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STATE OF WISCONSIN 09-23-2019

COURT OF APPEALS CLERK OF COURT OF APPEALS
OF WISCONSIN

DISTRICT III

STATE OF WISCONSIN,

Plaintiff/Respondent,

APPEAL NO. 2019000491

vs.

DARRIN STINGLE,

Outagamie County Case No. 2017FO001430

Defendant/Appellant.

**REPLY BRIEF OF DEFENDANT-APPELLANT
DARRIN STINGLE**

On Appeal from the Circuit Court for Outagamie County

Case No. 2017FO001430

The Hon. Mark J. McGinnis, Presiding

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Defendant-Appellant Darrin Stingle (“Stingle”) submits this Reply Brief in support of his Principal Brief and to address the arguments presented by Plaintiff-Respondent State of Wisconsin (“State”).

ARGUMENT

I. The State Failed to Present Sufficient Evidence on Which a Reasonable Trier of Fact Could Find the Areas in Question on Stingle’s Property are Wetlands as Defined by Wisconsin Statute.

The State claims there was sufficient evidence on which a reasonable trier of fact could find Stingle guilty because its witnesses “testified about following the federal guidelines, the 1987 Wetland Delineation Manual authored by the US Army Corps of Engineers and took into account the proper criteria as a result of the site not being under normal circumstances.” Resp. at 14. The State’s witnesses, however, repeatedly admitted they did *not* follow the correct procedures in the Corps Manual to delineate wetlands on Stingle’s property as is unambiguously required by Wis.Stat. 281.36(2m) and Wis.Admin.Code 352.01-352.03.

The State also points to the Circuit Court’s assessment of the witnesses’ veracity and finding the State’s witnesses to be credible. Resp. at 5. The witnesses the Court found to be credible, however, conceded only Travis Stuck (“Stuck”) completed a wetland delineation, and Stuck admitted “**it’s really not worth a whole lot to me, honestly, to do a wetland determination following the ‘87 manual.**” [87].¹

Acquittal or, in the least, reversal is warranted because the Circuit Court failed to properly interpret and apply Wis.Stat. 281.36(2m) and Wis.Admin.Code 352.01-352.03

¹ Cites to transcript are in brackets.

to the evidence when it found the areas in question “constitute a wetland as defined by Wisconsin Statute” [302], where the State’s witnesses fully admitted they did not follow the Corps Manual when delineating wetlands on Stingle’s property. *See State v. Rushing*, 197 Wis.2d 631, 641–42, 541 N.W.2d 155, 159 (Ct.App.1995) (“for the court to reverse, the evidence must be in conflict with fully established or conceded facts.”).

A. The Circuit Court erred in its interpretation and application of Wisconsin Statute 281.36.

The State does not contest that, pursuant to Wis.Stat 281.36(2m) and Wis.Admin. Code 352.01-352.03, the Corps Manual and applicable supplements are the legal standard for delineating wetlands in this case. It was therefore erroneous for the Circuit Court *not* to apply or analyze whether the State presented sufficient evidence in accordance with the procedures and protocols in the Corps Manual when delineating wetlands on Stingle’s property.

The Wisconsin Legislature has directed that the Corps Manual and federal law and interpretation involving the same is applicable to Wis.Stat. 281.36. *See Wis.Stat. 281.36(1)(a), (1)(b), (2m) and (6)*. Accordingly, cases involving wetland delineations using the Corps Manual, for purposes of the Clean Water Act or Swampbuster for example, are applicable and controlling on this case. These cases require the trier-of-fact to engage in analysis about whether the agency followed the proper procedures and protocols set forth in applicable statutes, regulations and manuals when delineating wetlands.

In *Boucher v. U.S. Dept. of Agriculture*, the court engaged in extensive analysis of the applicable law and procedures that NRCS must follow when delineating wetlands. 934 F.3d 530, 532-540 (7th Cir.2019). The court set forth the applicable statutory and regulatory definition of wetlands in 16 U.S.C. 3801 and 7 C.F.R. 12.2. *Id.* at 533-34. The court emphasized the agency “must assess whether the area of interest” meets all three “separate, *mandatory* requirements” to be a wetland (i.e., hydric soils, hydrophytic vegetation, and hydrology). *Id.* at 533. The court discussed how “NRCS agents are required to identify wetlands and implement the Swampbuster provisions” using not only the statutes and regulations, but also detailed guidance found in the Corps Manual, its regional supplements, and NRCS’s National Food Security Act Manual. *Id.* at 534.

The *Boucher* court highlighted the exact procedures and steps in the Corps Manual that must be followed when determining whether hydrology is present in atypical situations, which the State here claims Stingle’s property is “not under normal circumstances.” Resp. at 14. “STEP I” in the Corps Manual is to “examine the area and describe the type of alteration that occurred” and “determine the approximate date when the alteration occurred.” *Boucher*, 934 F.3d at 539 (quoting Corps Manual at 80).² The Corps Manual notes: “It is *especially important* to determine whether the alteration occurred *prior* to the implementation of Section 404.” *Id.* This is, of course, because alteration occurring prior to government regulation of the area is a lawful nonconforming use. *City of Franklin v. Gerovac*, 55 Wis.2d 51, 55, 197 N.W.2d 772, 774 (1972) (salvage

² Corps Manual is available at <https://www.nae.usace.army.mil/Portals/74/docs/regulatory/JurisdictionalLimits/wlman87.pdf>.

yard was valid nonconforming use as it existed before the adoption of ordinance rezoning the district residential). Equally important, if the previous alterations removed adequate hydrology, then the “wetlands had already been converted, [and] the lands were no longer considered wetlands” upon enactment of the applicable law. *Boucher*, 934 F.3d at 544.

“With that legal framework in mind,” the *Boucher* court analyzed whether USDA “relied on factors which Congress [] intended it to consider...examine[d] relevant factors and relevant data...articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made...[and] evaluate[d] the significance—or lack of significance—of any new information presented” to it. *Id.* at 547–48. The Circuit Court here should have applied similar law and analysis as the court in *Boucher* did. The Circuit Court should have examined whether the DNR relied on factors the Legislature intended it to, gathered relevant data in accordance with the procedures in the Corps Manual, made a rational connection between the facts found and the determination made, and appropriately evaluated the significance of information presented to it, such as information about manipulations to the areas at issue prior to the enactment of Wis.Stat. 281.36.

The Circuit Court thus erred in its view of law when it failed to apply the pertinent law and procedures under Wis.Stat. 281.36(2m) and Wis.Admin.Code 352.01-352.03 to the evidence. The Circuit Court’s error was harmful to Stingle because, as discussed below, if the Circuit Court had applied the proper legal standard, then the State, by its

witnesses' admissions, failed to present sufficient evidence on which a reasonable trier of fact could find the areas at issue constitute wetlands as defined by Wisconsin law.

B. There is insufficient evidence to convict Stingle because the State's witnesses admitted to not following the Corps Manual.

The State's witnesses conceded at trial that they did *not* complete a proper delineation of wetland boundaries on Stingle's property according to the procedures and protocols in the Corps Manual as "*shall* be used when delineating nonfederal wetland boundaries." Wis.Admin.Code 352.03; Wis.Stat. 281.36(2m).

Thomas Nedland ("Nedland") and Scott Koehnke ("Koehnke") admitted they did not attempt to delineate or map wetland boundaries on Stingle's property. [42, 47-48, 181, 184-185]. Rather, Nedland and Koehnke represented to do a cursory "determination" of whether wetlands were present on Stingle's property. *Id.* A thorough review of their testimony, however, shows Nedland and Koehnke only determined whether hydric soils were present on Stingle's property. *Id.* Nedland and Koehnke did not determine whether wetlands were present on Stingle's property because they did not assess whether the other separate, *mandatory* requirements of hydrophytic vegetation and hydrology were present in the same areas they found hydric soils.

Despite Koehnke and Nedland only doing a determination of whether hydric soils were present on Stingle's property, not a determination that wetlands were present nor a delineation of wetland boundaries, they said it was "enough information to go through the enforcement process" and "allege[] that there was a violation." [184-185]. The fact that Koehnke and Nedland thought they needed no further information to start criminal

enforcement proceedings besides a mere determination that hydric soils were present on Stingle's property is extremely troubling considering the Corps Manual mandates an area must have hydric soils, hydrophytic vegetation, and hydrology to be a wetland, and Wisconsin statutes and DNR regulations *require* nonfederal wetlands be delineated according to the Corps Manual.

Stuck was the only witness for the State that represented to have completed an actual wetland delineation and mapping of wetland boundaries on Stingle's property. Stuck, however, blatantly admitted: "it's really not worth a whole lot to me, honestly, to do a wetland determination following the '87 manual." [87].

For hydrology, the Corps Manual requires the presence of at least one primary or two secondary indicators. *Id.* at 45. Stuck conceded that, although there was above-average antecedent precipitation and he excavated holes over twice the requisite depth, he did not find any primary indicator of water within 12 inches of the surface in the areas at issue. [115-116, 133, 148-149]; Ex. 4 at 4. *See Boucher*, 934 F.3d at 542 (criticizing NRCS for checking a primary indicator of surface water when three inches of rain fell the day before and day of the site visit). Stuck found two secondary indicators of "saturation visible on aerial imagery" and "geomorphic position" on all areas in question. Ex. 4, Att. I. Stuck also found "surface soil cracks" on wetland 7. *Id.*

Stuck conceded that, although he checked the box for "saturation visible on aerial imagery" for wetland 7, he did not find any wet signatures on the 6 photos he reviewed. [102, 137-138]. Stuck also testified that geomorphic position is the "simplest" secondary hydrology indicator to check and can be checked even "if you are on hillside with a

significant slope.” [118.] Stuck is incorrect. The critical determining factor is that geomorphic position “is *not* applicable in areas with functioning drainage systems and does *not* include concave positions on rapidly permeable soils...that do not have wetland hydrology unless the water table is near the surface.” Ex. 5.³ Stuck did not find water table near the surface in any of the areas, despite digging at least 26 inches down. [115-116; 149]. There was also ample evidence at trial that the areas Stuck identified as ditch-wetlands 2 and 3 are historic drainage ditches that abut the other areas at issue and were constructed before Wisconsin’s enactment of statute 281.36.

Stuck admitted multiple times the ditches removed some hydrology from the area, but conceded he did not consider the extent the ditches removed hydrology and did not ask Stingle whether there were other historic alterations on site either:

Q: [T]he NRCS determination is consistent with your aerial review that at least since 1983 those two areas you identified as Wetland 2 and Wetland 3 were ditches that had been constructed?

A: Yes. [85-86]

Q: PC means there’s been something done – some ditching, some tiling done – in that area, right?

A: Yes. [87]

Q: [Y]ou didn’t ask him [Stingle] about any prior drainage activity on the site, correct?

A: I don’t recall asking him specifically about the drainage activity.

Q: And you’re aware that under the Corps Manual and the applicable supplements when you do a delineation there are limits on how you make certain considerations if there is existing drainage that’s functioning on the site, right?

A: Yes.

Q: But you never looked at that? I mean you didn’t talk to Mr. Stingle. You are not aware if there’s tile or not; and you didn’t ask him, correct?

A: I didn’t ask him. [89].

³ Regional Supplement available at <https://usace.contentdm.oclc.org/utls/getfile/collection/p266001coll1/id/7640>.

Q: You were aware there's two drainage ditches of some functioning value on the site?

A: Yes. [91]

Q: Then Wetland 5 is adjacent to Wetland 2, which is the drainage ditch, correct?

A: Correct. [119].

Q: So you are not questioning that Wetland 2 was constructed for the purpose of draining water off the site?

A: No. [130].

Q: [Y]ou have indicated you have done thousands of these. You need to follow the Corps Manual. You follow the Corps Manual, and yet the Corps Manual is saying that if you use geomorphic position in an area that is – is not applicable in areas with functioning drainage systems. That was, in fact, a ditch, correct? You still used it?

A: Yes, [132-133].

Q: You testified that the ditch flows from the east to the west, correct?

A: Yes. [133].

Q: You would agree Wetland 3 again was constructed as a ditch, functions as a ditch?

A: Yes. [136].

Q: You agree Wetland 3 is a ditch? It runs to the west; is that correct?"

A: Yes. [141-142].

Q: And you agree that Wetland 9 is physical abutting the Wetland 3, which you agree is a functioning drainage ditch, might have water on the bottom? You might have determined it's a wetland but it is a drainage ditch?

A: Yes. [144-145].

Based on the above admissions, it was improper for Stuck to check "geomorphic position" on the areas in question. The State therefore did not find sufficient evidence for the areas in question on Stingle's property to meet all three requisite characteristics of wetlands in accordance with the procedures in the Corps Manual.

As the court in *Boucher* held, compliance with the procedures in the Corps Manual is extremely important to ensure there is a standard, clearly-defined, and repeatable process for determining whether an area is a wetland, and, "even in non-standard

situations, ‘the basic approach for making wetland determinations should not be altered (i.e., the determination should be based on the vegetative, soil, and hydrological characteristics of the area in question).’” 934 F.3d at 535. Here, similar to NRCS in *Boucher*, the DNR repeatedly failed to follow the applicable law and procedures. The DNR also disregarded compelling evidence showing the areas in question were previously manipulated and thus never qualified as wetlands.

Based on these admissions, the State failed to present sufficient evidence from which a reasonable trier of fact could find Stingle’s actions caused impermissible discharge into areas properly delineated to be wetlands under Wisconsin law.

II. The Circuit Court Demonstrated Prejudicial Bias.

The State claims Judge McGinnis’s questions to Stingle during Koehnke’s testimony was merely “a clarifying inquiry regarding what the actual issues are in the trial” and “did not express any opinion regarding a conclusion or decision about the issue in question.” Resp. at 16.

Although it cannot truly be reflected in the written transcript, there was immense tension in the courtroom when Judge McGinnis turned to Stingle’s counsel during Koehnke’s testimony and demanded to know why Stingle had not removed the fill. Counsel explained that it had not because “we’re contesting that, whether it’s a wetland.” [168]. Judge McGinnis flatly responded: “Got it, which I figured out by now.” *Id.* This response indicates Judge McGinnis needed no clarity about the contested issue. Judge McGinnis then continued to inquire and chastise Stingle for being “stubborn” and “set on

the position that he doesn't have to," which indicates Judge McGinnis had already predetermined Stingle's guilt, only part-way through trial. [168-169].

The State also argues Koehnke's rebuttal testimony "had very little, if anything, to add to the evidence" so it does not indicate bias for the court to "think about consequences at approximately the same time Mr. Koehnke began." Resp. at 17. Judge McGinnis's statement at approximately 5:25 p.m. [303] that he had been contemplating consequences for Stingle for the past 15 minutes [304] meant he was anticipating sentencing *prior* to Koehnke starting his rebuttal testimony at 5:15 p.m. [299] and *while* Stingle was still testifying. A reasonable person hearing this statement and Judge McGinnis' previous statements would certainly question the court's impartiality. In the least, reversal is warranted to allow Stingle a fair trial before an impartial judge.

III. The Court Should Grant Relief for the State's Delay and Noncompliance with Appellate Rules.

Wis.Stat. 809.19(3)(a)(1) mandates "the respondent shall file a brief." Wis.Stat. 809.83(2) provides: "Failure of a person to comply with a court order or with a requirement of these rules...is grounds for dismissal of the appeal, summary reversal, striking of a paper, imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate."

Stingle timely filed its Brief on June 3, 2019, and the Clerk filed the Acknowledgment of Filing on June 5th. According to Wis.R.App.P. 809.19(3), the State's responsive brief was due on July 5th. The State did not file its brief or request an extension by July 5th. Stingle's counsel contacted the District Attorney's office on July

10th and 11th to inquire about the status of the State's brief and was informed the State would not be filing its brief but apparently would be requesting an extension within 48 hours, which did not occur. The Clerk issued a Delinquent Brief of Respondent on July 16th. The State eventually filed a 30-day extension request on July 19th. The Court partially granted the extension, giving the State until August 5th to file its brief. The State requested another 30-day extension on August 2nd, which was granted. The State finally submitted its brief on September 3rd.

Wisconsin courts “may summarily reverse a judgment or order if respondent fails to file a brief...and [] usually do [because] failure to file a respondent's brief tacitly concedes that the trial court erred.” *State ex rel. Blackdeer by Blackdeer v. Twp. of Levis*, 176 Wis. 2d 252, 260, 500 N.W.2d 339, 341 (Ct.App.1993). Sanctions for less egregious violations have been ordered by Wisconsin courts too. *Nelson v. Machut*, 138 Wis. 2d 301, 310, 405 N.W.2d 776, 780 (Ct.App.1987) (awarding double costs for appellant's noncompliance with appendix rules).

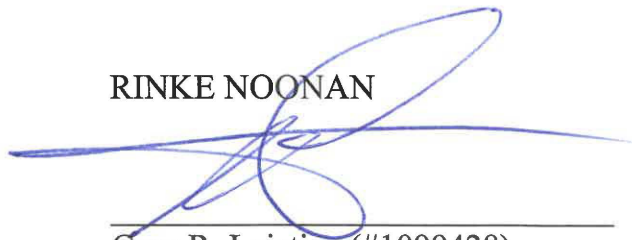
While the State here eventually filed its responsive brief, it did not bother to request an extension until two weeks after its initial filing deadline, and then requested an additional 30-day extension when it apparently could not meet the already extended deadline. Single respectfully requests the Court, at a minimum, award some costs and fees in this appeal for the State's unjust delay and noncompliance with the Court's rules and deadlines.

CONCLUSION

For the reasons discussed herein and in Defendant-Appellant's Principal Brief, Stingle respectfully requests the Court acquit him of the conviction under Wis.Stat. 281.36(3b)(b). If the Court should find acquittal is not warranted, Stingle requests the Court reverse for the errors discussed herein.

Respectfully Submitted this 20th day of September, 2019.

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CERTIFICATION OF BRIEF FORM AND LENGTH

I certify that this brief conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b) and (c) for a brief and appendix produced using a proportional serif font. The length of those portions of the brief referred to in sections 809.19(1)(d), (e) and (f) is 2,992 words.

Respectfully submitted this 20th day of September, 2019.

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**CERTIFICATE OF COMPLIANCE WITH
WIS. STATS. § (RULE) 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this Reply Brief of Defendant-Appellant Darrin Stingle which complies with the requirements of Wisconsin Statutes section (Rule) 809.19(12).


I further certify that:

This electronic Reply Brief of Defendant-Appellant Darrin Stingle is identical in content and format to the printed form of the Reply Brief of Defendant-Appellant Darrin Stingle filed with the court and served on all opposing parties.

A copy of this certificate has been served with the paper copies of this Reply Brief of Defendant-Appellant Darrin Stingle filed with the court and served on all opposing parties.

Respectfully submitted this 20th day of September, 2019.

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CERTIFICATION OF MAILING

I certify that this brief was deposited in the United State mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on September 20, 2019.

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CERTIFICATION OF REPLY APPENDIX

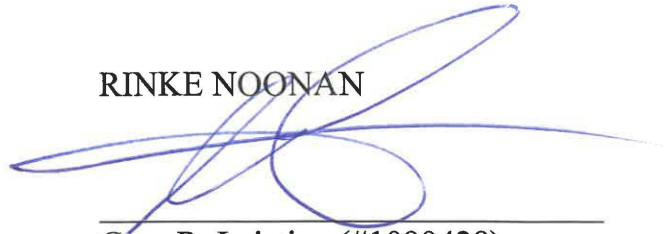
I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. §809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under 809.23; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Respectfully submitted this 20th day of September, 2019.

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**DEFENDANT-APPELLANT DARRIN STINGLE'S
REPLY APPENDIX**

**DEFENDANT-APPELLANT DARRIN STINGLE'S
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