Ch. NR 150;

5. Order DNR not to develop or open the Trail (or allow the Trail to be developed or opened by Polk County) until a full and proper EIS has been completed by DNR, pursuant to WEPA and Wis. Admin. Code Ch. NR 150;

6. Order DNR to prohibit use of motorized vehicles on the Trail, because neither Wis. Stat. § 23.175 nor Wis. Admin. Code §§ NR 51.70 to 51.75 grant the DNR any discretion or authority to allow the Trail to be developed or opened for use by motorized vehicles; and

7. Provide such other and further relief as the Court deems appropriate under the circumstances.

Dated this 26<sup>th</sup> day of March, 2007.



Glenn M. Stoddard  
State Bar No. 1020964  
Attorney for Petitioners

**Mailing Address:**  
130 S. Barstow Street  
Suite 2C  
Eau Claire, WI 54701  
Tel: (715) 852-0345  
Fax: (715) 852-0349