

NOTES from Contested Case Hearing between SPCA and DNR

January 14-17, 2019

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Overview: SPCA was engaged in a contested case hearing overseen by an administrative law judge for four days this week. We are represented by (pro bono) attorneys Perkins Coie with Brian Potts as lead attorney. He had two junior attorneys assisting him—Mary Beall and Jacob Aronson.

The Alliance brought 11 witnesses to the hearing (appearing in this order)—**Jeb Barzen** (birds and grassland ecosystems), **Gary Casper** (birds and salamanders), **William Hauda** (Nonmotorized Recreation and Transportation Trails Council), **Robin Meier** (Bluffview Sanitary District), **Charlie Luthin** (SPCA, birds, general high-impact recreation impacts), **Dr. Anna Pidgeon** (UW-Madison, impacts to birds), **Paul Senner** (grassland bird ecology), **Curt Meine** (Badger Reuse Committee, Plan & history of process), **Gene Dalhoff** (BRC), **Tom Gilbert** (former NPS rep on BRC) and **Mike Mossman** (birds of Badger).

DNR brought nine witnesses to the hearing: **Major Nils Henderson** (WI Army National Guard, WIARNG), **Stephen Warrner** (DNR), **Diane Brusoe** (former DNR planner for Badger), **John Pohlman** (planner for SPSRA Master Plan), **Eric Lobner** (wildlife, dog training/trialing), **Paul Zajackowski** (DNR regional parks manager), **James Pardee** (DNR Environmental Impact Analysis), **Brigit Brown** (DNR State Trails Coordinator), **Dave Sample** (DNR's grassland bird expert).

Each witness had provided pre-hearing written testimony, and many provided pre-hearing written rebuttals to statements from the other side.

The Alliance witnesses began and took most of the first two days of the hearing. DNR witnesses followed.

Here are a few highlights.

- 1) Badger Reuse Plan ignored. Thanks to brilliant, back-to-back testimonies by Curt, Gene Dalhoff and Tom Gilbert, all former members of the Badger Reuse Committee, the Badger Reuse Plan came screaming to the forefront. It became obvious that DNR always regarded the BRP only as “advisory” throughout their planning process. However, our witnesses clarified the intent and the significance of the BRP as a foundational document that should GUIDE all future land uses on the property, and with long-term oversight provided by BOMC. DNR did not want the BRP to be brought into the arguments—for good reason!
- 2) BOMC. DNR has never taken the Badger Oversight and Management Commission seriously, and it became embarrassingly obvious during their testimony. They knew little about its function, activities and eventual mortality (that they were responsible

for!) and certainly did not think it important to bring planning documents to the BOMC for comment before offering their plans to the general public.

- 3) DNR-driven planning process. A primary goal of the Alliance attorneys was to establish that DNR undertook its master planning process essentially free of outside input, and that many recreational uses were already “pre-ordained” for Badger and included in the planning process by DNR managers and staff. It became very clear that DNR either did not request input from key stakeholders or ignored/defied the input from stakeholders including neighboring landowners (DFRC, Ho-Chunk, Bluffview Sanitary District), the Badger Oversight and Management Commission (BOMC) and the Wisconsin Nonmotorized Recreation and Transportation Trails Council. All of those stakeholders’ comments and concerns should have been taken into consideration by DNR planners but were not.
- 4) Alternative 4. During the early stages of planning (2013), DNR offered three (very limited) scenarios (“alternatives”) for the future use of the state-owned portion of the Badger lands. Each of the alternatives was flawed and none addressed all of the key points of the Badger Reuse Plan. To offer a better option, “Alternative 4” was developed by key stakeholders, and this alternative was eventually endorsed by BOMC, the Nonmotorized Trails Council, various government entities, etc. DNR ignored Alternative 4 and shrugged it off as routine “public input” as they focused tenaciously to their three (limited) alternatives for future planning for the Badger property, only one of which was a serious alternative—and it included opportunities for all kinds of recreation on the property, including high impact activities.
- 5) High impact activities. High impact activities were included in early planning documents (“Alternative 3”) long before there was any public input and contained such language as “should be included.” DNR suggested that there was some sort of indirect “need” identified by some mystery public to include that type of recreation into their planning efforts.
- 6) Impacts to grassland birds. Six of our 11 witnesses are either experts in bird ecology or have considerable experience in ornithology. They demonstrated through various means that the proposed high impact uses (especially dual-sport motorcycles and dog training and trialing) WILL have negative impacts to grassland birds during the breeding season. This was essentially corroborated by DNR’s own grassland expert (Sample), who deferred entirely to the studies undertaken by Mike Mossman at Badger. In a perfect world, Sample indicated that he would never have included the high impact activities that he was handed in the master plan and asked to comment on. Sample admitted that there are no studies of impacts to grassland bird nesting by dual-sport motorcycles nor are there any studies of cumulative impacts by a variety of back-to-back activities at the same area (special use area) at Badger (e.g., dog trialing, motorcycle event, boy scout jamboree). Sample acknowledged that Badger is an Important Bird Area and is undoubtedly the best example of a large grassland bird habitat in southern Wisconsin. A compelling reason to reduce ALL negative impacts to grassland birds at SPSRA!

- 7) Helicopters at Badger. It became obvious that helicopter training at Badger is purely for convenience. Badger is the closest possible training area for helicopters based in Madison (15-minute flight time) compared to Ft. McCoy (35-minute flight time). WIARNG argues this is to save taxpayer money and to avoid the need to refuel during training flights. There was some concession by Mr. Sample that helicopters can scare eagles from nests, and there is an active eagle nest close to where the helicopters land and train. However, there is no indication that helicopters disrupt nesting by grassland birds (which was never our argument).
- 8) Motorcycles. Naturally, there was a lot of discussion about dual-sport motorcycles. Pohlman acknowledged that Ho-Chunk Nation was opposed to having off-road motorcycles at Badger at all. Brigit Brown admitted that these cycles do have impacts to trails—soil displacement and litter being among the impacts. She also acknowledged that she never informed the Wisconsin Nonmotorized Recreation and Transportation Trails Council about proposed motorcycle repurposing of biking and equestrian trails before the plan was made available to the public. Also, DNR ignored the Council's input on motorcycles even after they received input. Oh oh... bad mistake!

Follow-Up. The administrative law judge does NOT make a ruling. He will compile all testimony, exhibits, and other documents from the hearing and send all the documents to DNR. Our attorneys will prepare a brief to outline our arguments for the Natural Resources Board. DNR will prepare a recommendation for the Natural Resources Board. This process will take approximately 3 months. The Natural Resources Board will review all these materials and vote on whether to re-approve the Master Plan (probably at a meeting during the summer).

The Natural Resources Board may require modifications of the DNR's Master Plan for the Sauk Prairie State Recreation Area. If they ignore our case and do not require modifications, we can then appeal through the courts again, this time entering the entire body of materials and our arguments into the record.