

STATE OF WISCONSIN
IN SUPREME COURT

No. 2008AP3235

CURT ANDERSEN, JOHN HERMANSON,
REBECCA LEIGHTON KATERS, CHRISTINE
FOSSEN RADES, THOMAS SYDOW, NATIONAL
WILDLIFE FEDERATION AND CLEAN WATER
ACTION COUNCIL OF NORTHEASTERN
WISCONSIN, INC.,

Petitioners-Appellants,

v.

DEPARTMENT OF NATURAL RESOURCES,
Respondent-Respondent-Petitioner.

RESPONSE IN OPPOSITION TO DEPARTMENT OF NATURAL
RESOURCES PETITION FOR REVIEW OF A COURT OF APPEALS
DECISION DATED APRIL 13, 2010, HOLDING THAT DNR MUST IN
A PERMIT REVIEW HEARING DETERMINE WHETHER A
WASTEWATER DISCHARGE PERMIT ISSUED PURSUANT TO
STATE REGULATIONS
COMPLIES WITH APPLICABLE FEDERAL LAW

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Curt Andersen, John Hermanson, Rebecca Leighton
Katers, Christine Fossen Rades, National Wildlife Federation
and Clean Water Action Council of Northeastern Wisconsin,
Inc., (collectively referred to as the “Council” in the Court of
Appeals’ decision in Appeal No. 2008AP3235, dated April

13, 2010, and hereinafter referred to as the “Council”) submit this response in opposition to the Wisconsin Department of Natural Resources’ (“DNR’s”) Petition for Review of the Court of Appeals’ decision. The issue DNR has presented is not properly before this Court and this Court should deny DNR’s Petition for Review. DNR has misconstrued the Court of Appeals’ decision, which properly held that DNR has the authority to determine whether Wisconsin Pollutant Discharge Elimination System (“WPDES”) permit provisions comply with federal law. In addition, DNR has alleged facts outside the record in its Petition for Review.

STATEMENT OF ISSUE

DNR's statement of the issue is spurious and predicated on facts that are neither in the record nor entirely accurate.

DNR seeks review of the following issue: "Is an administrative permit review hearing the appropriate forum for disputes over the application of federal law, in a federally delegated program *where EPA approved the state's rules* and where EPA has not objected to the permit that does not have the limits or analysis that petitioners seek?" App.Pet. at 2 (emphasis added). However, this issue was not addressed or decided by the Court of Appeals, nor did DNR raise the issue in the Court of Appeals.

What the Court of Appeals did decide was that DNR must determine whether permit terms comply with applicable federal law and provide a forum for citizens to challenge permits terms that fail to comply with applicable federal law. This decision flowed from Wisconsin statutes, including especially Wis. Stat. § 283.31(3), which provides that DNR may issue a discharge permit only if "such discharges will meet . . . [a]ny more stringent limitations . . . [n]ecessary to comply with any applicable federal law or regulation[.]" This statute establishes that WPDES permits must contain conditions to ensure compliance with applicable federal law or regulation. *See* Wis. Stat. § 283.32(3). A permit also must comply with Wisconsin regulations approved by EPA, but that does not relieve DNR of the responsibility under Wis. Stat. § 283.31(3)(d)2 to ensure that discharges will meet more stringent limitations necessary to comply with applicable federal law. DNR ignored this statutory requirement almost

entirely, mentioning it only once, at page 10 of its petition. Even then, DNR misconstrued the plain language of the statute. Wisconsin Statute § 283.31(3)(d)2 provides an independent, sufficient basis for upholding the decision of the Court of Appeals, therefore it is unnecessary for this Court to review the non-dispositive issue which DNR has crafted and presented in its Petition for Review.

DNR has created a red herring by framing the issue as whether a permit complies with EPA-approved Wisconsin regulations, erroneously suggesting that the Council had challenged such regulations. DNR's explanation of the interaction between state and federal water pollution control law is complex, convoluted, factually and legally unsupported, and ultimately irrelevant, because the decision of the Court of Appeals is premised on a straightforward interpretation of Wisconsin statutes, especially Wis. Stat. § 283.31(3)(d)2. Thus, the issue is not appropriate for this Court's review.

In addition, DNR's Statement of the Issue is predicated on facts not in the record, some of which are demonstrably false in the context of the permit challenge that is the subject of this case. Nothing in the record indicates that the phosphorus and mercury permit terms challenged by the Council were authorized by state regulations *approved by EPA as consistent with federal law*. In fact EPA had not approved the state mercury regulations underlying the Fort James WPDES permit in this case when DNR issued the permit. Council Ct.App.Br:Lawton Aff:Ex:1. In fact, EPA later disapproved those same regulations as contrary to federal law. Council Ct.App.Br:Lawton Aff:Ex:1.

The scope of review in an administrative appeal is limited to the record before the agency. Wis. Stat. § 227.57(1). Consequently, DNR's stated issue is outside the scope of review of the Court of Appeals and this Court. *Id.* Without a factually developed record, the Supreme Court's opinion on review would be advisory at best. This alone is sufficient grounds for this Court to deny the Petition for Review.

CRITERIA FOR REVIEW

The issue presented by DNR does not meet the criteria for review outlined in §§ 809.62(1r)(c)2. and 3, Wis. Stats.

The appellate decision does not present a novel and purely legal question that a decision by this Court will help develop, clarify or harmonize. Since 1973, when EPA originally approved the delegation of the NPDES program to Wisconsin, state statutes have prohibited DNR from issuing permits that fail to include terms that require compliance with applicable federal law. Wis. Stat. § 147.02(3)(d)(2) (1973); 283.31(3)(d)(2) (2008). In 1981, this Court acknowledged DNR's authority to determine whether permit limits and conditions comply with all applicable laws and regulations, regardless of whether those regulations are federal or state regulations. *Sewerage Comm'n of Milwaukee v. DNR*, 102 Wis. 2d 613, 627-28, 307 N.W.2d 189, 196-97 (1981). The law is well-settled -- there is nothing novel about the requirement that state permits must comply with applicable federal law.

DNR appears to invite this Court either to ignore a state law that was critical to EPA's decision to delegate the NPDES program to the state of Wisconsin or to redefine the term "applicable federal law" to allow DNR to avoid meeting its Clean Water Act obligations. DNR seeks not to harmonize or clarify the law, but to invalidate or disregard the statutes that were the foundation for EPA's approval of the statutory authority for a state-run WPDES program. "An agency charged with administering a law may not substitute its own policy for that of the legislature." *Niagara of Wis. Paper Corp. v. DNR*, 84 Wis.2d 32, 48, 268 N.W.2d 153, 160 (1978). This Court simply could not hold in DNR's favor without abrogating or ignoring Wis. Stat. § 283.31(3)(d)2., requiring DNR to issue WPDES permits that comply with "applicable federal law", or carving out a statutorily nonexistent exemption to the review available under 283.63, Stats. This would further confuse the clear requirements of the EPA-approved state WPDES program.

The Court of Appeals' decision actually harmonizes state and federal law, by requiring DNR to administer the WPDES permit program as delegated to it by EPA and ensuring that DNR issues and reviews permit terms in compliance with applicable state and federal law. As the Court of Appeals aptly noted, it would be illogical to allow DNR to determine whether regulations or permit terms comply with federal law at the time of their creation, but not to consider or determine federal compliance when permit terms are challenged. (Decision at ¶ 29.)

The Court of Appeals' decision does not implicate a real and significant question of constitutional law. This court has frequently stated that it will, "never . . . anticipate a

question of constitutional law in advance of the necessity of deciding it . . .". *State ex rel. Ellenburg v. Gagnon*, 76 Wis. 2d 532, 536, 251 N.W.2d 773, 775 (1977). The issue presented by DNR is not developed on the record and thus is not yet properly before this Court. Courts act only to determine actual controversies--not to announce principles of law or to render purely advisory opinions. *See Id.*

STATEMENT OF THE CASE

DNR's petition fails to mention facts central to the issue before this Court and actually presumes facts that are not in the record.

This appeal arises out of DNR's decision to deny the Council an administrative hearing regarding the sufficiency of mercury and phosphorus permit terms to protect water quality.

On May 27, 2005, DNR proposed to reissue a WPDES permit to Fort James to discharge pollutants into the lower Fox River in northeastern Wisconsin. The permit did not limit Fort James' discharges of mercury and phosphorus to levels necessary to protect fish and aquatic life, recreation, and human health. (R.7 pp.331-349, 351; A-App. 101-119,122-123.)

DNR claimed that it was unable to establish a protective limit for phosphorus because it had not formally promulgated a numeric water quality criterion for phosphorus, and stated that the mercury terms were in accordance with state regulations at section NR 106.145(2)-

(3). (R.7 pp.316-317; A-App 147-149.) On August 30, 2005, DNR issued the Fort James Permit without altering the phosphorous or mercury requirements. (R.7 pp.316-317; A-App 147- 149.)

Pursuant to § 283.63, Stats., the Council petitioned for review of the phosphorus and mercury terms and conditions in the Fort James permit. (R.7 pp.243-254; A-App. 150 – 166.) The Council alleged that DNR failed to determine whether Fort James’ increased discharge of phosphorus and continued discharge of mercury would violate water quality standards protective of human health, wildlife, fish and aquatic life and recreation. (R.7 pp.243-254; A-App. 150 – 166.) DNR partially denied that petition, barring Council from raising any challenge grounded in federal law. (R.7 pp.5-9; A-App. 167-171.)

The circuit court, on judicial review, upheld DNR’s decision to deny the Council’s request for review of the mercury and phosphorus terms in the Fort James permit, holding that DNR must limit the review pursuant to section 283.63 to challenges based upon state law because EPA was not a party to the action. (R.64 pp.5-6; A-App. 260-261.) The circuit court also held that it was without jurisdiction because EPA was an indispensable party under section 803.03. (R.64 pp. 6; A-App. 261.) The circuit court further denied Council’s requests for declaratory judgment. (R.64 pp. 6; A-App. 261.)

The Council appealed, and the Court of Appeals reversed the circuit court’s judgment and DNR’s decision. Pet-App:101-121. The Court of Appeals also upheld the denial of the Council’s declaratory judgment claims, but for

different reasons than those given by the circuit court. Pet-App:101-121. The Court of Appeals held that “DNR possesses the authority to determine whether provisions within a state-issued wastewater discharge permit comply with federal law.” Pet-App. at 118.

Although the state regulations underlying DNR’s decision to issue the Fort James permit without a mercury limit were promulgated in the State administrative code in 2002, DNR did not submit those regulations to EPA for approval as a WPDES permit program revision until May 30, 2007, nearly two years after issuing the Fort James permit. Wis. Adm. Code § 106.145; Council Ct.App.Br:Lawton Aff:Ex:1. The regulations had not been approved by EPA in 2005 when DNR issued the permit at issue here, and were not effective for Clean Water Act purposes at that time. 40 C.F.R. § 123.62. In 2009, EPA formally disapproved those sections of the regulations, NR 106.145(2)-(3), Wis. Adm. Code, that formed the basis for DNR’s decision not to include mercury limits in the Fort James permit. Council Ct.App.Br:Lawton Aff:Ex:1. *See* 33 U.S.C. § 1342; 40 C.F.R. § 123.62. EPA indicated that DNR must issue permits in accordance with EPA-approved state program requirements. (EPA letter 02/17/2009 Ex. 1 at 2.)(emphasis added).¹

¹ Despite EPA’s disapproval, sections NR 106.145 (2)-(3) have not been repealed from the Wisconsin Administrative Code. Wis. Admin. Code § 106.145.

ARGUMENT

DNR's argument in support of its petition relies on both a faulty legal and faulty factual premise. In essence, DNR asks this Court do what the Court of Appeals refused to do - ignore long-standing state law that forms the foundation of the EPA-approved delegated WPDES permit program.

I. THE EPA-APPROVED DELEGATED PROGRAM REQUIRES DNR TO ISSUE PERMITS THAT COMPLY WITH FEDERAL LAW.

DNR's Petition for Review all but completely ignores applicable state law requiring it to issue permits with conditions necessary to ensure compliance with applicable federal law or regulation. In doing so, DNR urges this Court to disregard EPA-approved legal requirements that form the foundation of the WPDES program, and to authorize DNR to do that which it is not authorized to do: issue WPDES permits that fail to comply with applicable law.

A. Revisions to the EPA-Delegated WPDES Program are Not Effective Under the Clean Water Act Unless Approved by EPA.

The federal Clean Water Act ("CWA" or the "Act") prohibits the discharge of pollutants into navigable waters from any point source unless authorized by a National Pollutant Discharge Elimination System ("NPDES") permit. 33 U.S.C. §§ 1311(a), 1342(a)-(b), 1362(12). EPA may delegate its NPDES authority to a state that will impose standards at least as stringent as those of the federal program.

33 U.S.C. § 1342(b); *Niagara of Wis. Paper Corp*, 84 Wis. 2d 32 at 38, *see also* Wis. Stat. §§ 283.001, 283.31(3)-(4) (DNR prohibited from issuing permits where the discharge will not meet applicable federal laws or regulations). Any revisions to the state-run NPDES programs do not become effective under the Act unless approved by the EPA Administrator. 40 C.F.R. § 123.62(b)(4).

B. Under State Law, DNR Is Only Authorized to Issue WPDES Permits That Comply with Applicable Federal Laws and Regulations, Including the Federal Regulations Applicable to the Fort James Permit.

Because state legal and regulatory authority provided DNR all the authority it needed, at that time, to run a program at least as stringent as the federal Clean Water Act, EPA approved DNR's WPDES permit program in 1973. Since then, Wisconsin statutes (then Wis. Stat. § 147.02(3), now Wis. Stat. 283.31(3)) have prohibited DNR from issuing any WPDES permit that failed to require compliance with the following requirements:

- (a) Effluent limitations,
- (b) Standards of performance for new sources.
- (c) Effluent standards, effluents prohibitions and pretreatment standards.
- (d) Any more stringent limitations, including those:
 1. Necessary to meet federal or state water quality standards, or schedules of compliance established by the department; or
 2. Necessary to comply with any

applicable federal law or regulation; or
3. Necessary to avoid exceeding total maximum daily loads established pursuant to a continuing planning process developed under s. 283.83.

(e) Any more stringent legally applicable requirements necessary to comply with an approved area wide waste treatment management plan.

(f) Groundwater protection standards established under ch. 160. (b) Of each fee paid under par. (a), \$95 shall be credited to the appropriation account under s. 20.370 (4) (mi).

Wis. Stat. § 231.31(3). (emphasis added).

Applicable federal laws and regulations require DNR to have the legal authority to implement specified applicable federal regulations. 40 C.F.R. § 123.25(a). DNR, although authorized to impose more stringent requirements, must at all times administer the WPDES program at least in conformance with specified applicable federal regulations. 40 C.F.R. § 123.25(a). These mandatory regulatory provisions are listed at 40 C.F.R. § 123.25(a) and identified as “applicable to State NPDES programs, see § 123.25” in the subtitle of each applicable regulation. *See* 40 C.F.R. § 122.44. State regulations need not duplicate the applicable federal regulations; the state must merely have authority to implement each provision. 44 Fed. Reg. 32877 (June 7, 1979). Applicable federal requirements apply when DNR issues a WPDES permit. *Arkansas v. Oklahoma*, 503 U.S. 91, 105 n.10 (1992).

Section 283.11(2), Stats., requires that state regulations as they “relate to point source discharges, effluent limitations,

municipal monitoring requirements, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards shall comply with and not exceed the requirements of the [Clean Water Act].” Wis. Stat. § 283.11(2). This requirement does not alter or eradicate the separate requirements of 283.31(3)(d), Wis. Stat. Nor does it authorize DNR to issue WPDES permits that fail to contain conditions necessary to ensure compliance with applicable federal law or regulation, in direct violation of 283.31(3)(d)2, Stats. *See* Wis. Stat. § 283.11(2).

The mere fact that DNR has adopted regulatory language under 283.11 does not by itself assure that state issued permits will comply with all applicable federal regulations. Here, for example, DNR issued a WPDES permit that violated federal law. The mercury requirements contained in state regulations, and implemented in the Fort James permit, do not comply with federal law. Council Ct.App.Br:Lawton Aff:Ex:1. (EPA finding that Wis. Adm. Code § NR 106.145(2)-(3) does not conform to federal Clean Water Act requirements.) Under DNR’s theory, citizens and permittees alike would be precluded, in any forum, from demonstrating that a WPDES permit fails to comply with applicable federal laws or regulation.

C. DNR’s Overpromulgation Argument Is No More Than a Distraction and Has Nothing to do with the Challenged WPDES Permit Terms. There is No Regulatory Authority Authorizing EPA to Overpromulgate State Law and Regulations Related to the WPDES Program, Generally, as Distinct from Establishing Water Quality Standards.

For the first and only time in its petition, on page 10, DNR acknowledges the state statutory mandate requiring DNR to issue permits that contain conditions necessary to comply with applicable federal law or regulation. Yet DNR, without any legal or factual support, limits those laws that are “applicable federal law” to laws that EPA “overpromulgates,” meaning EPA disapproves a Wisconsin water quality regulation and promulgates a federal water quality standard to be applied to Wisconsin discharges in place of the disapproved Wisconsin regulation. DNR is wrong.

The CWA is multifaceted, creating several distinct but interrelated programs. One such program, Title III of the Act, is the Standards and Enforcement program, often referred to as the Water Quality Standards program. 33 U.S.C. §§ 1311-30. This program requires states to set water quality goals for the waters within their states, such as the goal that waters be fishable and swimmable, and set pollutant loads to protect those uses. *See* 33 U.S.C. § 1313(a). Under that program EPA is authorized to “overpromulgate” water quality standards that apply directly to a state where EPA determines that a standard is necessary or that the state has submitted a standard that fails to meet the CWA. 33 U.S.C. § 1313(c)(4).

That program is distinct from the NPDES permit program, Title IV of the Act, which authorizes EPA to “delegate” a NPDES permitting program to a state, but does not authorize EPA to “overpromulgate” state NPDES statutes and regulation. Once EPA has delegated authority, EPA’s oversight is limited to reviewing state program revisions, objecting to permits, or withdrawing delegation of the state program in its entirety. *See* 33 U.S.C. § 1342(d)(2), 40 C.F.R.

123.62-63. EPA is not authorized under the NPDES program to “overpromulgate” state NPDES statutes and regulations.²

State law requires DNR to issue permits that comply both with any overpromulgated federal water quality standards, 283.31(3)(d)(1), Stats., and with applicable federal law or regulation, 283.31(3)(d)(2), Stats. DNR is independently obligated to issue permits that comply with applicable federal regulations, as more fully defined above, see Section I.B., and 40 C.F.R. § 123.25.

D. DNR’s Misinterpretation of 283.31(3)(d)(2), Stats. Illustrates the Need for Review of Permit Terms for Compliance With Federal Law.

DNR’s disregard of the clear statutory mandate at 283.31(3)(d)(2), Stats., illustrates the need for review of state permit terms that fail to comply with applicable federal law. Although EPA has approved the state statute, DNR’s interpretation of its obligations under that statute contradicts both state and federal law. DNR’s definition of “applicable federal law,” as only those water quality standards regulations that EPA has overpromulgated, has no basis in law.

² The only exception allowing EPA to promulgate NPDES procedures for Wisconsin was not authorized until 1990, when Congress adopted the Great Lakes Critical Program Act of 1990, and does not apply to discharges in the larger Mississippi River basin. 33 U.S.C. § 1268(c)(2); 40 C.F.R. §§ 132.1(a), 132.6(h)-(j). Where a state fails to submit adequate procedures pursuant to the Water Quality guidance for the Great Lakes System, EPA must identify procedures in 40 C.F.R. Part 132 that apply within the Great Lakes System in the state. 40 C.F.R. § 132.5(f)(2). Importantly, these provisions were not implicated in DNR’s issuance of the Fort James permit without necessary mercury or phosphorus limits.

Without the opportunity to review DNR's issuance of a permit that violates federal law through a state administrative hearing, the Council would be left without any opportunity to challenge DNR's implementation of applicable federal law in a permit. Such a system would provide DNR unfettered discretion to issue permits that might comply with provisions of state law, but that violate applicable federal law and regulations, contrary to the state's own statute requiring compliance with federal law.

That is precisely what DNR attempted to do here: bar the Council from demonstrating during an administrative review that the permit violates applicable federal law. State law does not and cannot authorize this type of discretion on DNR's part.

State law *does* authorize DNR to present evidence to the state tribunal during a review hearing, including evidence that EPA has approved the regulations underlying the permit as compliant with federal law. The state tribunal is then free to determine whether EPA has approved the regulation, whether DNR's application of the state rule complies with EPA's approval of the regulation, and whether the permit in fact complies with federal law. Wis. Stat. § 283.63. But, state law *does not* authorize DNR to bar the Council from demonstrating to the tribunal that a state permit violates state law requiring compliance with applicable federal law.

II. THE COUNCIL HAS NOT CHALLENGED A PERMIT TERM THAT FOLLOWS EPA-APPROVED STATE REGULATIONS AND

HAS NOT CHALLENGED ANY STATE
REGULATION.

As outlined above, state statutes require DNR to issue permits that include terms necessary to comply with more stringent limitations, including federal regulations. Put another way, DNR is not authorized to issue WPDES permits that fail to comply with applicable federal laws or regulations. DNR's issuance of state regulations approved by EPA does not in turn authorize DNR to issue WPDES permits that fail to comply with applicable federal regulations.

The Council simply asked for an opportunity to challenge DNR's failure to do what it is required to do: comply with applicable federal regulations at 40 CFR §122.4(i), 122.44(d), and 122.45(d).

In essence DNR seeks to prohibit review of legally required permit terms. To avoid such review, DNR has created a red herring by suggesting that the issue is whether a permit complies with EPA-approved Wisconsin regulations. That issue was not presented to or decided by the courts below.

A. The Council is Not Challenging A State
Regulation Approved by EPA.

The record does not establish that EPA approved as compliant with federal law the state regulations underlying the permit terms the Council challenges. In fact, after DNR issued the Fort James permit, EPA determined certain of those regulations violated federal law and disapproved them. Council Ct.App.Br:Lawton Aff:Ex:1. The Council is not

challenging state regulations approved by EPA. Rather the Council merely wishes to challenge DNR's unauthorized issuance of a permit that fails to comply with applicable federal law.

B. DNR Promulgation of State WPDES Regulations, by Itself, Does Not Preclude DNR From Issuing Any Particular WPDES Permit In Violation of Applicable Federal Law.

DNR's promulgation of state regulations does not relieve DNR of its independent obligation to issue permits that comply with applicable federal law. DNR cannot skirt its statutory obligations by promulgating state regulations that violate federal law, avoiding EPA review of those regulations, and then issuing permits that violate applicable federal law. DNR seeks this Court's consent to continue this practice insulated from scrutiny.

C. EPA's Approval of Piecemeal WPDES Program Revisions Does Not Independently Ensure That WPDES Permits Comply with Applicable State and Federal Laws or Relieve EPA of Its Independent Duty to Issue Permits that Comply with Applicable Federal Law.

DNR is correct that nothing requires its regulations to be identical to EPA's regulations. *See* 40 C.F.R. 123.25(a). But EPA's approval of a DNR regulation does not establish an incontrovertible determination that each and every state permit issued thereafter is in compliance with federal law,

regardless of its contents. Nor does EPA's approval of a DNR regulation alter DNR's independent obligation to issue permits that comply with applicable federal law. Regardless of EPA's approval or disapproval of state regulations, state statutes never authorize DNR to issue WPDES permits that fail to comply with applicable federal law.

D. The Council's Only Avenue for Obtaining Review of Permit Terms That Violate Applicable Federal Law is in State Court.

As the Court of Appeals so concisely established, EPA's failure to object to a permit is discretionary and unreviewable, and EPA does not have the exclusive right to determine state compliance with federal environmental laws and regulations. The Wisconsin legislature has established a system for issuing and reviewing WPDES permit terms regardless of whether they are based on state law or applicable federal law. Wis. Stat. § 283.63. Nonetheless, DNR wishes this Court to bar review when the concern is that the permit fails to comply with federal law. As an alternative to administrative review pursuant to 283.63 Stats., DNR suggested, under no clear authority, that the Council's recourse when DNR issues a permit that fails to comply with applicable federal law is to "ask nicely" for EPA to object to the permit or disapprove the state regulations underlying the permit, or request the Natural Resources Board or the State Legislature to promulgate new regulations for EPA to approve. DNR argued that the Council — rather than utilize the state law procedures for obtaining review of a permit — should jump through a series of legal hoops that will not provide the recourse they request — a permit that complies with federal law

First, EPA is under no obligation to object to a state issued permit, even if it finds the permit violates federal law. *Save the Bay Inc. v. Administrator of EPA*, 556 F.2d 1282, 1294-95 (5th Cir. 1977). Requiring EPA to respond to petitions to veto a permit interferes with the informal supervisory function Congress envisioned. *Id.* at 1291-92.

Second, EPA's disapproval of the very same regulations underlying this permit failed to remedy the problem here. The Fort James WPDES permit still contains terms based on the regulations EPA disapproved, NR 106.145(2)-(3), and those disapproved regulations continue to be set forth as applicable state regulations in the Wisconsin Administrative Code. *See* Wis. Admin. Code § NR 106.145(2)-(3) (2005). Under the state's theory that DNR must implement state law and only state law, the DNR may even be required to rely on these disapproved regulations when issuing WPDES permits.

Third, in the extremely unlikely event that the Council convinced the Natural Resources Board or the legislature to promulgate new regulations for EPA to approve, the Fort James permit would continue to contain terms that fail to comply with state law and applicable federal regulations, absent DNR's modification of the permit possibly years after it was issued.

Fourth, a petition to EPA to withdraw the approval of the entire WPDES program, would not remedy the Fort James permit. Withdrawal of a state program is only available where the state repeatedly issues permits that fail to conform to the Act. 40 C.F.R. § 123.63(a)(2)(ii). The Council's

concern is DNR's issuance of the Fort James WPDES permit in violation of applicable federal law. A petition to withdraw the WPDES program, premised solely on DNR's issuance of the Fort James permit in violation of applicable federal law, would fail to meet the criteria for withdrawal of the Wisconsin program.³

Lastly, DNR's suggestion that the Council file a federal citizen suit against EPA to promulgate regulations for the state under 33 U.S.C. § 1365(a)(2), is premised on a faulty interpretation of law. Federal citizen suits under 33 U.S.C. § 1365(a)(2) are only available where EPA has failed to perform a non-discretionary duty. In DNR's example, *Florida Wildlife Federation v. Jackson*, the plaintiffs alleged that EPA had failed to perform its non-discretionary duty under Title III of the Act, 33 U.S.C. 1313(c)(4)(B), to establish water quality standards for the state of Florida. *Florida Wildlife Federation v. Jackson*, No. 4:08-Cv-324, 2009 WL 5217062, at *4 (N.D. Fla., Dec 30, 2009). DNR has pointed to no similar non-discretionary duty in Title IV of the Act, relating to NPDES permits, that would provide the relief the Council seeks.

E. Section 283.63, Stats., Authorizes Review of State Permits For Compliance with State Law, and That State Law In Turn Requires Compliance With Applicable Federal Law.

³ Interestingly, a court decision which strikes down or limits State NPDES authorities – precisely what DNR is asking this court to do – does meet the criteria for withdrawal of the program. 40 C.F.R. § 123.63(a)(1)(ii).

DNR recognizes that Administrative Law Judges (“ALJs”) are competent to hear objections to DNR’s implementation of a state regulation as inconsistent with that regulation. Nonetheless, DNR contends that ALJs are not competent to hear objections to DNR’s implementation of a state statute as inconsistent with that statute itself. DNR is not authorized under state law to issue permits that fail to comply with applicable federal law, but under DNR’s theory the Council should be barred from demonstrating that DNR acted outside its statutory authority when it issued the Fort James permit in violation of its own authorizing statutes. DNR desires to be the sole and final arbiter of its own statutory authority– but that is a role reserved for an ALJ, and then for court review. Nothing in state or federal law precludes the Council from challenging DNR’s issuance of a WPDES permit that violates applicable federal law as outside DNR’s statutory authority.

DNR argues that under state law it cannot alter a rule in the course of a permit review hearing, and that under EPA’s delegation it cannot implement a rule revision that EPA has not approved. Yet what DNR really seeks from this Court is revision or abrogation of the requirements in 283.31(3)(d)(2), that under DNR’s own theory it cannot implement without EPA approval. DNR asks this Court to override EPA’s prior determination that DNR must, as part of an EPA-delegated NPDES program under 283.31(3)(d)(2), Stats., issue permits that comply with applicable federal laws and regulations. DNR’s argument trips over its own feet as DNR simultaneously argues that state courts “cannot second guess EPA’s approval of the state program.” (App.Pet. at 17).

F. The Council Requested the DNR to Review the Fort James Permit for Compliance With State Law, Which Explicitly Requires Compliance with Applicable Federal Law.

State Courts and ALJs are perfectly capable, when presented with evidence, including EPA guidelines and other documents, to determine whether DNR acted outside its authority when it issued a WPDES permit to Fort James that fails to comply with state law requirements – including those state law requirements mandating that permits contain conditions necessary to comply with applicable federal law. State statutes do not authorize DNR to bar challenges that DNR acted outside its authority or in violation of state law.

III. DNR'S REMAINING MISCELLANEOUS CONTENTIONS ARE WITHOUT MERIT AND FAIL TO JUSTIFY SUPREME COURT REVIEW.

DNR's purported constitutional claim is unsupported by the record and without factual or legal substance. This Court has frequently stated that it will, ". . . never . . . anticipate a question of constitutional law in advance of the necessity of deciding it . . ." *State ex rel. Ellenburg v. Gagnon*, 76 Wis. 2d 532, 536, 251 N.W.2d 773, 775 (1977).

Supreme Court review is not necessary to clarify imprecise dicta in cases relied on by the Court of Appeals. This issue does not independently warrant Supreme Court review.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that DNR's Petition for Review fails to satisfy the criteria for review, and should be denied.

Respectfully submitted this 26th day of May, 2010.



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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a response to a Petition for Review produced with a proportional serif font. The length of this response is 5,373 words.

Dated this 8th day of June, 2010.



Elizabeth Lawton
Staff Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of a response to a Petition for Review in compliance with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic response to Petition for Review is identical in content and format to the printed form of the response filed as of this date.

A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated this 8th day of June, 2010.



Elizabeth Lawton
Staff Attorney