

STATE OF WISCONSIN
SUPREME COURT

CHRIST ANDERSEN, JOHN DEEMANSON, NEERUCA
LEIGHTON KATERS, CHRISTINE ROSSEN RADES,
NATIONAL, WILPHILFE EDUCATION and CLEAN
WATER ACTION COUNCIL, OF NORTHEASTERN
WISCONSIN, INC.,

Petitioners-Appellants,

v.

APPEAL NO. 2008AP0003733

DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent-Petitioner.

REVIEW OF A COURT OF APPEALS DECISION
REVERSING AN AMENDED DECISION AND ORDER
ENTERED BY BROWN COUNTY CIRCUIT JUDGE
TIMOTHY A. HINKFUSS AND HOLDING THAT ONE
MUST IN A PERMIT REVIEW HEARING
DETERMINE WHETHER A WASTEWATER
DISCHARGE PERMIT ISSUED UNDER STATE LAW
PURSUANT TO AN HPA APPROVED STATE
PROGRAM COMPLIES WITH FEDERAL LAW

DEPARTMENT OF NATURAL RESOURCES BRIEF

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TABLE OF CONTENTS

	Page
ISSUE PRESENTED	2
POSITION ON ORAL ARGUMENT AND PUBLICATION	3
STATEMENT OF THE CASE	3
ARGUMENT	5
I. THE COURT OF APPEALS DECISION IS REVIEWED DE NOVO BUT MINDFUL OF DNR'S 35-YEAR ADMINISTRATION OF THE WPDES PERMIT PROGRAM, WHICH THE COURT OF APPEALS DECISION CONTRAVENES.....	6
II. THE COURT OF APPEALS DECISION WILL LEAD TO UNWORKABLE RESULTS.....	7
III. THE COURT OF APPEALS IMPROPERLY EXTENDED STATE AND FEDERAL LAW REQUIRING THAT STATE <u>RULES</u> COMPLY WITH FEDERAL LAW, TO TERMS IN STATE <u>PERMITS</u> ISSUED PURSUANT TO STATE RULES.	8
A. EPA determined that Wisconsin DNR has the authority to conduct a state wastewater discharge permit program that implements federal Clean Water Act requirements.....	9

B. Wisconsin statutes authorize DNR to promulgate rules setting standards consistent and compliant with federal requirements..... 10

C. EPA actively participates in DNR's rule-making process. 11

D. EPA reviews promulgated DNR rules through periodic program reviews..... 13

E. EPA reviews promulgated DNR rules upon public request. 13

F. Wisconsin statutes authorize DNR to issue permits with terms that meet standards set by state rules that comply with federal law..... 14

G. The court of appeals decision requires that DNR duplicate the rulemaking process for challenged permit terms. 15

H. EPA reviewed and did not object to the permit issued here..... 15

IV. THE COURT OF APPEALS IMPROPERLY PLACES DNR IN EPA'S SHOES..... 16

A. The federal/state water pollution prevention program comprises water quality standards and permit requirements and procedures..... 16

- B. EPA must formally review and approve revisions of state water quality standards and may determine not to review state permit implementation procedures that it deems are not substantial. 17
- C. EPA may respond in other ways to state permits that include terms pursuant to state rules that did not warrant its review at the time of promulgation. 19
- D. The court of appeals decision makes DNR do EPA's job of objecting to a state permit or reviewing promulgated state rules. 19

V. WHEN DNR ISSUES PERMITS IT IMPLEMENTS STATE LAW AND DIRECTLY IMPLEMENTS FEDERAL LAW ONLY IN INSTANCES OF OVERPROMULGATION. 20

- A. The Clean Water Act authorizes EPA approval of state programs with adequate authority to implement federal requirements. 20
- B. The EPA-approved Wisconsin program authorizes DNR to implement state law, except in instances of overpromulgation. 21
- C. Subdivisions 283.31(3)(d)1. and 2. refer to EPA's overpromulgation of water

quality standards or permitting procedures that apply specifically only to Wisconsin. 23

D. If subdivisions 283.31(3)(d)1. and 2. mean all federal CWA requirements, there is no need for other state statutes or rules, or for a state program. 25

E. No state statute supports the court of appeals decision requiring DNR to bypass EPA and directly implement federal law. 26

VI. CHALLENGES THAT PERMIT TERMS THAT FOLLOW EPA-APPROVED STATE RULES FALL SHORT OF FEDERAL LAW, ARE CHALLENGES THAT THE STATE RULES AUTHORIZING THE PERMIT TERMS DO NOT FOLLOW FEDERAL LAW; THOSE CHALLENGES MAY BE REMEDIED ONLY BY EPA, AND THE COURT OF APPEALS IMPROPERLY HELD OTHERWISE. 27

A. Permit terms that are authorized by state rules may differ from terms that would be authorized under federal law, but if the state program has been approved by EPA as consistent with federal law, then the terms authorized by the approved program are consistent with federal law, and persons seeking a different outcome are really challenging

the state rules or EPA's program approval. 28

B. The Council's challenges to this permit's mercury and phosphorus terms are that the state mercury and phosphorus rules setting those terms fall short of federal law requirements. 29

C. The Council here expressly challenged the permit's mercury provision as consistent with a state rule that violates federal law. 30

D. A claim that a state permit term consistent with state rules falls short of federal law is a challenge to the rules or program, which can be remedied only by EPA or by additional rulemaking. 31

E. EPA must be a party to any challenge to state rules approved by EPA, but is immune from suit in state court. 34

F. DNR authority in a contested-case permit review hearing is limited to review of compliance with state law. 36

VII. THE COURT OF APPEALS ERRONEOUSLY RELIED ON IMPRECISE AND INACCURATE DICTA. 36

CONCLUSION 39

TABLE OF CONTENTS

Cases

Aminoil U. S. A., Inc. v. Cal. State, etc., 674 F.2d 1227 (9th Cir. 1982).....	28
Arkansas v. Oklahoma, 503 U.S. 91 (1992).....	9
Badger Paper Mills v. DNR, 154 Wis. 2d 435, 452 N.W.2d 797 (Ct. App. 1990).....	38
Florida Wildlife Federation v. Jackson, No. 4:08-CV-324, 2009 WL 5217062 (N.D.Fla. Dec. 30, 2009).....	33
Froebel v. Meyer, 217 F.3d 928 (7th Cir. 2000).....	37, 38
Highland Manor Associates v. Bast, 2003 WI 152, 268 Wis. 2d 1, 672 N.W.2d 709	25
Hogan v. Musolf, 163 Wis. 2d 1, 471 N.W.2d 216 (1991)	37-38
Niagara of Wis. Paper Corp. v. DNR, 84 Wis. 2d 32, 268 N.W.2d 153 (1978)	10
Northern States Power Co. v. Bugher, 189 Wis. 2d 541, 525 N.W.2d 723 (1995)	37
Rusk County Citizen Action Group, Inc. v. DNR, 203 Wis. 2d 1, 552 N.W.2d 110 (Ct. App. 1996).....	6
Save the Bay, Inc. v. Administrator of E. P. A., 556 F.2d 1282 (5 th Cir. 1977).....	7, 32

Sewerage Commission of Milwaukee v. DNR, 102 Wis. 2d 613, 307 N.W.2d 189 (1981)	38
U.S. Dept. of Energy v. Ohio, 503 U.S. 607 (1992)	8
Wis. Elec. Power Co. v. DNR, 93 Wis. 2d 222, 287 N.W.2d 113 (1980)	8, 30

Statutes

5 U.S.C. § 701	32
33 U.S.C. § 1251(a)	9
33 U.S.C. § 1313(c)(4)b.	24
33 U.S.C. § 1342(a)	9
33 U.S.C. § 1342(b)	9, 20, 28
33 U.S.C. §§ 1342(c)(3) and 1369(b)	33
33 U.S.C. § 1342(d)	15
33 U.S.C. § 1342(d)(2)	32
33 U.S.C. § 1365(a)(2)	33
33 U.S.C. §§ 1365(a)(2), 1369(b), 1319	35
33 U.S.C. § 1369	29
Wis. Stat. ch. 227	8, 30
Wis. Stat. ch. 283	9
Wis. Stat. § 227.45	31
Wis. Stat. § 281.15(l)	24

	Page
Wis. Stat. §§ 281.15, 283.11 and 283.31.....	11
Wis. Stat. § 283.001	21
Wis. Stat. § 283.001(2).....	10
Wis. Stat. § 283.11	22
Wis. Stat. §§ 283.11, 283.13 and 283.31.....	9
Wis. Stat. §§ 283.11-21	17
Wis. Stat. § 283.11(2).....	10
Wis. Stat. § 283.11(2)(a)	22
Wis. Stat. § 283.31	6, 14
Wis. Stat. §§ 283.31-63	17
Wis. Stat. § 283.31(2)(c)	15
Wis. Stat. §§ 283.31(2)(c) and 283.41	15, 35
Wis. Stat. § 283.31(3).....	22, 23, 25
Wis. Stat. § 283.31(3)(a)-(c).....	22
Wis. Stat. § 283.31(3)(d)	24
Wis. Stat. § 283.31(3)(d)1. and 2.	23, 24, 25
Wis. Stat. § 283.63	3, 27
Wis. Stat. § 283.63(1).....	36
Wis. Stat. § 803.03	35
Wis. Stat. § 902.01(2)(b)	11

Regulations

40 C.F.R. pt. 122	16
40 C.F.R. pt. 123	8, 10
40 C.F.R. pt. 131	16, 18, 33, 35
40 C.F.R. pt. 132	24
40 C.F.R. §§ 123.21-30	17
40 C.F.R. § 123.25.....	16, 28
40 C.F.R. § 123.44.....	15
40 C.F.R. §§ 123.44, 123.62 and 123.63.....	19
40 C.F.R. § 123.62.....	18, 33, 35
40 C.F.R. §§ 123.62 and 131.21.....	10
40 C.F.R. § 123.62 - 123.64	35
40 C.F.R. § 123.62(a).....	17
40 C.F.R. § 123.62(b)(2)	17
40 C.F.R. §§ 123.63and 123.64.....	33
40 C.F.R. §§ 131.2 and 131.3(i).....	24
40 C.F.R. § 131.5.....	10
40 C.F.R. §§ 131.5 and 131.21.....	17
40 C.F.R. § 131.21.....	10, 17, 18
40 C.F.R. § 131.21(c)	23

	Page
40 C.F.R. § 132.5.....	24
40 C.F.R. § 132.6(f)-(j)	25
40 C.F.R. §§ 131.20 and 131.21.....	35
40 C.F.R. §§ 131.41(e) and 132.6(f)-(j)	23
Wis. Admin. Code chs. NR 102 and 104-106.....	17
Wis. Admin. Code chs. NR 102, 105, 106, and 207	11
Wis. Admin. Code chs. NR 102, 104, 105, 106, 210	18
Wis. Admin. Code ch. NR 105.....	18
Wis. Admin. Code ch. NR 106.....	14, 24
Wis. Admin. Code ch. NR 200.....	12
Wis. Admin. Code chs. NR 200-205.....	17
Wis. Admin. Code ch. NR 216.....	12
Wis. Admin. Code ch. NR 243.....	12
Wis. Admin. Code § NR 205.08.....	7
Other	
65 Fed. Reg. 66504-66510	25
75 Fed. Reg. 4175 (Jan. 26, 2010).....	33

STATE OF WISCONSIN
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CURT ANDERSEN, JOHN HERMANSON, REBECCA
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PROGRAM COMPLIES WITH FEDERAL LAW

DEPARTMENT OF NATURAL RESOURCES' BRIEF

The Department of Natural Resources asks this Court to reverse the court of appeals, which erroneously required DNR to determine in the permit issuance and hearing process whether a state wastewater discharge permit term, authorized by state rules as part of an EPA-approved program in a permit to which EPA has not objected, meets federal law requirements. The court of appeals decision will potentially result in improperly promulgated and non-federally approved new state rules, and will establish a regulatory review process that is contrary to the proper remedies of petitioning EPA for objections to permits, rule revision or withdrawal of state program approval.

ISSUE PRESENTED

The United States Environmental Protection Agency has approved Wisconsin's program of statutes and rules regulating wastewater discharges as consistent with the federal Clean Water Act, and has authorized DNR to administer the Clean Water Act permitting program pursuant to those state statutes and rules. State statutes provide that state rules relating to wastewater discharges must comply with the federal Clean Water Act. State statutes authorize DNR to issue wastewater discharge permits containing standards set forth in those rules. At the time that the Ft. James wastewater discharge permit was issued, state rules did not require numerical limits or analyses related to phosphorus and mercury that the Council asserts the federal rules required. Is a state administrative permit issuance and hearing process the appropriate forum for disputes over the application of federal law to the state program that governs state permits, in a state program that EPA has approved and determined is consistent with federal law and where EPA has not objected to the permit that does not have the limits or analyses that the Council seeks?¹

The court of appeals answered: Yes. The court of appeals reversed DNR and the circuit court, and held that DNR must determine whether wastewater discharge permit provisions, which are authorized by state regulations that are part of a state permitting program approved by EPA as consistent with federal law, nevertheless violate federal law.

¹ The court of appeals decision focuses on whether the direct application of federal law is appropriate for the permit review hearing. Logically extended, the court of appeals decision would require DNR staff, even before lengthy contested-case hearings on permits, to review each and every permit term in relation to federal law, including not only federal statutes and regulations but EPA guidance documents, environmental appeal board decisions and federal court decisions, even though all of those sources would already have been consulted, by EPA and/or DNR, in the course of developing and reviewing the state rules governing the permit terms.

The circuit court answered: No. The circuit court affirmed DNR and held that only EPA may determine whether a state permit term violates federal law, EPA is an indispensable party to any state challenge that a state permit term violates federal law, and EPA may be sued only in federal court.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The issue presented for review is one of statewide importance and likely to be repeated. Therefore, both oral argument and publication are appropriate.

STATEMENT OF THE CASE

In 2005 DNR issued a public notice of intent to reissue to Ft. James Operating Company a WPDES Permit regulating the discharge of a variety of pollutants into the lower Fox River, along with the proposed permit and permit reissuance fact sheet explaining the proposed permit terms. R.7:331-360, 372-391.²

EPA sent a letter stating that it "will not object" to the permit. R.7:311; Pet-App:134.

DNR issued its Final Decision on Permit Reissuance and Response to Comments, and reissued the Permit effective from October 1, 2005 to September 30, 2010. R.7:316-317.

Petitioners, referred to as the Council by the court of appeals and so referred to as the Council here, requested a contested-case permit review hearing under Wis. Stat. § 283.63, on the phosphorus terms in Section

² Ft. James Operating Company is now GP Consumer Products, LP. WPDES is officially the Water Pollutant Discharge Elimination System, and in common usage is referred to as the Wisconsin Pollutant Discharge Elimination System.

2.2.1 of the permit based on five claims that the terms violate federal law and one claim that the terms violate state law, and on the mercury terms in Sections 2.2.1 and 2.2.1.3 of the permit based on three claims that the terms violate federal law. R.7:243-254.

DNR granted the contested-case hearing request to hear the phosphorus claims based on state law and denied the request to hear claims based on federal law because DNR's sole permitting authority is state law. DNR also denied the contested-case hearing request on the mercury issues because those issues were not previously raised in the public comment period on the proposed permit. R.7:5-9; Pet-App:129-133.

The Council commenced this action, seeking judicial review of DNR's decision denying the Council's request for a contested-case permit review hearing on its mercury claims that were not raised in the public comment period and its phosphorus and mercury claims that were based on federal law. The Council also sought a declaratory judgment that DNR may not require that issues be raised in the public comment period before they may be addressed in a contested-case permit review hearing (or that the mercury issues were so raised), and that DNR may not issue WPDES permits that do not comply with federal law. R.1:1-38. The Council also sought declarations that two state rules are invalid, but withdrew those claims in its reply brief. R.23:2.

The circuit court dismissed the claims for declaratory judgment and found that DNR properly limited the scope of the contested-case permit review hearing, leaving only the state law phosphorus claims to be addressed in the permit review hearing. R.64:1-7; Pet-App:122-128.

The Council appealed, and the court of appeals issued its decision reversing the circuit court and DNR on April 13, 2010. Pet-App:101-121. The court of appeals upheld the dismissal of the declaratory judgment claims,

but reversed DNR's denial of the Council's hearing request.

DNR petitioned for review of only that part of the court of appeals decision requiring DNR to hold a contested-case hearing on whether the permit terms comply with federal law. This Court granted the petition, and DNR submits this brief asking that this Court reverse the court of appeals and affirm DNR.

ARGUMENT

Wisconsin law requires that state rules governing the terms in state water pollutant discharge elimination permits (referred to in this brief as wastewater discharge permits) comply with federal law. EPA has determined that Wisconsin's statutory and regulatory program for wastewater discharge permits is consistent with federal law. State wastewater discharge permit terms that comply with state rules therefore comply with federal law unless and until EPA finds otherwise. The Council's claims that permit terms that comply with state rules nevertheless fall short of federal law are, therefore, challenges to the state rules themselves and to EPA's determination that the state program is consistent with federal law. The court of appeals decision requiring DNR to hear such challenges in a contested-case permit review hearing would require DNR to second-guess EPA's review of the state program, and would potentially require DNR to replace existing rules with unpromulgated, and non-EPA approved, rules in a permit issuance process. The court of appeals decision disregards the Council's proper remedy, which is to ask EPA to object to the permit, to require Wisconsin to change its program by changing its rules, or to withdraw approval of the state program. Supreme Court review is necessary to prevent the resulting incongruence between federal and state law and overstepping of the bounds of Wisconsin's delegated authority.

I. THE COURT OF APPEALS
DECISION IS REVIEWED DE
NOVO BUT MINDFUL OF DNR'S
35-YEAR ADMINISTRATION OF
THE WPDES PERMIT PROGRAM,
WHICH THE COURT OF
APPEALS DECISION
CONTRAVENES.

The question on review is whether DNR has authority under state law to determine in a contested-case permit review hearing whether wastewater discharge permit terms, which are prescribed pursuant to state rules in a state program that has been approved by EPA as consistent with federal law, and which are part of a permit to which EPA has not objected, nonetheless violate federal law. This is a legal question reviewed *de novo*. *Rusk County Citizen Action Group, Inc. v. DNR*, 203 Wis. 2d 1, 6, 552 N.W.2d 110 (Ct. App. 1996) ("[t]he extent of the DNR's statutory authority is a question of law").

DNR's interpretation of its authorizing statutes is both longstanding and reflective of its experience working with EPA in developing the program comprising the regulations and permits authorized by those statutes, and in issuing WPDES permits consistent with the statutes and regulations, for over 35 years. DNR has administered the WPDES permitting program since EPA approved it in 1974. Note to Wis. Stat. § 283.31, tracing the history of that section to 1973; 1973 Memorandum of Agreement and 1974 EPA Letter to Governor Lucey (Pet-App:333-350). (EPA's state authorization information can be found at <http://cfpub.epa.gov/npdes/statestats.cfm>.) The court of appeals decision contravenes DNR's longstanding understanding of the WPDES statutes based on that experience.

II. THE COURT OF APPEALS DECISION WILL LEAD TO UNWORKABLE RESULTS.

The answer to the legal question before the Court has the potential to affect the many wastewater discharge permits that DNR issues each year. DNR's website lists 386 industrial dischargers and 680 municipal dischargers with permits; 22 are currently publicly noticed for issuance or reissuance. See <http://www.dnr.state.wi.us/org/water/wm/ww/permlists.htm>.³ Because these permits are reissued every 5 years, the answer to the question presented may affect hundreds of permits as their 5-year terms expire.

The court of appeals decision in general upsets the federal/state law balance struck by the federal Clean Water Act, see *Save the Bay, Inc. v. Administrator of E. P. A.*, 556 F.2d 1282, 1284 and 1297 (5th Cir. 1977) (referring to the "delicate partnership" and "contrapuntal balance" set up by the CWA between EPA and the states), and may in any specific case result in incongruence between state and federal law.

The court of appeals decision also disturbs the system created by the Clean Water Act of continuing checks and balances after a state has been authorized to implement the wastewater permitting program:

Even when a State obtains approval to administer its permitting system, the Federal Government maintains an extraordinary level of involvement. EPA reviews state water quality standards. 33 U.S.C. § 1313(c). It retains authority to object to the issuance of particular permits, § 1342(d)(2), to monitor the state program for continuing compliance with federal directives, § 1342(c), and even to enforce the terms of state permits when the State has not instituted enforcement proceedings, § 1319(a).

³ Additionally, hundreds of industrial facilities are covered under general permits under Wis. Admin. Code § NR 205.08.

See U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 634 (1992).

The review required of DNR by the court of appeals—whether permit terms that comply with state rules also comply with federal law—is necessarily a review of the rules not the terms, and only EPA or a federal court may reject promulgated state rules as inconsistent with federal law.

If the Administrative Law Judge deems a rule governing a permit term to be contrary to federal law, and orders DNR to change the permit accordingly, DNR will have to adopt the ALJ's federal law interpretation. The result will effectively be a rule revision that has been neither properly promulgated by DNR through the procedures in Wis. Stat. ch. 227 (*see Wis. Elec. Power Co. v. DNR*, 93 Wis. 2d 222, 287 N.W.2d 113 (1980)), nor approved by EPA through the procedures in 40 C.F.R. pt. 123. And DNR will face a conflict between the ALJ's interpretation and EPA's approval of the state program. DNR asks this Court to forestall such a result by reversing the court of appeals.

III. THE COURT OF APPEALS
IMPROPERLY EXTENDED
STATE AND FEDERAL LAW
REQUIRING THAT STATE RULES
COMPLY WITH FEDERAL LAW,
TO TERMS IN STATE PERMITS
ISSUED PURSUANT TO STATE
RULES.

The court of appeals erroneously extended state and federal law requiring that state rules comply with federal law, to terms in state permits issued pursuant to state rules. EPA has approved state statutes and rules that regulate wastewater discharges through a permitting program. The state statutes authorize DNR to administer a wastewater discharge permit program, require that DNR

promulgate rules with standards that comply with federal law, and authorize DNR to issue permits that follow those state rules. *See e.g.*, Wis. Stat. §§ 283.11, 283.13, and 283.31. The court of appeals' conclusion that DNR is authorized to determine whether permit terms, to which EPA has not objected and which follow properly promulgated state rules as part of a program approved by EPA, fall short of federal law upsets the federal/state balance established by law and is not supported by law.

- A. EPA determined that Wisconsin DNR has the authority to conduct a state wastewater discharge permit program that implements federal Clean Water Act requirements.

"The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251(a)). Effectuating this partnership, the Clean Water Act created the National Pollutant Discharge Elimination System (NPDES), which prohibits discharges of pollutants into the waters of the United States without a permit issued by EPA or by a state pursuant to a formal delegation of authority to that state. 33 U.S.C. § 1342(a).

EPA reviewed DNR regulations and Wis. Stat. ch. 283 and determined that Wisconsin has all of the authority necessary to administer and enforce a wastewater discharge permitting program that mirrors the federal program. DNR Ct.App.Br:R-App:105-122 (Memorandum of Agreement signed by DNR on 12/14/1973 and by USEPA on 12/17/1973); *see also* 33 U.S.C. § 1342(b). EPA thereafter approved the state wastewater discharge statutes and rules implementing federal CWA

requirements through state law. DNR Ct.App.Br:R-App:105-122 (Letter to Governor Lucey from Russell Train, Administrator of EPA dated 02/04/1974). EPA has continued to review and approve Wisconsin's regulatory program since 1974 under 40 C.F.R. §§ 123.62 and 131.21.⁴

- B. Wisconsin statutes authorize DNR to promulgate rules setting standards consistent and compliant with federal requirements.

DNR does not implement the federal law. *See Niagara of Wis. Paper Corp. v. DNR*, 84 Wis. 2d 32, 52, 268 N.W.2d 153 (1978) ("It should also be pointed out that EPA determinations under the [Clean Water Act] do not automatically become administrative law in Wisconsin. The DNR still makes the rules"). DNR implements the federally delegated program under state law. DNR acts pursuant to state statutes and promulgates state rules authorized by the state statutes.

Wisconsin Stat. § 283.001(2) authorizes DNR "to establish, administer and maintain a state pollutant discharge elimination system . . . consistent with all the requirements of the federal water pollution control act amendments of 1972." Under Wis. Stat. § 283.11(2), "all rules promulgated by" DNR as they relate to wastewater discharge standards "shall comply with and not exceed the requirements of the federal water pollution control act."

Under these statutes, DNR assesses whether the rules that it promulgates comply with federal law in the course of the rule-making process. Throughout this process, both EPA and the public are involved and submit comments. This process is separate from the permit issuance and review processes at issue here. Following

⁴ 40 C.F.R. pt. 123, §§ 131.5 and 131.21, all cited in this brief, are reproduced at the end of the Appendix at Pet-App:316-332.

the rule-making process, DNR promulgates rules pursuant to Wis. Stat. §§ 281.15, 283.11, and 283.31, which govern the terms that DNR places in permits.

C. EPA actively participates in DNR's rule-making process.

EPA actively participates in DNR's rule-making process, and DNR affirmatively solicits EPA's comments during that process, as shown in the following examples.

EPA submitted extensive comments on the antidegradation rule package in 1997. Pet-App:136-139.⁵ See also, Preamble to the 1997 revision to Wis. Admin. Code chs. NR 102, 105, 106, and 207:

These revisions are proposed to be consistent with and as protective as the U.S. Environmental Protection agency's Water Quality Guidance for the Great Lakes System, published on March 23, 1996 . . . and are part of the triennial review process required by U.S. EPA. States have two years (until March 23, 1997) during which to promulgate regulations that are as protective as and consistent with the Guidance.

EPA submitted comments on DNR's proposed chloride rules in 1998, noting at Pet-App:140,

Collaboration between our agencies in the development of policies and procedures promotes efficient administration of the WPDES and ensures

⁵ DNR asks the court to take judicial notice of the existence of EPA's comments here, and of other official records from EPA and DNR elsewhere in this brief, as "sources whose accuracy cannot reasonably be questioned" under Wis. Stat. § 902.01(2)(b). Judicial notice is appropriate because deciding the legal question before the Court depends not on any evidence in the record before the agency but on construction of statutes independent of the agency proceeding here, and these public official agency documents support the statements in this brief that present the context in which the statutes are to be read.

continued progress toward the goals of the Clean Water Act (CWA).

EPA submitted comments on proposed revisions of Wis. Admin. Code ch. NR 200 relating to applications for permits and variances in 1999. Pet-App:144-171. Specifically,

EPA Region V comments were primarily aimed at making sure that the rule captured the requirements of the corresponding federal regulations. Subsequent to receiving the comments, Department staff communicated with EPA staff via a conference call, personal telephone contacts and electronic mail to make sure Department staff fully understood the comments and to determine if the suggested rule modifications satisfied EPA's concerns.

Pet-App:153 (emphasis added).

EPA submitted comments twice on DNR's proposed revision of Wis. Admin. Code ch. NR 243 relating to concentrated animal feeding operations in 2001, noting, "We sincerely appreciate the cooperation you and your staff have shown by changing the proposed chapter in response to our earlier comments" and identifying additional changes that needed to be made to be consistent with federal regulations. Pet-App:172-175.

EPA submitted comments on DNR's proposed revisions of Wis. Admin. Code ch. NR 216 relating to storm water discharge permits in 2003. Pet-App:176-179.

In the course of developing new rules for animal feeding operations in 2005, DNR specifically sought EPA input, "If the WDNR is not correctly interpreting EPA's regulations with regard to the definition of agricultural stormwater discharges, please contact me directly . . . since the Department is in the process of promulgating administrative rules that are in part based on federal regulations." Pet-App:180. EPA submitted comments on the entire proposed rule package that same year, noting, "We look forward to working cooperatively with you and

your staff to resolve our comments before the Wisconsin Natural Resources Board approves and adopts the code." Pet-App:181. EPA was on the Technical Advisory Committee for the rule revision. Pet-App:200.

EPA has been equally extensively involved in the most recent development of rules setting a water quality standard for phosphorus and permit procedures for implementing that standard. Pet-App:136-139; 201-210.

D. EPA reviews promulgated DNR rules through periodic program reviews.

EPA reviews DNR rules after they have been promulgated through periodic program reviews, such as its most recent 2008-2009 review of Wisconsin's WPDES program. Pet-App:211-230 (comprising a draft of the review document currently in development).

E. EPA reviews promulgated DNR rules upon public request.

EPA also reviews DNR rules after they have been promulgated upon public request, as was the case with the mercury and phosphorus rules at issue here.

After DNR issued the Ft. James permit, the Council and the National Wildlife Federation asked EPA to review and disapprove Wisconsin's mercury rule, which is the source of one of the contested terms in the Ft. James' permit. Pet-App:287-292. Due to the concerns regarding the procedures in the rule, which provides for mandatory monitoring before a mercury limit may be imposed, DNR agreed to formally submit the rule to EPA for review. Pet-App:293-301. EPA did so and disapproved the rule in part. *Id.* The Council's counsel has similarly sought EPA's review and disapproval of other Wisconsin rules,

including the phosphorus provisions that it challenges here. Pet-App:302-312.

It remains significant that EPA did not object to the Ft. James permit when it was reissued by DNR. As noted above, when environmental groups continued to challenge the procedures in the mercury rule, DNR submitted the rule to EPA for formal action (as noted in the EPA review letter) and EPA disapproved some, but not all of the procedures. EPA's letter enables DNR to evaluate whether mercury limits are necessary in accordance with EPA's letter and DNR's other general reasonable potential procedures in Wis. Admin. Code ch. NR 106 at the time of permit reissuance in 2010. It would have been improper for DNR at the time of permit issuance in 2005 to ignore very specific state-promulgated procedures for mercury before EPA took formal action to disapprove those procedures.

- F. Wisconsin statutes authorize DNR to issue permits with terms that meet standards set by state rules that comply with federal law.

As explained above, Wisconsin statutes provide that DNR's WPDES rules must comply with federal law. Wisconsin Stat. § 283.31 authorizes DNR to issue permits with terms that follow those rules. So, permit terms that comply with the rules and statutes that comprise the program that EPA has determined is at least as stringent as federal law, necessarily comply with federal law consistent with EPA's determination.

G. The court of appeals decision requires that DNR duplicate the rulemaking process for challenged permit terms.

After going through the multi-faceted processes reviewed above for determining and confirming that its rules meet the federal and state statutory requirements for consistency with federal law, DNR would be required by the court of appeals decision to duplicate those efforts to determine that permit terms prescribed pursuant to the state rules also comply with the same federal law. No state law authorizes such a duplication.

H. EPA reviewed and did not object to the permit issued here.

EPA's ability to block DNR from issuing a permit upon its objection plays an important role in the federal/state partnership. If EPA objects, DNR cannot issue the permit unless it addresses the reasons for the objection. Wis. Stat. § 283.31(2)(c).

EPA specifically reviewed and had no objection to the permit issued here. R.7:311, Pet-App:134; *see also* Wis. Stat. §§ 283.31(2)(c) and 283.41 (requiring that DNR notify EPA of a permit and barring DNR from issuing a permit to which EPA objects); 33 U.S.C. § 1342(d) and 40 C.F.R. § 123.44 (EPA authority to veto state permits). EPA even asked for additional time to complete its review, indicating that EPA's lack of objection was not just a rubber stamp review of the permit. *See* R.7:330; Pet-App:135.

IV. THE COURT OF APPEALS IMPROPERLY PLACES DNR IN EPA'S SHOES.

Federal law provides for mandatory EPA review of state programs when they are created, and either mandatory or discretionary review of revisions to approved programs thereafter. The court of appeals decision improperly requires DNR to conduct the review relegated by federal law to EPA.

- A. The federal/state water pollution prevention program comprises water quality standards and permit requirements and procedures.

The federal/state water pollution prevention program comprises water quality standards and permit requirements and procedures.

40 C.F.R. pt. 131 prescribes the water quality standards (what the Council in its response to the petition for review called the water quality standards program) that a state must incorporate in an approved program.

40 C.F.R. § 123.25 (what the Council in its response to the petition for review called the permitting program) sets out the checklist of permit implementation requirements that an authorized state must meet in order to obtain EPA approval and to maintain an authorized program. That section includes provisions referring to other C.F.R. sections, which state that they are "applicable to state programs." See the specific sections in 40 C.F.R. pt. 122 referred to in 40 C.F.R. § 123.25.

A state's regulations set limits derived from the water quality standards in Title III of the Clean Water Act, which are imposed on dischargers through permits issued under Title IV.

Wisconsin's program, which comprises rules setting forth water quality standards and permits containing discharge limits to achieve those standards, mirrors the federal framework. The rules setting forth water quality standards are in Wis. Stat. §§ 283.11-21 and in regulations including Wis. Admin. Code chs. NR 102 and 104-106. The procedures for issuing permits that impose those standards on dischargers are in Wis. Stat. §§ 283.31-63 and Wis. Admin. Code chs. NR 200-205.

- B. EPA must formally review and approve revisions of state water quality standards and may determine not to review state permit implementation procedures that it deems are not substantial.

A state obtains initial approval of its wastewater discharge permit program from EPA under 40 C.F.R. §§ 123.21-30. Thereafter, any revision to a state's program follows two different paths of EPA review.

EPA must review and approve a state's revision to its rules setting water quality standards under 40 C.F.R. §§ 131.5 and 131.21. A state obtains input from EPA (and others) in the course of developing its rules and must submit the rules after they have been promulgated to EPA for its review, and EPA must then affirmatively approve or disapprove the water quality standards. *See* 40 C.F.R. § 131.21.

By contrast, a state's revision of its permit implementation procedures may or may not be reviewed by EPA. A state must keep EPA informed of any revision to its permit implementation procedures under 40 C.F.R. § 123.62(a). Under 40 C.F.R. § 123.62(b)(2), EPA undertakes a formal review of such a revision only when EPA determines that the revision is substantial.

Examples of the two different paths of EPA review of state program revisions follow.

In 2009, EPA reviewed and approved revised rules setting water quality standards for toxics in Wis. Admin. Code ch. NR 105, under 40 C.F.R. pt. 131. Pet-App:231-236.

In 2004, EPA received DNR's revised promulgated rules relating to ammonia nitrogen in Wis. Admin. Code chs. NR 102, 104, 105, 106 and 210. EPA reviewed the revisions of water quality standards in chs. NR 102, 104 and 105 as required under 40 C.F.R. § 131.21 and approved the revisions as consistent with federal requirements. Pet-App:237-256. EPA declined to review the revisions to chs. NR 106 and 210, which pertained to implementation of the standards in permits, under 40 C.F.R. § 123.62. Pet-App:237. The inference from EPA's non-review of the latter revisions is that EPA found those revisions not to be substantial.

In 2000, EPA received DNR's revised promulgated rules relating to chlorides. EPA reviewed and approved the revisions of water quality standards as required under 40 C.F.R. § 131.21, and declined to review the revisions relating to publicly owned treatment works authority as not comprising water quality standards. Pet-App:257-264. However, EPA had earlier commented on the proposed implementation procedures in the rule package. Pet-App:265-266.⁶

In 2005, EPA submitted comments on DNR's proposed revisions of rules regulating animal feeding operations, in response to changes in federal regulations, and indicated that it would review the promulgated revised rules under 40 C.F.R. § 123.62. Pet-App:181-199.

⁶ Notably, EPA advised DNR that the implementation procedures were not consistent with federal requirements and that EPA would invoke the procedures in 40 C.F.R. § 123.62 for revision if those procedures were adopted. EPA suggested an alternative approach. Pet-App:265-266.

No formal approval is in DNR's files in response to DNR's 2008 query if EPA planned to issue a formal approval of the rules, indicating that EPA determined the revisions not to be substantial. Pet-App:267.

- C. EPA may respond in other ways to state permits that include terms pursuant to state rules that did not warrant its review at the time of promulgation.

As with the animal feeding operations rules, EPA generally submits comments during the development of DNR's rule revisions, in fulfillment of its role in the federal/state partnership to assure consistency with federal requirements. *See* Section III.C. above. After promulgation, even when EPA decides that a revision is not so substantial as to warrant a formal review, EPA may respond to a state permit that incorporates such a revision by objecting to the permit, requiring additional revision or withdrawing approval of the program under 40 C.F.R. §§ 123.44, 123.62, and 123.63. Citizens who object to permit terms based on unreviewed rules may ask EPA to take those steps, as they may also do for permit terms based on rules that EPA has reviewed and approved.

- D. The court of appeals decision makes DNR do EPA's job of objecting to a state permit or reviewing promulgated state rules.

In this case, EPA had approved the antidegradation rules as they apply to phosphorus (Pet-App:268-286), which governed the terms to which the Council objected in the permit. In this case, EPA had not reviewed the permit implementation rule requiring the taking of 12 samples before setting a mercury limit, a permit term to which the Council also objected. So, the questions are,

with respect to a DNR permit to which EPA has not objected, 1) what should happen when a DNR permit contains a term that follows a state rule setting a water quality standard that EPA has approved, but that the Council asserts violates federal law, and 2) what should happen when a DNR permit contains a term that follows a state rule setting permit implementation procedures that EPA has decided was not so substantial as to warrant review, but that the Council asserts should be reviewed and found to violate federal law?

The court of appeals' answer is that DNR should do EPA's job, because EPA did not object to the permit, and decide 1) whether the already EPA-approved water quality standard rule complies with federal law, and 2) whether the unreviewed permit implementation rule that EPA determined not so substantial as to warrant review should be reviewed and found to violate federal law.

This Court should reverse the court of appeals' assigning of EPA's objection, review and approval roles to DNR.

V. WHEN DNR ISSUES PERMITS IT IMPLEMENTS STATE LAW AND DIRECTLY IMPLEMENTS FEDERAL LAW ONLY IN INSTANCES OF OVERPROMULGATION.

A. The Clean Water Act authorizes EPA approval of state programs with adequate authority to implement federal requirements.

The state program approval provision of the Clean Water Act (33 U.S.C. § 1342(b)) provides that:

(b) State permit programs

... [T]he Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

....

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title [monitoring and recordkeeping]; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

....

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

This language is instructive in that it shows that state programs and regulations do not have to be identical, and that EPA is the entity that determines whether state programs "apply, and insure compliance with" federal requirements.

B. The EPA-approved Wisconsin program authorizes DNR to implement state law, except in instances of overpromulgation.

Wisconsin Stat. § 283.001 provides the broad foundation for the state water pollution prevention program:

(2) The purpose of this chapter is to grant to the department of natural resources all authority necessary to establish, administer and maintain a state pollutant discharge elimination

system to effectuate the policy set forth under sub. (1) and consistent with all the requirements of the federal water pollution control act amendments of 1972.

Wisconsin Stat. § 283.11 provides the foundation for the part of the program that consists of state rules setting water quality standards that meet the federal requirements (Wis. Stat. § 283.11(2)(a)):

[A]ll rules promulgated by the department under this chapter 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 federal water pollution control act, 33 U.S.C. § 1251 to 33 U.S.C. § 1387, and regulations adopted under that act.

Finally, Wis. Stat. § 283.31(3) provides the foundation for the part of the program that consists of the permits containing the limits in the state rules:

(3) The department may issue a permit under this section for the discharge of any pollutant, or combination of pollutants, other than those prohibited under sub. (2), upon condition that such discharges will meet all the following, whenever applicable:

- (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.

The conditions in Wis. Stat. § 283.31(3)(a)-(c) are state standards set by rules under Wis. Stat. § 283.11. The Council appears to hang its hat on the word "federal" in

Wis. Stat. § 283.31(3)(d)1. and 2., and argues that these subdivisions require DNR to directly implement federal law requirements in state permits. To the contrary, the statutory scheme set forth above, the language of the subdivisions themselves taken together with the introductory language in subsection (3), and the placement of the word "federal" only in two subdivisions, indicate that the subdivisions have a much more narrow reach.

Paragraphs (a) to (d) apply only "whenever applicable," Wis. Stat. § 283.31(3)(intro.), namely to certain federal standards that are specifically directed at Wisconsin waters. EPA promulgates such state water-specific standards by overpromulgation for Wisconsin waters through EPA's rule-making process under 40 C.F.R. §§ 131.41(e) and 132.6(f)-(j). Especially instructive for interpreting applicable standards is the table in 40 C.F.R. § 131.21(c), which provides that the promulgated water quality standards in an authorized state are the applicable water quality standards "[u]nless or until" EPA has promulgated a more stringent water quality standard for that state.

- C. Subdivisions 283.31(3)(d)1. and 2. refer to EPA's overpromulgation of water quality standards or permitting procedures that apply specifically only to Wisconsin.

Subdivision 1. requires DNR to include in state permits water quality standards set by federal overpromulgation, and subdivision 2. requires DNR to implement other procedural standards set by federal overpromulgation.

A water quality standard establishes criteria for the surface water that will allow the designated uses of the receiving water to be maintained—either a numeric or narrative standard that specifies how much of a pollutant

can be present and still allow the designated use to be achieved. 40 C.F.R. §§ 131.2 and 131.3(i); Wis. Stat. § 281.15(1). In addition, there are also implementation or permit procedures for how to calculate and impose limits in permits for point source dischargers to ensure that water quality standards will be met. *See, e.g.*, 40 C.F.R. pt. 132; Wis. Stat. § 283.31(3)(d); Wis. Admin. Code ch. NR 106. Subdivision 1. of Wis. Stat. § 283.31(3)(d) refers to the former, and subdivision 2. to the latter. *See* also Section IV above.

EPA may promulgate a specific water quality standard for a state water if the state fails to do so under 33 U.S.C. § 1313(c)(4)b. If EPA does promulgate a specific water quality standard applicable to Wisconsin waters, then Wis. Stat. § 283.31(3)(d)1. requires that DNR issue a permit with limits based on that federally promulgated water quality standard for Wisconsin waters. No such federally promulgated water quality standard for Wisconsin waters exists in this case.

If EPA believes that a state's procedures are inconsistent with federal requirements (other than where EPA has expressly addressed water quality criteria and permit implementation procedures together, as for the Great Lakes in 40 C.F.R. § 132.5), then EPA may disapprove and overpromulgate a federal permit procedure that directly applies specifically only to Wisconsin. If so, then Wis. Stat. § 283.31(3)(d)2. requires that DNR issue a permit that includes that overpromulgated provision.⁷

For example, EPA overpromulgated criteria for copper, nickel, endrin and selenium, provisions governing Total Maximum Daily Loads in the Great Lakes Basin, provisions taking into account intake pollutants in water quality based effluent limit calculations for discharges to the Great Lakes Basin, and provisions determining

⁷ If EPA finds a state's regulations setting water quality standards or terms in a permit or program procedures inconsistent with federal requirements, EPA may also object to the permit, remove program approval, or require a rule revision, as explained in Section VI.D.

reasonable potential for whole effluent toxicity. EPA took this action on November 6, 2000, 65 Fed. Reg. 66504-66510. Overpromulgation means that EPA disapproved Wisconsin's rules and promulgated federal procedures specifically for Wisconsin discharges to the Great Lakes System. See 40 C.F.R. § 132.6(f)-(j).

- D. If subdivisions 283.31(3)(d)1. and 2. mean all federal CWA requirements, there is no need for other state statutes or rules, or for a state program.

To give the subdivisions Wis. Stat. § 283.31(3)(d)1. and 2. the broad meaning urged by the Council would obviate the need for the other parts of subsection (3), and for the delegated program altogether, and there would be no need for DNR to go through the rule-making process to implement the delegated program. DNR could ignore all state regulations and go directly to the federal regulations for its permit terms. There would be no need for any of the other statutory provisions. If "applicable federal law" means all delegable federal standards that apply to the Ft. James permit, as the Council has argued, then state standards are entirely irrelevant.

The Court must construe the statutes so as to avoid such an absurd result and so as not to make other statutory provisions superfluous. *Highland Manor Associates v. Bast*, 2003 WI 152, ¶9, 268 Wis. 2d 1, 672 N.W.2d 709. Limiting the subsections to federal standards set by overpromulgation, where EPA has determined that existing state rules are not adequate to meet federal requirements, preserves the integrity of both the state statutory scheme and the joint state/federal program.

- E. No state statute supports the court of appeals decision requiring DNR to bypass EPA and directly implement federal law.

With the exception of overpromulgation, the standards that must comply with federal law are codified in state law, and it is state law that DNR administers. With the exception of overpromulgation, no state statute authorizes or requires DNR to issue permits that directly implement federal requirements. The court of appeals decision causes the exception to swallow the rule that DNR issues permits that implement state rules as part of a state program that EPA has determined is consistent with federal law, and requires DNR to second-guess that determination. DNR's interpretation and administration of the statute preserve its state law authority and its role in the federal/state delegation partnership.

The Council's interpretation would swallow the delegation altogether. EPA approved DNR's water pollution prevention permitting program because DNR's program is consistent with all of the federal requirements that apply to all approved state programs. The program that DNR administers consists of the state standards that achieve that consistency, except for the overpromulgation of Wisconsin waters-specific federal regulations in supercession of the delegation. In sum, the court of appeals decision is devoid of any state statutory support.

VI. CHALLENGES THAT PERMIT TERMS THAT FOLLOW EPA-APPROVED STATE RULES FALL SHORT OF FEDERAL LAW, ARE CHALLENGES THAT THE STATE RULES AUTHORIZING THE PERMIT TERMS DO NOT FOLLOW FEDERAL LAW; THOSE CHALLENGES MAY BE REMEDIED ONLY BY EPA, AND THE COURT OF APPEALS IMPROPERLY HELD OTHERWISE.

As explained in Section III, DNR implements the federally approved program under state law. State statutes authorize DNR to promulgate rules that must comply with federal law, and to apply those state rules to terms in state permits. Under Wis. Stat. § 283.63, a person may object to a permit condition that violates state rules. However, a person who objects to a permit term on the basis that it falls short of federal law even though it follows state rules, is really challenging the rules. DNR properly limited the scope of the contested-case permit review hearing to the former—objections that permit terms violate state rules. A permit review hearing is not the proper forum for challenges to state rules or laws as being inconsistent with federal law. Such challenges may only be remedied by the agency that found the state program to be consistent with federal law, namely EPA. The court of appeals erred in holding otherwise.

- A. Permit terms that are authorized by state rules may differ from terms that would be authorized under federal law, but if the state program has been approved by EPA as consistent with federal law, then the terms authorized by the approved program are consistent with federal law, and persons seeking a different outcome are really challenging the state rules or EPA's program approval.

EPA approves, and state statutes require, state rules that comply with the federal Clean Water Act requirements, but neither EPA nor state statutes require that state rules be identical to federal rules.

A state that seeks federal approval to administer the NPDES permit program must demonstrate to EPA that the state's program includes requirements that are as protective as the federal requirements. However, it is neither required nor possible that every state have statutes, regulations, and procedures that are identical to the federal requirements. *See* 40 C.F.R. § 123.25 Note ("Except for paragraph (a)(46) of this section, states need not implement provisions identical to the above listed provisions"). *See also Aminoil U. S. A., Inc. v. Cal. State, etc.*, 674 F.2d 1227, 1229-30 (9th Cir. 1982) (describing a "scheme of cooperative federalism established by the [Clean Water] Act"). Rather, EPA determines through review of state statutes and regulations whether the state regulatory program is sufficient.

There are many provisions in federal law that include general substantive or procedural measures for administration of the Clean Water Act. The operative language in 33 U.S.C. § 1342(b), which requires EPA to approve any state program with adequate authority to

issue permits that comply with federal requirements, is emblematic of the broadly prescriptive nature of the delegation. As a result, there is often room for different approaches to the federal requirements that the state must include in its wastewater discharge permitting program. The Wisconsin program that EPA has found complies with federal law may result in different outcomes than may result from federal rules or other states' rules. If a person objects to that difference, then that person's recourse is to ask EPA to object to a permit or to require different state rules, or to ask DNR or the Natural Resources Board or the legislature to promulgate new rules for EPA to approve.

- B. The Council's challenges to this permit's mercury and phosphorus terms are that the state mercury and phosphorus rules setting those terms fall short of federal law requirements.

The Council's objections here to the phosphorus and mercury permit terms are really objections that the state's phosphorus and mercury rules do not go far enough to require what the Council would like to see in state permits. So, the Council asked EPA to review and disapprove Wisconsin's mercury rule, which is the source of the contested mercury term in the Ft. James permit. Pet-App:287-292. EPA reviewed the rule and disapproved it in part. Pet-App:293-301. This decision is reviewable in federal court. *See* 33 U.S.C. § 1369. The mercury term that the Council found unreasonable as contrary to federal law was remedied in response to the Council's appeal to EPA, by EPA's disapproving a regulatory exemption and requiring the issuance of permits without reliance on the disapproved exemption. Pet-App:293-301.

The Council's counsel has also appealed to EPA to review and disapprove other Wisconsin rules, including the phosphorus rules, and to require the promulgation of numerical phosphorus standards other than the narrative limits currently in state law. Pet-App:302-312. Concurrently, DNR has started the rulemaking process for revising its antidegradation procedures based in part upon the Council's appeal to the EPA and EPA's response to that appeal. Wis. Admin. Register No. 651 (April 1, 2010) (publishing scoping statement to begin the rulemaking process for revising Wisconsin's antidegradation procedures).

The appeals to EPA to require changes in Wisconsin's mercury and phosphorus rules confirm that the Council's federal law challenges here to the mercury and phosphorus permit terms are, in fact, challenges to the state rules themselves.

A permit term that follows state rules can only fall short of federal law if the rules prescribing the term fall short of federal law. It would violate state law for DNR to alter a rule in the course of a permit hearing, without following the specific rule-making process in Wis. Stat. ch. 227. *See Wis. Elec. Power Co.*, 93 Wis. 2d at 255-56.

C. The Council here expressly challenged the permit's mercury provision as consistent with a state rule that violates federal law.

In the Council's comments on the proposed Ft. James permit and its request for a contested-case hearing to review the issued permit, the Council clearly attacked the mercury rule (which required 12 monitoring results over 24 months before imposing a mercury limit, regardless whether available information showed the need for a limit earlier), as violating the federal standard. The Council stated that the permit was in compliance with the

state standard, but it was the standard that was not consistent with federal law. *See* Council Ct.App.Br:A-App. 142-145.⁸

EPA reviewed the rule and agreed with the Council. In light of EPA's disapproval, DNR agreed to no longer rely on those portions of the rule that were disapproved. Pet-App:293-301. Absent the decision from EPA, the ALJ had no authority to replace the existing state rule with a new rule allowing the change in the permit term sought by the Council. Rather, the ALJ is required to take official notice of all state administrative rules under Wis. Stat. § 227.45.

- D. A claim that a state permit term consistent with state rules falls short of federal law is a challenge to the rules or program, which can be remedied only by EPA or by additional rulemaking.

If the Council objects to DNR's implementation of a state rule because it is inconsistent with that rule, then that objection may be, and will be, heard by the ALJ. If the Council objects to DNR's implementation of a state rule because it objects to the rule—because it believes that the outcome under the state rule does not comply with federal law—then it is using the wrong procedural vehicle to challenge the rule.

A person who believes that a permit condition that complies with a state rule violates federal law, must ask EPA to object to the permit on that basis, or must appeal to EPA to require DNR to change the rule, as happened with the mercury rule. A person who believes that a permit is missing conditions that are not required by state

⁸ It is unknown whether the Council sent a letter to EPA at the time of the permit's reissuance asking EPA to object to the permit based on this alleged violation of federal law.

law, but that would be required by federal law, must ask EPA to object to the permit on that basis, or must appeal to EPA to set new standards that DNR must adopt, as in the recent appeal to EPA pertaining to phosphorus. Pet-App:302-312.

Federal statutes and cases, including *Save the Bay, Inc. v. Administrator of E. P. A.*, 556 F.2d 1282 (5th Cir. 1977), establish that someone who believes that a state permit contains a condition that interprets state law inconsistently with federal law—that is consistent with state law but not with federal law—has a variety of remedies, all directed at EPA.

First, the person may ask EPA to object to the permit under 33 U.S.C. § 1342(d)(2).⁹ Second, the person may, when EPA issues a statement that it does not object to the state permit, seek judicial review of that decision in federal court on the ground that EPA omitted consideration of a particular violation of CWA requirements—"that a proposed permit contains a violation of applicable federal guidelines that the agency has failed to consider." 556 F.2d at 1296. The federal Administrative Procedures Act provides for this review. 5 U.S.C. § 701. "[I]f [EPA] claims to have attended to the factor during its review, [it] will have to explain in a manner that cannot be labeled arbitrary how it concluded the violation did not warrant veto . . . [or] it will have to reconsider its decision in light of the new factor." 556 F.2d at 1296. Or, a person may claim that unlawful factors tainted EPA's exercise of its discretion.

⁹ That EPA does not often object, or does not review all permits, does not transfer its role as the reviewer of permit compliance with federal law to DNR. EPA has unburdened itself of the duty to administer and implement the NPDES program in Wisconsin, but not of its role as the arbiter of whether Wisconsin permits comply with federal law. Only EPA has the authority to veto a DNR permit, to disapprove a permit term as contrary to federal law, to enforce federal law requirements, or to withdraw approval of the Wisconsin program. DNR has authority only to administer and enforce the state law provisions adopted under state law so as to obtain EPA's approval of the WPDES program.

Third, the person may petition EPA to require revisions to state water quality standards or to promulgate other program revisions. 40 C.F.R. § 123.62 and pt. 131.

Fourth, the person may petition EPA to withdraw approval of the state program, and if EPA denies the request, the person may seek review of the denial. 33 U.S.C. §§ 1342(c)(3) and 1369(b); 40 C.F.R. §§ 123.63 and 123.64.

Fifth, the person may sue EPA to promulgate rules for the state under 33 U.S.C. § 1365(a)(2). *See Florida Wildlife Federation v. Jackson*, No. 4:08-CV-324, 2009 WL 5217062 (N.D.Fla. Dec. 30, 2009) (approving consent decree requiring that EPA develop numeric nutrient standards for Florida waters); 75 Fed. Reg. 4175 (Jan. 26, 2010) (public notice of rulemaking for Florida as required by consent decree).

Under any of these remedies, EPA is the sole decision-maker for determining whether a state rule or a state permit violates federal law. If EPA concludes that state rules comply with federal law or does not object to a state permit, the jurisdiction to challenge those decisions lies in federal court or with EPA.

In this federally approved program, where state statutes authorize DNR to implement state rules that comply with federal law, EPA acts in a supervisory capacity to ensure that state programs across the country comply with federal law. For state ALJs and courts to decide whether state rules in an EPA-approved program do not comply with federal law would be to usurp that Clean Water Act-mandated supervisory role.

Here, for mercury and phosphorus, at the time that the permit was issued, DNR was following a methodology set forth in its rules in a program approved by EPA, and DNR's implementation of that methodology via issuance of the permit was submitted to EPA and EPA did not

object. So, there are two EPA decisions at issue here, EPA's review and approval of DNR's program, and EPA's decision not to object to DNR's permit. The Council cannot challenge either of those EPA decisions in a state permit review hearing or in state court.

The state ALJ and the state court cannot second-guess EPA's approval of the state program, and they should not step in the shoes of EPA and prospectively make the decision for EPA in cases where EPA has not reviewed a rule that is part of the program. Nor can the state ALJ and state court second-guess EPA's determination not to object to the state permit. Both are federal agency decisions, which the ALJ and state court cannot review.

What the Council is really seeking here is additional rulemaking, either voluntarily or as required by EPA, but it cannot do so in a contested-case permit review hearing. If the Council believes that the DNR rule is insufficient, it can petition EPA to overpromulgate or to require DNR to revise the rule, or the Council can petition the Natural Resources Board to initiate rulemaking to be submitted to EPA for approval. The Council cannot use the Ft. James permit review process as a back-door way to obtain a rule or program change.

- E. EPA must be a party to any challenge to state rules approved by EPA, but is immune from suit in state court.

The phosphorus rules proposed by DNR, referred to above, went through extensive EPA comment and review early in the rule-making process (Pet-App:136-139), and new phosphorus rules are currently going through legislative review after extensive EPA comment

and review once again (Pet-App:201-210).¹⁰ If and when the phosphorus rules are approved by the legislature, DNR must submit them to EPA for formal approval under 40 C.F.R. §§ 131.20 and 131.21. If EPA formally approves the rules, can a petitioner circumvent or overturn that federal approval when the next permit is issued pursuant to the federally approved state rules and request that an ALJ or state court determine that the rules are inconsistent with federal law? If so, EPA must be a party to that challenge.

Just as federal law prescribes the prerequisites for state administration of the federal NPDES program, so federal law prescribes the manner in which a citizen may petition EPA to require revision of a state rule, object to a state permit, enforce a federal requirement violated by a state permittee, or withdraw state delegation of a federal program. *See* 33 U.S.C. §§ 1365(a)(2), 1369(b), 1319; 40 C.F.R. § 123.62 - 123.64 and pt. 131. Under any of the federal law-prescribed scenarios, EPA is a necessary party, akin to an indispensable party under Wis. Stat. § 803.03.

EPA is the party needed to respond to the Council's claim that a DNR permit that complies with a state rule is not consistent with federal requirements. EPA determines whether a state rule must be revised under 40 C.F.R. § 123.62. EPA reviews a permit, as provided under Wis. Stat. §§ 283.31(2)(c) and 283.41, to assure that "the draft permit meets the guidelines and requirements of the Clean Water Act." R.7:330; Pet-App:135. If the Council contends that the permit does not meet those federal requirements, only EPA can provide relief by disapproving the permit or the regulatory terms included in the permit.

¹⁰ DNR has also initiated rule revisions to the antidegradation procedures raised in the Council's original petition for review (Wis. Admin. Register April 1, 2010) and EPA has recently announced listening sessions for proposed changes to the national rule governing antidegradation procedures (press release dated July 30, 2010 at Pet-App:313-315).

F. DNR authority in a contested-case permit review hearing is limited to review of compliance with state law.

Under Wis. Stat. § 283.63(1), a party may state that a permit term is unreasonable for any reason, and can use EPA guidelines and documents and other state guidelines and documents to argue that a permit term is not reasonable, or that a different permit term is necessary. But, ultimately, the challenge must be that the term violates state law, and the DNR or ALJ determination as to what is necessary and reasonable may be based only on state law. DNR and the ALJ have authority to implement a federally approved program only because state law allows it.

The Council in its reply brief on appeal at 13 stated that, "EPA's decision not to object does not deprive ALJs or circuit courts of jurisdiction over challenges to state-issued permits that fail to comply with Wisconsin's delegated CWA program." Precisely: the scope of state forum review is compliance with the EPA-approved state program, not with the CWA itself.

VII. THE COURT OF APPEALS ERRONEOUSLY RELIED ON IMPRECISE AND INACCURATE DICTA.

EPA approved Wisconsin's wastewater discharge permitting program because the statutes require compliance with federal law and because the rules comply with federal law. Pet-App:333-334. No state statute authorizes DNR to issue permits that directly implement federal law other than in instances of Wisconsin-specific overpromulgation.

The court of appeals relied in part on non-dispositive language in certain inapplicable cases to support its holding to the contrary. Supreme Court review is necessary to clarify that those cases do not authorize DNR review of whether a permit term that complies with state rules nonetheless falls short of federal law, and do not authorize DNR alteration of a rule so as to comply with federal law, in a contested-case permit review hearing.

In *Froebel v. Meyer*, 217 F.3d 928, 935, 936 (7th Cir. 2000), the court barred a Clean Water Act claim for failure to raise the claim before the ALJ and circuit court, because those tribunals "could have" heard his claims, the federal act "might have provided" a basis for the relief sought, and the ALJ "may have concluded" that DNR was violating the Clean Water Act. The court's analysis is speculative at best, and faulty. The court speculated that Froebel might have a section 402 federal claim, but section 402 (the federal wastewater discharge permitting program) is not effective in Wisconsin because Wisconsin has an approved state wastewater discharge permitting program. Moreover, the court relied on Wisconsin cases of little relevance to the situation here.

In *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 559, 525 N.W.2d 723 (1995), the court barred a constitutional challenge to a tax provision based on claim preclusion, and in so doing stated that the state Department of Revenue and the Tax Appeals Commission "have authority in limited situations to determine whether application of Wisconsin taxing scheme passes constitutional muster." The court did not examine whether that limited authority applied to the challenge at hand. More importantly, the challenge here does not involve a constitutional challenge, which a state court would be free to adjudicate independent of a federal agency.

Similarly, because the Council's challenges do not implicate any federal constitutional claim, *Hogan v.*

Musolf, 163 Wis. 2d 1, 471 N.W.2d 216 (1991) is inapposite.

In *Badger Paper Mills v. DNR*, 154 Wis. 2d 435, 438-39, 452 N.W.2d 797 (Ct. App. 1990), cited in *Froebel*, EPA asked DNR to add Badger Paper Mills to a list of facilities requiring stricter discharge limitations. DNR did so and denied Badger Paper Mills' subsequent request for a contested case hearing on its inclusion on the list. The court dismissed Badger Paper Mills' action for declaratory and injunctive relief seeking an order requiring DNR to grant the hearing, for failure to exhaust. Contrary to the suggestion in *Froebel*, 217 F.3d at 936, DNR would not in *Badger Paper Mills* have necessarily reviewed Clean Water Act requirements. Rather, the Wisconsin court stated that the issues that would have been heard were whether DNR's inclusion of the mills on the list "was invalid, unlawful and beyond DNR's statutory authority," and whether DNR's denial of the hearing request "was arbitrary, capricious and beyond its statutory authority." *Badger Paper Mills*, 154 Wis. 2d at 440. Nothing in the court's holding suggests that those issues could not be decided based only on state statutes.

In *Sewerage Commission of Milwaukee v. DNR*, 102 Wis. 2d 613, 619, 307 N.W.2d 189 (1981), the parties had stipulated that the state court would decide the question of DNR's authority under federal and state law to include certain requirements in the permit. The court noted that the challenge implicated the construction of both federal and state law, *id.* at 627-28, and that full relief in an administrative hearing was available, *id.* at 631, but the court never reached the issue whether the question of DNR's authority could be decided only under state law because the court dismissed the action for failure to exhaust exclusive administrative remedies.

In sum, DNR asks that the Supreme Court clarify that no case authorizes DNR to stand in EPA's shoes and determine in a contested-case permit review hearing whether a state WPDES permit term that complies with

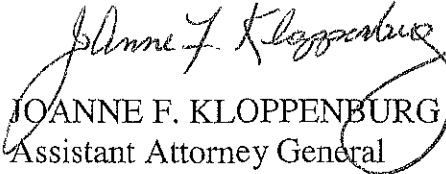
state law as part of an EPA-approved program in a permit to which EPA has not objected, nevertheless falls short of federal law.

CONCLUSION

DNR asks the Supreme Court to reverse that part of the holding by the court of appeals requiring DNR to review a state permit under federal law.

Respectfully submitted this 19th day of August, 2010.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,689 words.

Dated this 19th day of August, 2010.



JoAnne F. Kloppenburg
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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I certify that:

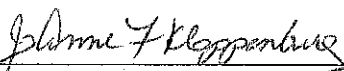
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 19th day of August, 2010.



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