

# Midwest Environmental ADVOCATES

*pro bono publico*

## Wisconsin Supreme Court Shuts the Door on Citizens' Rights to Clean Water

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The Wisconsin Supreme Court has shut the door on citizens of the state who question DNR's failure to comply with federal law in environmental permits, even though state law requires DNR permits to meet the minimum protections of the federal Clean Water Act.

**Today, the Wisconsin Supreme Court decided that the Wisconsin DNR does not have to protect Wisconsin from polluted discharges as stringently as other states and it cut citizens' rights to participate in their state's decision making process where water quality is concerned.**

The case decided today began six years ago, when concerned individuals from Green Bay, the Clean Water Action Council of Northeastern Wisconsin and the National Wildlife Federation, represented by Midwest Environmental Advocates, challenged a permit the DNR issued to the Fort James paper mill (now Georgia Pacific) for failing to adequately limit the mill's discharge of mercury and phosphorus to the Fox River and Lower Green Bay. The Court of Appeals, District III, found in favor of the citizens and environmental groups on two issues. First, the Court of Appeals recognized the citizens' right to participate in the permitting process for this major industrial discharger, which the DNR surprisingly tried to limit, upholding Wisconsin's rich tradition of public access and participation in state decisions.

The Court of Appeals also rejected the Wisconsin DNR's argument that it was not obligated to issue a permit that complied with the requirements of the federal Clean Water Act. Displeased with this outcome, DNR asked the Wisconsin Supreme Court to overturn this portion of the Court of Appeal's decision.

**Today, the Supreme Court did just that, holding that DNR is not required to consider challenges to water pollution permits that fail to comply with "the basic requirement of the federal Clean Water Act" In its decision, the Supreme Court wrongly deferred to DNR's own interpretation of its authority to deny citizens an opportunity to object to permits that fail to comply with Clean Water Act standards. Today's decision undermines Wisconsin's long standing tradition to allow individuals to participate in decisions that impact the water they drink, swim, and recreate in – and ultimately leaves citizen's with NO forum to challenge permits that fail to protect public health and the environment.**

This is a disappointing moment for Wisconsin and Wisconsin residents and visitors who drink, live on, fish in and recreate in Wisconsin's many waters. It may jeopardize Wisconsin's authority to regulate water pollution at all. If the DNR does not run a program that complies with the federal Clean Water Act, EPA can take back the authority it gave Wisconsin to issue permits to facilities.

Curt Andersen, a Green Bay resident who lives near and enjoys fishing in Green Bay says, "I am stunned by the decision. It suggests there are two different things going on here – the spirit of the law and the letter of the law. The spirit of the law is to protect the people of the state. The milky, coffee colored

water coming from this paper mill is not regulated to a point that it's protecting the river and the bay." Andersen continued, "I think it's confusing. At one point the DNR insists that it was their right to make the decisions, but then they change their mind and say that it is all up to the EPA. Where do we go to get our voices heard?"

"This decision is a blow to water quality, public health, communities and wildlife," said Neil Kagan, senior counsel of the National Wildlife Federation. "It gives the green light to the state of Wisconsin to violate the Clean Water Act. At a time when the region is rallying around the protection and restoration of the Great Lakes and the rivers and streams which feed them, this decision is step backward."

"This decision goes against the best interests of millions of Wisconsin citizens by undermining water quality protections that are the foundation of our communities, economy and way of life," says Betsy Lawton, Midwest Environmental Advocates' staff attorney. "The Court's anti-environmental decision enables DNR to weaken the clean water program, and it allows DNR to cloak its decisions in secrecy, an affront to Wisconsin's noble history of open and transparent decision-making. The Court went so far as to revise long-standing rules of legal analysis to reach this result."

The Clean Water Act was passed by Congress in 1972 to set minimum standards for water quality for the nation. Individual states earned the ability to implement the CWA by creating regulatory frameworks that included the protections of federal law. Nearly 40 years after the passing of the CWA, not one state in the union fully and effectively implements the laws designed to protect water quality essential to public health and well-being. Wisconsin, disappointingly, seems to denounce its once grand reputation as a national leader for natural resource protection and seems subject to the will of the few, rather than the want of the many.

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## FAST FACTS

- Wisconsinites lose big in this decision. Why? Because the contested case process is the first and ONLY place that a citizen can ask the Courts to determine if the state is doing its job to apply Federal law.
- Today's ruling means that the DNR does not have to give Wisconsin's waters the same protection uniformly required in other states.
- What started as a challenge to one bad permit now has broader implications. The EPA can withdraw the DNR's authority to implement a delegated program if there are programmatic problems.
- "All State Programs ... must have legal authority to implement each of the following provisions and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements". 40 CFR 123.25(a)
- "The Administrator may withdraw program approval when a State program no longer complies with the requirements [of Federal law]". 40 CFR 123.63(a). Scenarios under which EPA could withdraw approval of a state program include: action by state legislature or court striking down or limiting State authorities or failure to promulgate necessary new authorities; failure to issue permits, repeated issuance of permits which do not conform to applicable requirements, or failure to comply with public participation requirements; failure to act on permit violations, seek adequate enforcement penalties or inspect and monitor activities subject to regulation; failure to comply with the terms of the Memorandum of Agreement; failure to develop an adequate program for developing water quality-based effluent limits in NPDES permits; failure of a great lakes state or tribe to adequately incorporate the NPDES permitting implementation procedures. *Ibid.*
- The DNR has implemented the Clean Water Act in Wisconsin since 1974, when EPA granted the department Federal authority to issue water pollution permits.
- Georgia Pacific's pollution permit expired in September 2010. DNR will soon have to issue a new permitting decision for this facility.
- Midwest Environmental Advocates is a non-profit environmental law center with offices in Madison and Milwaukee, Wisconsin. Since 1999, MEA has provided legal and technical support to grassroots groups that are working for environmental justice in the Western Great Lakes and Mississippi River region.
- The National Wildlife Federation is America's largest conservation organization. NWF works with more than 4 million members, partners and supporters in communities across the country to protect and restore wildlife habitat, confront global warming and connect with nature. Since 1982, NWF's Great Lakes Regional Center has been a leader in protecting the Great Lakes for the wildlife and humans that depend on this invaluable resource.
- The Clean Water Action Council is a non-profit citizen organization, founded in 1985, working to protect public health and the environment in Northeast Wisconsin. Clean Water Action Council works to increase public awareness of the many threats to water quality, and to build support for improved management.