STATE OF WISCONSIN
SUPREME COURT

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

Petitioners-Appellants,

v. APPEAL NO. 2008AP3235

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 COURT JUDGE TIMOTHY A. HINKFUSS AND HOLDING THAT A PETITIONER MAY OBTAIN A CONTESTED CASE HEARING UNDER WISCONSIN STATUTES SECTION 283.63 TO CHALLENGE A WPDES PERMIT THAT FAILS TO SATISFY THE APPLICABLE REQUIREMENTS OF FEDERAL LAW, AS REQUIRED BY STATE STATUTES

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

In this case, the Court of Appeals correctly decided that, as a matter of State law, wastewater discharge ("WPDES") permits issued by the Department of Natural Resources ("DNR") must comply with the applicable

requirements of the federal Clean Water Act. *Andersen v. DNR*, 2010 WI App 64, ¶¶ 29, 33, 324 Wis. 2d 828, 783 N.W.2d 877.

The sole issue before this Court is procedural: whether the original petitioners (collectively referred to as "the Council") have a right to a hearing to determine DNR's compliance with a State law that requires the agency to comply with applicable federal law when issuing a WPDES permit. There is no challenge to any federal decision; nor is the Council challenging any DNR rule.

The following pertinent State statutes are clear:

a. DNR-issued WPDES permits must include limitations "[n]ecessary to comply with any applicable federal law or regulation." WIS. STAT. § 283.31(3)(d)(2).

b. Parties contesting a discharge permit are entitled to a contested case hearing on, *inter alia*, "the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit." WIS. STAT. § 283.63(1).

Accordingly, a citizen may challenge, in a contested case hearing, whether a permit issued by DNR under State law complies with applicable federal law.

DNR's brief to this Court presents an array of arguments that are tangential, irrelevant, or simply wrong. DNR has offered a disjointed discussion of selected features of the relationship between DNR and the U.S. Environmental Protection Agency ("EPA"), as well as arguments regarding the ability to raise federal law issues to EPA in alternative forums. DNR has offered interpretations of State statutes that artificially restrict its statutory authority, essentially rewriting those statutes to evade their plain meaning. DNR

has also suggested that its permit decision here is consistent with federal law, an argument that is at best premature since DNR denied the Council a hearing to determine that issue.

This Court therefore should affirm the decision of the Court of Appeals and reject the arguments of the DNR.

ISSUE PRESENTED

Whether a petitioner may obtain a contested case hearing under Wisconsin Statutes section 283.63 to challenge a WPDES permit that fails to satisfy the applicable requirements of federal law, as required by State statutes.[1]

Answered "yes" by Court of Appeals.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Council agrees that oral argument and publication are appropriate, consistent with this Court's practice.

STATEMENT OF FACTS

I. THE FEDERAL CLEAN WATER ACT PROGRAM

DNR scatters descriptions of selected components of the Clean Water Act ("CWA") throughout its brief. The issue presented in this case, however, warrants a more integrated

[1]DNR presented this issue in two different ways: in its Petition, as relating to the application of federal to a ". . . federally delegated program where EPA has approved the state's rules . . .?"; but in its Brief as relating to the application of federal to ". . . the state program that governs state permits, in a state program that EPA has approved and determined is consistent with federal law . . .?" The issue here relates to review of a specific permit, not the many aspects of the state wastewater program.

discussion of the CWA, and the relationship it creates between EPA and the states.

The Clean Water Act envisions 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." 33 U.S.C. § 1251(a); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

> The role envisioned for the [delegated] states encompasses both the opportunity to assume primary responsibility for the implementation and enforcement of federal effluent discharge limitations, and the right to enact discharge limitations which are more stringent than the federal standards.

Aminoil U. S. A., Inc. v. Cal. State Water Res. Control Bd., 674 F.2d 1227, 1230 (9th Cir. 1982) (citations omitted).

The CWA is a multifaceted federal law containing several programs to protect water resources, including programs regulating discharges of pollutants by ships, factories, sewerage systems, and other point sources; funding for pollution control programs and facilities; and the dredge and fill of material in navigable waters. Two programs central to this case are the National Pollutant Discharge Elimination System ("NPDES") permit program, authorized by Title IV of the Act, and the related Water Quality Standards program, authorized by Title III of the Act. These programs work in tandem to ensure that discharges of pollutants do not exceed levels that are safe for fishing, recreation, and other designated uses.

A. The NPDES Permit Program

A foundational goal of the CWA was to eliminate the discharge of pollutants into navigable waters by 1985. 33 U.S.C. § 1251(a). The principal mechanism to achieve this and other interim goals is the NPDES permit program. The

CWA prohibits the discharge of any pollutant by any person to navigable waters from any point source unless an authorized agency has issued that person a NPDES permit. 33 U.S.C. §§ 1251(a)(1), 1311(a), 1342, and 1362(12). The core of the NPDES permit is to regulate discharges through the establishment of numeric or narrative "effluent limitations," and to require periodic monitoring and reporting of compliance with such limitations. NPDES permits may not be issued if the permit does "not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA." 40 C.F.R. § 122.4(a).

The CWA and EPA regulations establish different levels of effluent limitations. First, municipal and industrial dischargers are subject to technology-based limitations, which reflect the level of treatment that can be achieved using specific technology. 33 U.S.C. § 1311(b)(1)(A); 40 C.F.R. § 122.44(a)(1). Where application of technology-based limits will not achieve goals for the use of individual water bodies, point sources are subject to more stringent limitations based on water quality standards, discussed immediately below. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d); *see also* 33 U.S.C. § 1312.

Water quality-based effluent limitations are necessary to control pollutants that the permitting agency "determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard." 40 C.F.R. § 122.44(d)(1)(i). The permitting agency makes this determination by conducting what has come to be known as a "reasonable potential analysis." Water quality-based effluent limitations are not based on available control technology, but on what is necessary to achieve water quality standards. *See American Paper Inst. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993); 40 C.F.R. § 122.44(d)(1).

B. The Water Quality Standards Program

The states have primary authority to establish water quality standards within state borders. 33 U.S.C. § 1313(a). Each state must establish ambient water quality standards for intrastate waters at levels necessary to protect the "public health or welfare, enhance the quality of water and serve the purposes of" the CWA. 33 U.S.C. § 1313(c)(2)(A). A water quality standard consists of three components: (1) designated uses of the water, (2) narrative or numeric criteria necessary to protect the designated uses, and (3) a policy limiting the degradation of water quality ("antidegradation policy"). 33 U.S.C. § 1313(c)(2)(A); *PUD No. 1 of Jefferson Co. v. Wash. Dep't of Ecology*, 511 U.S. 700, 714 (1994); 40 C.F.R. § 131.3(e); 40 C.F.R. § 131.6; EPA, WATER QUALITY STANDARDS HANDBOOK § 1.2 (1994), *available at* http://www.epa.gov/ waterscience/ standards/ handbook/chapter01.html.

Under the CWA, EPA retains a limited oversight role of a State's implementation of the water quality standards program, particularly where changing technology and information show the need for updated water quality standards. After a state officially adopts revisions to its water quality standards program, EPA must review and determine whether the standards comply with the CWA. 40 C.F.R. §§ 131.5, 131.21. If EPA approves the standards they become applicable for CWA purposes. 40 C.F.R. § 131.21. If the adopted standards fail to comply with the requirements of the CWA, EPA must disapprove the State standards and must then "overpromulgate" by establishing CWA-compliant standards that are directly applicable to that state's waters. 33 U.S.C. § 1313(c)(4); 40 C.F.R. §§ 131.21-.22. *See* 40 C.F.R. Subpart D. The applicable water quality standards adopted by the state or overpromulgated by EPA for that state are the minimum standards used when developing water quality-

based effluent limits in NPDES permits. 40 C.F.R. § 131.21(d).

C. State Delegated NPDES Programs

EPA has primary authority over the NPDES permit program, but EPA may delegate that authority to a state to administer the NPDES program if the state has adequate authority to ensure compliance with applicable CWA requirements. 33 U.S.C. § 1342(b); *Niagara of Wis. Paper Corp. v. DNR*, 84 Wis. 2d 32, 38, 268 N.W.2d 153 (1978); *see also* WIS. STAT. §§ 283.001, 283.31(3)-(4) (DNR-issued permits must comply with any applicable federal laws or regulations).

Delegated state programs must at all times be administered at least in conformance with specified federal regulations, identified in 40 C.F.R. § 123.25 as "*applicable* to State NPDES program." 40 C.F.R. §§ 123.25(a), 122.1(a)(5) (emphasis added). The "[WPDES permit program] must be administered consistently with the federal act." *Badger Paper Mills Inc. v. DNR*, 154 Wis. 2d 435, 437, 452 N.W.2d 797 (Ct. App. 1990).

Once EPA has delegated authority to a state, EPA's oversight is limited.[2] EPA must review state program revisions, and may object to state issued permits or withdraw delegation of the state program in its entirety. 33 U.S.C. § 1342(d)(2); 40 C.F.R. §§ 123.62-.63. Revisions to delegated state NPDES programs do not become effective under the CWA until approved by EPA. 40 C.F.R. § 123.62(b)(4). Where a state program no longer meets applicable CWA requirements and the state fails to take corrective action EPA may withdraw state delegation of the NPDES program. *Id.* §

[2]EPA continues to oversee the NPDES program in non-delegated states. 33 U.S.C. § 1342. It must supervise state programs and update effluent standards and applicable requirements as technology, information, and legal and regulatory requirements change. *Id.* § 1251 *et. seq.*

123.63. Finally, the state may not issue permits that EPA has exercised its discretionary authority to object to. *Id.* §§ 122.4(b), 123.44.

Except for review of program revisions, EPA's oversight of delegated state programs is also largely discretionary. The CWA "reflects 'the desire of Congress to put the regulatory burden on the states and to give the [EPA] broad discretion in administering the program.'" *American Paper Inst. v. EPA*, 890 F.2d 869, 875 (7th Cir. 1989) (quoting *District of Columbia v. Schramm,* 631 F.2d 854, 860 (D.C. Cir. 1980)). "[F]ederal courts should leave EPA with its discretion to review state-issued permits." *Id.* EPA's objection or non-objection to a state-issued permit is unreviewable in federal courts. *Id.*

II. WISCONSIN'S CLEAN WATER ACT PROGRAM

Wisconsin Statutes chapter 283 authorizes DNR to implement and administer the Wisconsin Pollutant Discharge Elimination System ("WPDES") permit program. By design, the Wisconsin program mirrors the federal program. Chapter 283 prohibits the discharge of a pollutant to waters of the state unless authorized pursuant to a WPDES permit, with the goal of eliminating the discharge of pollutants into waters of the state by 1985. WIS. STAT. §§ 283.001(2), 283.31(1). Permits issued by DNR must comply both with all applicable state and federal water quality standards and with all applicable state and federal laws and regulations. WIS. STAT. § 283.31(3)-(4). DNR-issued permits must also include effluent limits "necessary to meet applicable water quality standards, treatment standards, schedules of compliance or any other state or federal law, rule or regulation" and require compliance with these water quality-based effluent limits. WIS. STAT. § 283.13(5).[3]

[3]In Wisconsin, water quality standards are established pursuant to section 281.15(1) and are contained in chapters NR 102 – 105 of the Wisconsin Administrative Code. WIS. STAT. § 281.15(1); WIS. ADMIN. CODE §

Certain DNR-issued rules also must mirror federal law:

> (2) COMPLIANCE WITH FEDERAL STANDARDS. (a) Except for rules concerning storm water …, all 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 [CWA]* and regulations adopted under that act.

WIS. STAT. § 283.11(2) (emphasis added). This so-called "uniformity provision" does not apply to water quality based effluent limits or technology based phosphorus limits. WIS. STAT. §§ 283.11(3)(am) and (5). EPA reviews revisions to the state's program to determine whether the rule complies with federal requirements, but does not review to determine whether the rule exceeds federal requirements. 40 C.F.R. § 123.62.

These longstanding state statutes form the legal foundation for EPA's delegation of the CWA program to Wisconsin—they were first enacted in July 1973, Act 74, and placed in chapter 147 of the statutes to allow the State to qualify for NPDES delegation.

III. BACKGROUND FACTS

DNR's statement of the facts in this case is generally accurate.[4] Additional explanation is necessary, however, to fully understand the nature of the underlying substantive

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NR 106.01 and chs. NR 102, 103, 104 and 105. DNR is wrong: Wisconsin Statutes section 283.11 does not provide the foundation for setting water quality standards. (Pet-Br:17, 22).

[4]DNR only petitioned for review of that part of the Court of Appeals decision requiring DNR to review whether the Fort James permit terms comply with federal law. (DNR Br. 5). Therefore, the facts and legal analysis presented here are limited to those facts and analysis relevant to that issue.

issues that prompted the Council to request a hearing, and to correct certain DNR misstatements.

A. Facts Underlying the Council's Hearing Request.

The DNR's treatment of two pollutants in the Fort James permit led to the Council's hearing request: phosphorus and mercury.

1. Phosphorus

Phosphorus is a pollutant that can cause extreme and unpleasant algal growth in surface waters. (R.5:1-11.) These algal blooms also use significant amounts of dissolved oxygen, depressing the amount of oxygen available to support a healthy aquatic ecosystem, including fish and food sources for fish. (R.5:1-11.) DNR has identified the lower Fox River as "impaired" by depressed levels of dissolved oxygen, caused by severe and excessive levels of phosphorus. (R.5:1-11.)

Wisconsin has established a technology-based effluent limit of 1 milligram per liter ("mg/L") for certain dischargers of phosphorus. WIS. ADMIN. CODE § NR 217.04(1)(a). The 1 mg/L limit is imposed in WPDES permits as a 12-month rolling average concentration limit. *Id.* This requirement was promulgated under an exemption from the state uniformity clause. WIS. STAT.§ 283.11(3)(am).

At the time DNR reissued the Fort James permit, Wisconsin had not adopted numeric phosphorus water quality criteria. Wisconsin regulations did however contain narrative water quality criteria that prohibit, *inter alia*, floating or submerged debris, oil, scum, objectionable deposits, and material producing color, odor, taste or unsightliness—these water quality problems are associated with phosphorus pollution. WIS. ADMIN. CODE § NR 102.04(1).

2. Mercury

Mercury is a toxic pollutant that bio-accumulates in fish and other living organisms. *See* 40 C.F.R. § 132, Table 6A. It is linked to cancer, brain damage, and birth defects in humans. Because of the high levels of mercury in the lower Fox River, DNR has issued a fish consumption advisory, limiting the recommended amount of fish from the lower Fox River that individuals, particularly women of child-bearing age, should consume. (R.5:5.)

Wisconsin has established numeric mercury water quality criteria for the protection of human health and for the protection of wildlife: 1.5 nanograms per liter ("ng/L") and 1.3 ng/L respectively. WIS. ADMIN. CODE §§ NR 105.08(3), Table 8, 105.07(1)(b), Table 7. In late 2002, DNR promulgated regulations establishing procedures for obtaining a variance from meeting water quality-based effluent limits for mercury, including a procedure to determine whether a mercury effluent limit is necessary, in a WPDES permit. WIS. ADMIN. CODE § NR 106.145. Sections NR 106.145(2)-(3) prohibit DNR from imposing necessary mercury water quality-based effluent limits in a WPDES permit and requires DNR to impose quarterly monitoring requirements unless the permittee supplies "at least 12 monitoring results spaced out over a period of at least 2 years" at the time of permit reissuance.

Although promulgated in 2002, DNR did not submit section NR 106.145 to EPA for approval as a WPDES permit program revision until May 30, 2007, nearly two years after DNR had invoked the regulation to issue the Fort James permit without a mercury effluent limit. (Pet-App:293-301.) Thus, the regulation was not effective for CWA purposes when DNR issued the Fort James permit. 40 C.F.R. § 123.62.

In 2009, EPA formally disapproved the portions of the regulation that DNR used to justify excluding a mercury effluent limit in the Fort James permit, Wisconsin Administrative Code sections NR 106.145(2) and (3); and EPA directed DNR to issue permits in accordance with the prior, EPA-approved state program requirements. (Pet-App:293-301.) *See* 33 U.S.C. § 1342; 40 C.F.R. § 123.62. Despite EPA's disapproval eighteen months ago, DNR has still not repealed section NR 106.145 (2)-(3).

3. The Council's Hearing Request

In 2005, when DNR reissued a WPDES permit to Fort James to discharge pollutants into the lower Fox River, DNR did not include limits necessary to protect fish and aquatic life, recreation, and human health from phosphorus and mercury pollution. (R.7:331-349.) Rather, DNR imposed a "technology-based" phosphorus limit of 1 mg/L as a twelve-month rolling average and required Fort James to monitor its discharge of mercury under section NR 106.145. (R.7:351.) DNR also did not determine whether Fort James' increased discharge of phosphorus – 10,000 lbs annually – was necessary before authorizing this increased pollution. (R.5:1-11).

The Council petitioned DNR under Wisconsin Statutes section 283.63 for a contested case hearing to review the deficient phosphorus and mercury terms and conditions in the Fort James permit. (R.7:243-254; Resp't App.:101-112.) The Council alleged that DNR failed to follow state law requiring the agency to comply with applicable federal regulations requiring a reasonable potential analysis for phosphorus and mercury, and the inclusion of daily maximum and average monthly limits for phosphorus. (R.7:247-48; Resp't App.:105-06); *See* 40 C.F.R. §§ 122.44(d)(1), 122.45. There is no issue in this appeal involving a challenge to any DNR rule. Rather, the Council is challenging DNR's issuance of a single discharge permit as inconsistent with

minimum requirements of federal law required to be imposed by state statutes.

B. Procedural Posture

DNR partially denied the Council's petition, barring review of any challenge grounded in federal law. (R.7:5-9; Pet-App:129-33.) The Council sought judicial review of the DNR's decision to partially deny its petition, pursuant to Wisconsin Statutes section 227.52, *et seq.* (R.1:1-38.) The Council also asked the circuit court to declare that DNR may not issue a WPDES permit that fails to comply with federal regulations, pursuant to Wisconsin Statutes section 806.04. (R.1:1-38.)[5] The circuit court denied the Council's request for declaratory judgment and upheld DNR's decision to deny a hearing on the phosphorus and mercury terms in the Fort James permit, holding that DNR must limit the hearing to challenges based upon state law because EPA was not a party to that action. (R.64:5-6; Pet-App:126-27.) The circuit court also held that it was without jurisdiction because EPA was an indispensable party under section 803.03. (R.64:5-6; Pet-App:126-27.)

On appeal, the Court of Appeals reversed the circuit court regarding the scope of hearing under Wisconsin Statutes section 283.63, but affirmed the dismissal of the Council's declaratory judgment claims, albeit for different reasons. *Andersen v. DNR*, 2010 WI App 64, 324 Wis. 2d 828, 783 N.W.2d 877; (Pet-App:101-21.) The Court of Appeals held that "DNR possesses authority to determine whether provisions within a state-issued wastewater discharge permit comply with federal law." *Andersen*, 2010 WI App 64, ¶ 33; (Pet-App:118).

[5]The Council originally sought a declaratory judgment, pursuant to Wisconsin Statutes section 227.40, *et. seq.*, that two state administrative rules were invalid, but later withdrew that request. (R.1:2-3.) That claim is therefore not relevant to this review.

ARGUMENT

I. THIS COURT REVIEWS DNR'S DECISION *DE NOVO*

The issue before the Court—whether DNR can and must review a WPDES permit under section 283.63 for compliance with the federal CWA—is a question of agency authority, which is reviewed *de novo*. When deciding issues of statutory authority, this Court owes no deference to an agency's legal interpretation of its own authority—particularly here, where DNR has concocted jurisdictional restrictions that are absent from the statutes. *Wis. Power & Light Co. v. PSC*, 181 Wis. 2d 385, 392, 511 N.W.2d 291 (1994). DNR's expertise on environmental issues does not equate to specialized knowledge in construing authorizing and procedural statutes. *Town of Norway v. Racine County Drainage Bd.*, 220 Wis. 2d 595, 602-03, 583, N.W.2d 437 (Ct. App. 1998).

DNR argues that this Court must review its decision to deny the Council a hearing through a lens tinted by "DNR's longstanding understanding of the WPDES statutes." (DNR Br. 6). It cited no authority for this proposition. Moreover, it provided no support for the proposition that its arguments in this case reflect any longstanding agency understanding. Additionally, as discussed immediately below, no weight is accorded to agency interpretation where the statute is unambiguous. There is simply no need for interpretation by the agency.

II. STATE LAW REQUIRES DNR TO ISSUE PERMITS THAT COMPLY WITH FEDERAL LAW.

A. The Pertinent Statutes Are Clear and Require No DNR Interpretation

The goal of statutory interpretation is to "discern and give effect to the intent of the legislature." *State v. Head*, 2002 WI 99, ¶ 82, 255 Wis. 2d 194, ¶ 82 648 N.W.2d 413, ¶ 82. Courts first look to the statute's plain language to determine if it "clearly and unambiguously sets forth the legislative intent." *Id.* If the statute is clear and unambiguous, the inquiry ends there. *Id.* In interpreting a statute, courts will "favor a construction that fulfills the purpose of the statute over one that undermines the purpose." *Brunton v. Nuvell Credit Corp.*, 2010 WI 50, ¶ 17, 325 Wis. 2d 135, ¶ 17, 785 N.W.2d 302, ¶ 17.

B. Wisconsin Statutes Require that DNR-Issued WPDES Permits Comply with Applicable Federal Laws and Regulations.

When EPA delegated the administration of the NPDES permit program to Wisconsin in the 1970s, sections 147.02(3) and (4), now sections 283.31(3) and (4), required that DNR-issued permits include any water quality-based effluent limitations and conditions necessary to comply with any applicable federal law or regulation. The language has not substantively changed since its adoption in 1973:

> (3) The department may issue a permit under this section for the discharge of any pollutant ... 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*; 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 areawide waste treatment management plan.
> [. . .]
>
> (4) The department shall prescribe conditions for permits issued under this section to assure compliance with the requirements of sub. (3)....

WIS. STAT. §§ 283.31(3)-(4) (WEST 2010)(emphasis added). *Compare* WIS. STAT. §§ 147.02(3)-(4) (1973).

The statute could not be clearer. DNR must, in addition to state requirements, impose more stringent effluent limitations necessary to comply with any applicable federal laws and regulations.

C. DNR's Argument Rewrites the Statute, Making it Inconsistent with Both State and Federal Law.

Although DNR acknowledges that its rules must comply with federal law, it denies that section 283.31(3)(d)(2) means what it explicitly says. Instead, without the benefit of any authority, it argues that the "applicable" federal laws and regulations referenced in section 283.31(3)(d)(2) are limited to federal permit requirements established by EPA that apply solely to Wisconsin—"overpromulgated" in DNR's words. (DNR Br. 24.)

DNR's argument ignores EPA's stricture that "[c]ertain [NPDES] requirements set forth in [C.F.R.] part[] 122 . . . are made *applicable* to approved State programs by . . . reference . . . in § 123.25 of this chapter. . . ." 40 C.F.R. § 122.1(a)(5) (emphasis added). Those sections or paragraphs that are "applicable to States, through reference in § 123.25 . .

. , [are] signaled by the following words at the end of the section or paragraph heading: (Applicable to State programs, see § 123.25 of this chapter)." *Id.* EPA's use of those words at the end of the headings of sections 122.44 and 122.45 signals that those sections are applicable to *all* State NPDES programs, including Wisconsin's WPDES program. *See* 40 C.F.R. §§ 122.44, 122.45. Sections 122.44 and 122.45 are the sections that were the basis for the Council's claims that DNR failed to comply with federal law by failing to conduct reasonable potential analyses for phosphorus and mercury and by failing to include daily maximum and average monthly limits for phosphorus.

Thus, DNR's arguments that sections 122.44 and 122.45 are not "applicable" and that it did not have to comply with them lack any foundation and are simply wrong. EPA expressly made those regulations "applicable" to all state NPDES programs, and our Legislature confirmed through its enactment of section 283.31(3)(d)(2) that DNR has an obligation to comply with them in establishing permit conditions in the Fort James permit.[6]

D. State Statutes That Limit DNR's Authority to Establish State Rules More Stringent than Certain EPA Requirements Do Not Invalidate DNR's Obligation to Issue Permits that Comply with Any Applicable Federal Laws and Regulations.

DNR makes the untenable contention that Wisconsin Statutes section 283.11(2) authorizes the agency to violate the requirements of section 283.31(3)(d)(2) and to issue WPDES permits that lack conditions necessary to ensure compliance with any applicable federal law or regulation. (DNR Br. 21-23.)

[6] Reliance on applicable federal regulations may also be necessary where a delegated state has simply failed to adopt federal requirements into state code.

Section 283.11(2) does not apply here. That statute mandates that certain state *rules* related to point source discharges, technology-based effluent limitations, municipal monitoring requirements, standards of performance for new sources, toxic effluent standards or prohibitions, and pretreatment standards comply with and do not exceed the requirements of the CWA. WIS. STAT.§ 283.11(2). Permit terms do not violate the uniformity provision in section 283.11(2) unless those terms are considered "rules." *Wis. Elec. Power Co. v. DNR*, 93 Wis. 2d 222, 240, 287 N.W.2d 113, 124 (Wis. 1980). Moreover, that statute provides that state *rules* must comply with and cannot "exceed" federal requirements. It has no bearing on the Council's position that the Fort James *permit* fails to meet minimum federal requirements.

In addition, section 283.31(3)(d) authorizes DNR, in specified circumstances, to issue permits containing more stringent limits than effluent limits promulgated by rule. In particular, 283.31(3)(d)(1) requires more stringent permit limits if they are necessary to meet state and federal water quality standards, and 283.11(2) does not bar inclusion of those more stringent limits in WPDES permits. *Wis. Elec. Power*, 93 Wis. 2d at 250; *Niagara of Wis. Paper Corp.*, 84 Wis. 2d 32, 53-54, 268 N.W.2d 153, 162-63 (Wis. 1978). More stringent limits necessary to meet any other applicable federal law and regulations, as required under 283.31(3)(d)2, therefore must also not be barred by 283.11(2).

E. DNR's Definition of Applicable Federal Laws Leads to an Absurd Result.

DNR is wrong to assert that the Council's interpretation renders the Wisconsin program altogether useless. So long as a delegated program is at least as stringent as the applicable federal law and regulations, a state may tailor its program "to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any

requirement respecting control or abatement of pollution." 33 U.S.C. § 1370; 40 C.F.R. § 123.25, Note.

The plain language of the CWA makes "applicable" all federal NPDES regulations identified as "applicable," 40 C.F.R. §§ 40 C.F.R. 122.1(a)(5), 123.25(a), and all water quality standards adopted by the state or overpromulgated by EPA. 40 C.F.R. § 131.21(c). *See* 40 C.F.R. § 131.31-.38 (federal promulgated water quality standards). It would render these clear requirements meaningless and create redundancies if EPA were required to republish—or overpromulgate—identical NPDES regulations specific to each state: the NPDES regulations applicable to *all* state delegated NPDES programs are *already* clearly identified in the federal code, so there is no authority or need to overpromulgate those requirements. In any event, the state law which requires DNR to issue permits which comply with *all* of these applicable federal laws and regulations never makes any reference to the "overpromulgation" concept on which DNR's strained argument rests.

III. STATE LAW DOES NOT BAR CHALLENGES TO STATE-ISSUED PERMITS THAT FAIL TO COMPLY WITH FEDERAL REQUIREMENTS.

A. Wisconsin Statutes Section 283.63 Does Not Authorize DNR to Deny a Hearing to Challenge WPDES Permit Terms For Failure to Comply with Federal Law.

State law does not prevent review of a WPDES permit for compliance with federal law. Wisconsin Statutes section 283.63(1) authorizes citizens to obtain a contested case hearing to review, among other things, the "reasonableness of or necessity for any" WPDES permit "term or condition." By its plain language, section 283.63 neither authorizes nor

requires DNR to limit that review to state law issues.[7] DNR is authorized 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 389 (1981).

Indeed, DNR concedes that nothing in section 283.63 restricts the scope of the hearing to state law challenges.[8] (DNR Br. 36.) Consequently, DNR cannot graft onto section 283.63 a restriction barring the Council from demonstrating that the Fort James WPDES permit violates applicable federal law and regulations made mandatory by section 283.31(3)(d)(2).[9]

B. Reading Section 283.63 to Prohibit Review of WPDES Permits for Compliance with Applicable Federal Law is Illogical.

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[7]The legislature did, however, expressly restrict the scope of review under section 283.63 in several other respects, specifically restricting review to: 1) permit denials, modifications, suspensions or revocations; 2) the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit; 3) any proposed thermal effluent limitations; or 4) any water quality based effluent limit. WIS. STAT. § 283.63(1).

[8]As the Court of Appeals correctly noted, the statutory scheme surrounding section 283.63, contrary to DNR's assertion, does not reserve to EPA the exclusive right to review a permit for consistency with federal law. *Andersen v. DNR*, 2010 WI App 64, ¶ 30.

[9] Regardless, state statutes require DNR to review the permit to ensure that state requirements were implemented and applied in a manner that does not violate federal law. Just as DNR might erroneously implement or apply a state requirement in violation of state law, DNR might also implement or apply a state requirement in violation of a federal law, regardless of whether the state requirement was originally intended to comply with federal law.

In establishing the authority necessary to obtain delegation, the Wisconsin Legislature expressly prohibited DNR from issuing WPDES permits that fail to include effluent limitations necessary to comply with any applicable federal law or regulation. WIS. STAT. § 283.31(3)(d)(2) (formerly § 147.02(3)(d)(2), 1973 Wis. Act 74). As part of the same Act, the Legislature enacted section 283.63 (then § 147.20) to provide interested persons the opportunity to obtain review of the terms of a WPDES permit. 1973 Wis. Act 74.

It would have been illogical for the Legislature to have required DNR to issue permits that comply with federal laws and regulations and to authorize citizens to obtain a review of any permit term or condition before an independent hearing examiner, but to preclude the hearing examiner from considering DNR's compliance with its statutory mandate to comply with applicable federal law. Statutory language is interpreted to avoid unreasonable results—not in isolation, but as part of a coherent whole. *Heritage Farms, Inc. v. Market Ins. Co.,* 2009 WI 27, ¶ 7, 316 Wis. 2d 47, ¶ 7, 762 N.W.2d 652, ¶ 7 (quoting *State ex rel. Kalal v. Cir. Ct. for Dane County,* 2004 WI 58 ¶¶ 45, 49, 271 Wis. 2d 633, 681 N.W.2d 110). Courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.* ¶ 13 n.9 (quoting *Kalal*, 2004 WI 58, ¶ 39). "[E]very word excluded from a statute must be presumed to have been excluded for a purpose." *Id.* (quoting 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTE AND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2007)). In enacting section 283.63 to authorize contested case hearings regarding the reasonableness of permit provisions, the legislature did not include any language excluding issues arising under federal law or regulation.

C. State Tribunals Are Competent to Interpret and Apply Federal Law.

State courts are perfectly competent to interpret and apply federal law. *See, e.g., Terry v. Kolski,* 78 Wis. 2d 475, 482, 254 N.W.2d 704 (1977); *American Paper Inst. v. EPA*, 890 F.2d 869, 875 (7th Cir. 1989). Similarly, administrative law judges are competent to interpret and apply federal law: "it is permissible to raise federal environmental law in state administrative litigation;" and Administrative Law Judges ("ALJs") are competent to find that "Wisconsin provisions as interpreted by []DNR violate[] the federal [CWA]." *Froebel v. Meyer*, 217 F.3d 928, 936 (7th Cir. 2000). "When reviewing state-issued permits . . .state courts are perfectly competent to decide questions of federal law." *American Paper*, 890 F.2d at 875.

This Court has itself interpreted federal law to assess whether WPDES permit terms or DNR rules are *more* stringent than CWA requirements. *Wis. Elec. Power Co. v. DNR*, 93 Wis. 2d at 243. A state ALJ is similarly competent to determine whether WPDES permit terms are *less* stringent than CWA requirements, in violation of Wisconsin Statutes section 283.31(3)(d)(2).[10]

IV. EPA'S DECISION NOT TO OBJECT TO A WPDES PERMIT THAT FAILS TO COMPLY WITH CWA REQUIREMENTS IS NOT AN ENDORSEMENT OF THE PERMIT.

DNR overstates the relevance and importance of EPA's failure to object to the Fort James permit. EPA is not authorized, let alone required, to approve state-issued NPDES permits, regardless of whether they fail to comply with applicable federal law or regulations. 40 C.F.R. § 123.44. In fact, EPA may, under the CWA, waive all authority to object

[10]Shortly after enactment of the CWA, federal courts began upholding the authority of state administrative agencies to hold hearings to determine compliance with the federal act and federal regulations promulgated under it. *See, e.g., Power Auth. of State of N.Y. v. Dep't of Envtl. Conservation*, 379 F. Supp. 243 (N.D.N.Y. 1974).

to NPDES permits issued in a state delegated program. 33 U.S.C. § 1342(d)(3).

EPA's decision not to object does not mean the agency made an affirmative decision that the Fort James permit complies with federal law. Any decision to intervene in a state permitting decision is purely discretionary. 40 C.F.R. § 123.44 (providing that EPA "*may* make . . . objections to . . . proposed [State] permits." (emphasis added)). EPA's decision not to object to the Fort James permit may reflect its judgment that it should allocate its resources to broader concerns rather than intervene in an individual case, particularly since the Wisconsin legislature had established a state process for reviewing individual permits. DNR should have followed that process by granting the Council's request for a hearing on the Fort James permit.

DNR's suggestion that the Council's remedy is to appeal EPA's decision not to object to the Fort James permit is faulty. Congress intended "EPA to retain discretion to decline to veto a permit even after the agency found some violation of applicable guidelines." *Save the Bay, Inc. v. EPA,* 556 F.2d 1282, 1291-92, 1294-95 (5th Cir. 1977) (emphasizing minimal federal intervention in state programs). Federal courts do not have jurisdiction, pursuant to 33 U.S.C. §1369(b) or any other statute, to hear challenges to EPA's failure to object to a state-issued NPDES permit. *American Paper,* 890 F.2d at 874-75; *Save the Bay,* 556 F.2d at 1291-92, 1294-95. The Council is not allowed, much less required, to file a federal action to challenge a WPDES permit that is inconsistent with federal law. *Save the Bay,* 556 F.2d at 1294-95. EPA's decision not to veto an individual permit is not a reviewable action; and it is immune from judicial review. *Id.* EPA's failure to object to a permit is discretionary and unreviewable, and the Court of Appeals correctly held that EPA does not have the exclusive right to determine state compliance with federal environmental laws and regulations. *Andersen v. DNR,* 2010 WI APP at ¶¶ 27-28, 33.

In delegating primary responsibility to Wisconsin over the NPDES program within the State, EPA transferred its authority to issue permits and determine their legality. It would defeat the purpose of the delegation to hold that EPA retains the obligation to determine whether a WPDES permit complies with federal CWA requirements. Indeed, the sole avenue for review of a state-issued NPDES permit is through the state. The CWA "does not contemplate federal court review of state-issued permits." *American Paper,* 890 F.2d at 875. DNR therefore cannot divest itself of the obligation to ensure the Wisconsin WPDES program and permits issued thereunder comply with the CWA. The Wisconsin legislature confirmed that obligation by requiring DNR to provide an opportunity for review of a WPDES permit for compliance with applicable federal law and regulations.

V. EPA'S OVERSIGHT OF THE DELEGATED WPDES PERMIT PROGRAM DOES NOT RELIEVE DNR OF ITS DUTY TO ENSURE COMPLIANCE WITH THE CWA; NOR DOES IT PRECLUDE A STATE FORUM FOR REVIEW OF DEFICIENT WPDES PERMITS.

Although EPA retains an oversight role and may withdraw approval of Wisconsin's WPDES program, that oversight role does not absolve DNR of its state statutory obligation to ensure compliance with the CWA; nor does it deprive an ALJ or State court of authority to find that a permit fails to comply with applicable federal laws or regulations. DNR's suggestion that citizens may invoke EPA's oversight role or seek other recourse is no substitute for a petition for a contested case hearing.[11] None of the

[11] DNR's suggested remedies for the Council are unfeasible. Rather than request review of a NPDES permit under the clear procedures in state law, DNR suggests that, within the 30 day public notice period following DNR's notice of proposed issuance of a WPDES permit, citizens must: assess whether rules underlying the permit have been approved by EPA

avenues DNR suggests will provide the remedy the Council seeks. Indeed, if the Council is denied an opportunity to challenge deficiencies in the Fort James permit in a state forum, the Council will be without any forum in which to obtain review of a clearly deficient WPDES permit.[12]

A. EPA's Obligation to Review and Approve NPDES Program Revisions is Not Discretionary, Provides No Remedy for the Council in This Case, And is Irrelevant to the Issue Presented to This Court.

DNR asks "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 the Council asserts should be reviewed and found to violate federal law?" (DNR Br. 20). EPA did not decide not to review Wisconsin's mercury rule revisions because the WPDES program changes were not substantial; *EPA did not review those revisions because DNR had not submitted them for review and approval.* (Pet-App:293.) Moreover, when EPA did review the state rule setting implementation procedures for mercury after it was brought to its attention, EPA declared those procedures invalid. (Pet-App:293-301.)

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or whether rules necessary to ensure compliance with applicable federal law are absent from the Wisconsin code, and then ask EPA to review unapproved rules, petition EPA or DNR to promulgate missing rules, ask EPA to object to a rule, or petition for withdrawal of the entire WPDES program. (DNR Br. 32-33). It would be next to impossible to obtain any of the suggested remedies within the short public comment period or prior to DNR's final issuance of the WPDES permit.

[12]The record does not establish that EPA approved the contested permit terms as compliant with federal or state law. In fact, after DNR issued the Fort James permit, EPA determined certain of the underlying regulations violated federal law and disapproved them. (Pet-App:293-301.)

Secondly, DNR asks "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?"[13] (DNR Br. 20.) This question mischaracterizes the issue in this case. The Council is not challenging any state water quality standard, but rather DNR's failures to conduct reasonable potential analyses for phosphorus and mercury, and to set daily maximum and average monthly limits for phosphorus, as required by applicable federal regulations when issuing an individual permit to Fort James. Compliance with those federal rules is wholly compatible with DNR's narrative water quality standards, and does not require different or additional state regulations.

DNR incorrectly suggests that federal regulations give EPA the option to forgo review of revisions to a delegated NPDES permit program it deems are not substantial.[14] DNR misreads federal regulations and cites no legal authority allowing EPA to forgo review and approval or disapproval of

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[13] DNR suggests, without any relevant support, that EPA has approved Wisconsin's antidegradation rules insofar as they relate to phosphorus. (DNR Br:11, 19.) DNR is wrong. The document DNR cites as support is actually EPA's approval/disapproval of Wisconsin's submission under the Great Lakes Water Quality Guidance, of which EPA only reviewed Wisconsin's antidegradation procedures as applied to bio-accumulative chemicals of concern. (Pet-App:271); 40 C.F.R. Part 132, Table 6A and Appendix E; 40 C.F.R. §§ 132.4(a)(6) & (f). Regardless the Council is still entitled to a hearing to determine whether DNR's application of the state's antidegradation rules in the Fort James permit satisfies the state law requirement mandating compliance with all applicable federal requirements.

[14] DNR has not shown how EPA's participation during the rulemaking process or periodic program reviews has any relevance to the issues before this Court. Regardless of EPA's informal involvement in the rulemaking process or programmatic reviews, WPDES rule revisions are not applicable for CWA purposes unless approved by EPA. 40 C.F.R. § 123.62(b)(4).

revisions that are not substantial.[15] No program revisions are effective for CWA purposes unless approved by EPA. Approval is given via publication in the Federal Register, or for revisions that are not substantial, via letter. 40 C.F.R. §§ 123.62(b)(2) and (4).[16] In this case, EPA did not forgo review of the state rule for setting mercury limits because it deemed the revision not substantial. Rather, DNR did not timely submit that revision to EPA for review.[17]

EPA's disapproval of that revision, once it was brought to the agency's attention, will not remedy the Council's legitimate concerns that the Fort James permit violates applicable CWA requirements. The Fort James

[15] DNR is wrong to imply that the Council's request for EPA to review the mercury rule as a revision to the approved WPDES permit program illustrates that EPA reviews promulgated DNR rules upon public request or that the Council asked EPA to *disapprove* the rule. Similarly, the October 22, 2008 letter contained in DNR's appendix raising concerns of the Sierra Club, not a party to this action, about numerous deficiencies in Wisconsin's permitting program, is not relevant to this Appeal. (Pet-App. 302-312.)

[16]DNR's appendix contains numerous documents regarding various revisions to the state program. None of them support the inference that EPA ever deemed any of Wisconsin's submitted rule or statute revisions as non-substantial and therefore not worthy of review. Even if EPA had determined that some revisions were non-substantial, which there is nothing in the record to indicate, EPA would be required to issue a notice of approval before those NPDES program revisions became effective for CWA purposes. 40 C.F.R. § 123.62(4). What DNR's documents potentially illustrate are additional examples of WPDES permitting regulations and requirements that may not have been approved as compliant with CWA requirements by EPA. The few documents within DNR's appendix that *are* relevant document EPA's rejection of NR 106.145(2)-(3) after it was belatedly submitted for approval. That was the rule on which DNR had relied in fashioning the deficient mercury provisions in the Fort James permit. (Pet-App. 293-301.)

[17] DNR's theory "would allow DNR to promulgate rules and issue permits violating federal law so long as it can successfully skirt the EPA's discretionary review." *Andersen v. DNR*, 2010 WI App 64, ¶ 28.

permit still contains terms based on regulations that EPA deemed violate CWA requirements, *i.e.*, WIS. ADMIN. CODE § NR 106.145(2)-(3). Those regulations, despite EPA's disapproval, continue to be part of the Wisconsin Administrative Code. Thus, EPA's disapproval of rules that fail to comply with CWA requirements may not prevent DNR from issuing permits that violate applicable federal law in the future. Under DNR's argument that it must implement state law and only state law, DNR arguably would be required to rely on these disapproved regulations when issuing WPDES permits.

Even if EPA had approved a state program revision, *state statutes* never authorize DNR to issue WPDES permits that fail to comply with applicable federal law. EPA's approval of state program revisions neither authorized DNR to issue WPDES permits that fail to comply with applicable federal regulations, nor relieved DNR of its independent obligation to meet the requirements of sections 283.13(3)-(4). EPA's approval of a state rule also does not establish an incontrovertible determination that each and every state permit issued thereafter is in compliance with federal law, regardless of its contents.

B. Petitioning EPA to Withdraw Delegation of the WPDES Program Will Not Remedy the Deficiencies in the Fort James Permit and Is Irrelevant to the Issue Presented to this Court.

Withdrawal of a state program may remedy *programmatic* problems with a delegated NPDES permit program, such as a state's repeated issuance of NPDES permits that fail to conform to the Act. 40 C.F.R. § 123.63(a)(2)(ii). EPA cannot withdraw the entire program based on deficiencies in *one* permit. 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.[18]

DNR's suggestion, even if available, is facially absurd. The WPDES permit program applies to hundreds if not thousands of facilities, involves hundreds of Wisconsin employees involved in permit writing, technical assistance and compliance, and involves millions of dollars of federal funding. Why would a party seek to eliminate an entire state program when there is an available, statutory opportunity under Wisconsin law to seek a hearing regarding the deficient permit? DNR's proposition illustrates why EPA's authority to withdraw Wisconsin's delegation of the NPDES program is irrelevant to this action.

C. EPA's Authority to Overpromulgate Water Quality Standards is Irrelevant to the Issue Before This Court.

DNR's suggestion that the Council file a federal citizen suit against EPA to promulgate regulations for the state is similarly absurd and legally unavailable. Federal citizen suits under 33 U.S.C. section 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

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[18] Scenarios under which EPA could withdraw approval of a state program include: action by state legislature or court striking down or limiting State authorities or failure to promulgate necessary new authorities; failure to issue permits, repeated issuance of permits which do not conform to applicable requirements, or failure to comply with public participation requirements; failure to act on permit violations, seek adequate enforcement penalties or inspect and monitor activities subject to regulation; failure to comply with the terms of the Memorandum of Agreement; failure to develop an adequate program for developing water quality-based effluent limits in NPDES permit; failure of a great lakes state or tribe to adequately incorporate the NPDES permitting implementation procedures. 40 C.F.R. § 123.63(a).

the Act, 33 U.S.C. section 1313(c)(4)(B), to establish water quality criteria for the state of Florida. (DNR Br. 33); *Fla. Wildlife Fed'n v. Jackson,* 2009 WL 5217062, at *2, 4 (N.D. Fla., Dec 30, 2009). In this case, the Council does not seek new water quality criteria for Wisconsin. DNR has pointed to no similar non-discretionary duty in Title IV of the CWA, relating to NPDES permits, that would provide the relief the Council seeks. Moreover, as demonstrated above, the EPA has *already* identified and explicitly designated which federal regulations are applicable to all delegated state programs, including Wisconsin. The regulations have already been promulgated. All that remains is for this Court to direct the DNR to acknowledge their existence, and follow them in issuing permits, as mandated by our Legislature.

D. DNR Urges This Court To Deny An Opportunity For Review of the Fort James WPDES Permit in the Only Available Forum.

Despite its acknowledgment that the Fort James permit must comply with applicable federal law, (DNR Ct. App. Resp. Br 23), DNR argues that the Council cannot obtain review in any state forum.

If this Court adopts DNR's position, the Council and similarly situated persons will be entirely barred from presenting their legitimate concerns to any tribunal. As explained above, the Council cannot obtain review in federal court either of the Fort James permit or EPA's discretionary decision not to review the permit. This Court should not interpret EPA's delegation to nullify a fundamental CWA right: the right to challenge through state proceedings a state's issuance of a permit that fails to comply with applicable federal law and regulations. 33 U.S.C. §1342(b), 40 C.F.R. §123.30.[19]

[19] Ruling in DNR's favor would similarly abrogate the right to a hearing established by our Legislature in section 283.63.

VI. THE COUNCIL IS NOT REQUESTING REVIEW OF STATE RULES.

DNR's professed fear of incongruous results is unavailing.

The Council's request for declaratory judgment is not before this Court. Contrary to DNR's assertion, even if the ALJ rules in the Council's favor, there is no risk of an incongruous result. Nothing in the record indicates that any of the Council's challenges would require the ALJ to determine that EPA-approved state rules violate federal law.

Even if the Council were to challenge state rules, state tribunals are perfectly competent to determine whether state rules violate applicable federal laws, and a contested case hearing *is* the appropriate forum in which to raise such a challenge. On at least one occasion, this Court has determined that state rules exceed the requirements of federal laws implicated by state laws. *See Wis. Elec. Power Co. v. DNR*, 93 Wis. 2d at 243 (in review of WPDES permit challenge, pertinent rules violate sec. 147.021 (now 283.11(2)). Nothing would prohibit that type of review in this matter. A contested hearing pursuant to section 283.63, in conjunction with section 227.40(2)(e), is the appropriate forum to raise challenges that agency rules underlying a challenged WPDES permits exceed DNR's statutory authority. *Sewerage Comm'n of Milwaukee v. DNR*, 102 Wis. 2d 613, 633, 307 N.W.2d 189 (1981). A challenge to a permit *and* a rule is appropriate in a contested case hearing, even where resolution of issues related to DNR's legal authority depend solely on the construction of federal law. *Id. at* 627-28. Such a challenge to the rule underlying the disputed permit term, if "invoked upon timely judicial review of a department decision on a permit-review pursuant to compliance with the procedural terms of sec. 147.20 [now

283.63], authorizes a declaratory challenge to the validity of the rule underlying the permit." *Id.* at 628.

VII. THE COURT OF APPEALS DECISION WILL NOT LEAD TO THE UNWORKABLE RESULTS DNR IDENTIFIES.

A. The Court of Appeals Decision Harmonizes State and Federal Law.

Delegated states should play the "leading role" in implementing delegated state programs: "it seems beyond argument that [the Court] should construe the Act to place maximum responsibility for permitting decisions on the states where the EPA has certified a NPDES permitting program." *American Paper Inst.*, 890 F.2d. at 874.

The Court of Appeals' decision 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 our Legislature has directed. *Andersen v. DNR,* 2010 WI APP at ¶ 29. 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. *Id.*

DNR's interpretation necessarily requires this Court to either 1) ignore the plain language of a state law underlying EPA's decision to delegate the WPDES permit program; 2) redefine the term "applicable federal law," in Wisconsin statutes section 283.31(3)(d)2; or 3) carve out a statutorily nonexistent exemption to the review available under section 283.63. DNR seeks not to harmonize or clarify the law, but to invalidate and disregard the statutes that were the foundation for EPA's approval of a state-run NPDES

program. This would further confuse the clear requirements of the EPA-approved state WPDES program.

DNR has provided no support for its contention that the Court of Appeals' decision will result in incongruence between state and federal law, and it provides no examples of such incongruence. Indeed, not requiring harmony between state and federal law creates greater risk to permittees and the public.

Wisconsin has a well-developed, EPA-approved, state system for issuance and review of WPDES permits. Eliminating contested case review of WPDES permits that fail to comply with federal law would create an "undesired bifurcated system" that would authorize DNR to issue permits under state law, but require EPA to review issues related to whether a permit violates federal law. *American Paper*, 890 F.2d at 875.

B. The Court of Appeals Decision Reduces the Possibility that Wisconsin Water Will Receive Weaker Protection than Uniformly Required in Other States.

DNR urges this Court to disregard EPA-approved legal requirements that form the foundation of the WPDES program, and to empower DNR to do what it is prohibited from doing: issue WPDES permits that fail to contain restrictions and requirements necessary to comply with applicable CWA requirements. To do so would ignore the underlying federal nature of the delegated state program and authorize DNR to issue permits less stringent than uniformly required across the nation, without any opportunity for affected communities to object.

DNR acknowledges that the Court's decision has the potential to affect many hundreds of municipal and industrial wastewater dischargers in the state. But DNR altogether

ignores the impact this Court's holding will have on the vibrant state tourism industry and the millions of Wisconsin residents and visitors who drink, live on, fish in, and recreate in Wisconsin's many waters. If state contested case hearings do not provide a forum for review of a WPDES permit for compliance with the CWA, concerned residents and tourism-related businesses would have no option but to accept that DNR does not require polluters to limit their discharges to the extent uniformly required in other states. This means that the water outside our back door, at the end of our faucet, or at our favorite fishing or vacation spot, may be more polluted than if we lived elsewhere—but affected citizens will have no forum in which to raise their concerns, and DNR will be insulated from review of its decision to impose less stringent requirements. DNR's position is that all WPDES permits comply with federal law simply because DNR has enacted rules that it believes comply with federal law. Nevertheless, DNR has not presented any justification for treating its permit-issuing decisions with respect to compliance with federal law as infallible and unreviewable.

C. The Court of Appeals Decision Will Not Create a Conflict Between State Administrative Decisions and EPA Approved State Rules.

DNR also provides no support for its bald contention that the review required by the Court of Appeals decision "is necessarily a review of the rules not the terms, and only EPA or federal court may reject promulgated state rules as inconsistent with federal law." (DNR Br:8.) The Court of Appeals did not decide whether the permit terms comply with state law, or whether state law complies with federal law. That question was not before the court or developed in the record because there has been no actual review of the substance of the Council's petition. The Council was denied that opportunity by DNR.

The Court of Appeals decision will not result in unpromulgated state rules that have not been reviewed or approved by EPA. The Council is not asking for new rules, but for DNR's implementation of existing state requirements consistent with its statutory responsibilities.

D. DNR's Attempts to Distinguish or Question the Court of Appeals' Citation to Established Caselaw Are Baseless and Irrelevant.

DNR asks this Court to clarify that cases cited by the Court of Appeals "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."[20] (DNR Br:37). DNR misreads the Court of Appeals decision to encompass issues and facts that are not present. The Court of Appeals' reliance on these cases was not so broad as DNR implies. The Court of Appeals cited these cases only as "suggesting [that] state administrative agencies and courts may determine the requirements of, and state compliance with, federal law." *Andersen v. DNR,* 2010 WI APP at ¶31; (Pet-App:117.)[21]

DNR does not and cannot contend that the Court of Appeals mischaracterized any of these cases. Nor does DNR offer any legal or factual authority to dispute the Court of Appeals' application of these cases. DNR simply disagrees with the conclusion reached by the Court of Appeals, and

[20]*Froebel v. Meyer*, 217 F.3d at 935; *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 559, 525 N.WW.2d 723 (1995); *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W.2d 216 (1991); *Sewerage Comm'n of Milwaukee v. DNR*, 102 Wis. 2d at 619. The Court of Appeals does not, as DNR asserts, cite *Badger Paper Mills v. DNR*, 154 Wis. 2d 435, 438-39 (Ct. App. 1990).

[21]In view of the Supremacy Clause of the United States Constitution, that is hardly a novel proposition.

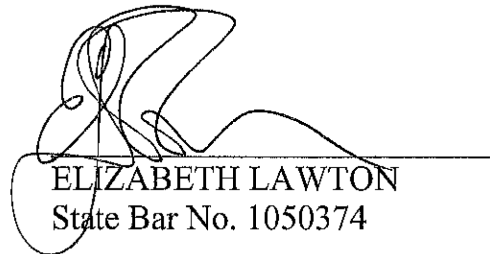
relies not on any legal or factual authority, but on its unsubstantiated assessment of its own authority.

CONCLUSION

For the reasons stated herein, the Council respectfully requests the Court to affirm the decision of the Court of Appeals.

Respectfully submitted this 13th day of September, 2010.

MIDWEST ENVIRONMENTAL ADVOCATES



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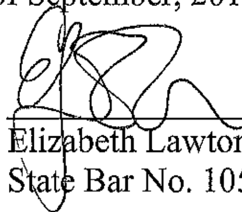
CERTIFICATION

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 9,836 words.

Dated this 13th day of September, 2010



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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.

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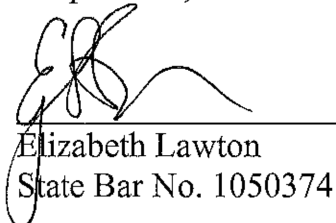

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