

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. 2008AP003235

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 DNR
MUST IN A PERMIT REVIEW HEARING
DETERMINE WHETHER A WASTEWATER
DISCHARGE PERMIT ISSUED UNDER STATE LAW
PURSUANT TO AN EPA-APPROVED STATE
PROGRAM COMPLIES WITH FEDERAL LAW

DNR'S REPLY BRIEF AND APPENDIX

J.B. VAN HOLLEN
Attorney General

JOANNE F. KLOPPENBURG
Assistant Attorney General
State Bar #1012239

Attorneys for
Respondent-Respondent-Petitioner
Department of Natural Resources

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9227; (608) 266-2250 (Fax)
kloppenburgjf@doj.state.wi.us

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DNR'S REPLY BRIEF

State statutes provide that state WPDES permit terms shall meet conditions in applicable state rules and "any applicable federal law or regulation." The Council interprets this clause as embracing the whole of federal law that prescribes the prerequisites for initial EPA approval of state programs and rules. DNR interprets this clause to mean only any post-approval federal rules promulgated directly for Wisconsin waters, none of which is at issue here. DNR asks this Court to accord DNR the great weight deference due its interpretation, reverse the court of appeals, and affirm its denial of the Council's request for a hearing on whether state permit terms violate general federal law.

I. DNR'S INTERPRETATION OF WIS. STAT. § 283.31(3)(d)2. IS DUE GREAT WEIGHT DEFERENCE.

DNR agrees with the Council that Wis. Stat. § 283.31(3) and (4) authorizes DNR to issue permits containing terms based on the sources of standards set forth in that statute, "whenever applicable." Wis. Stat. § 283.31(3). DNR and the Council disagree as to how to interpret one of those sources, Wis. Stat. § 283.31(3)(d)2.: "Any more stringent limitations . . . [n]ecessary to comply with any applicable federal law or regulation." The interpretation of "any applicable federal law or regulation" is a question of law reviewed under the great weight deference standard.

A. The interpretation of "any applicable federal law or regulation" is not a question of DNR's authority to regulate.

The Council in its petition for a hearing contended that certain terms in the St. James WPDES permit "violate[d] federal law." R.7:247-48; Resp'tApp:105-06; Pet-App:351-352 (highlighting added).¹

DNR denied the challenges based on federal law "as not being authorized pursuant to Wis. Stat. § 283.63." R.7:8; Pet-App:132. The Council intertwined its subsequent petition for judicial review with requests for declaratory judgments (R.1:1-38), and DNR responded

¹ The Council now recharacterizes its claims that permit terms violate federal law, as claims that the permit violates the state statute setting forth the sources of terms in permits that DNR is authorized to issue (Wis. Stat. § 283.31(3) and (4)). However, the Council disputes not DNR's compliance with that statute but DNR's interpretation that that statute does not embrace the Council's general federal law claims. The fact remains that the Council claims that permit terms violate federal law.

(R.19) and the circuit court decided (R.64:1-7; Pet-App:122-28) without addressing the standard of review.

In the parties' briefs on appeal, the Council framed the issue of whether DNR properly limited the scope of the hearing that it granted to the Council, as one of DNR's authority to review claims that permit terms violate federal law. Council Ct.App.Br:xi, 41-42; DNR Ct.App.Br:3, 7. DNR followed suit in its initial brief in this Court. Pet-Brief:6.

The Council's response brief makes it clear that the question to be decided is not one of DNR's authority, but whether DNR properly interpreted statutory language identifying the various sources of terms in permits. That question is a question of law that this Court decides under the great weight deference standard.

Here, DNR is not reaching out to regulate pursuant to a statute, as in *Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶2, 270 Wis. 2d 318, 677 N.W.2d 612 (whether statute gave DNR authority to promulgate rule setting a hunting season for mourning doves); *Grafft v. DNR*, 2000 WI App 187, ¶14, 238 Wis. 2d 750, 618 N.W.2d 897 (whether statute authorized rule setting standards for boat shelters); *Wis. Environmental Decade v. PSC*, 81 Wis. 2d 344, 347, 351, 260 N.W.2d 712 (1978) (whether statute that required a public hearing before a change in schedules increasing rates authorized PSC to permit clauses allowing rate increases without any hearing); or the cases cited by the Council on page 14 of its brief.

Rather, DNR is determining how to do what it is authorized to do—what terms to include in the permits that it is authorized to issue. DNR has determined that the terms are those based on state rules prescribing the "[e]ffluent limitations," "[s]tandards of performance", and "[e]ffluent standards, effluent prohibitions and pretreatment standards" referred to in Wis. Stat. § 283.31(3)(a), (b), (c) and (d)1. (all rules that DNR is

authorized to prescribe under Wis. Stat. § 283.11(1) ("The department shall promulgate by rule effluent limitations, standards of performance for new sources, toxics effluent standards or prohibitions and pretreatment standards"), and more stringent limitations necessary to meet federal requirements directed specifically at Wisconsin waters under Wis. Stat. § 283.31(3)(d)2.

The Council disagrees with DNR's interpretation of the basis or source of terms covered by the last subdivision. That disagreement is not over DNR's authority; it is not jurisdictional; it is not over procedure (and the cases cited by the Council on page 14 of its brief do not stand for the propositions stated there). It is over how DNR puts terms in the permits the parties agree it is authorized to issue.

- B. DNR's interpretation of "any applicable federal law or regulation" as a source of permit terms in Wis. Stat. § 283.31(3)(d)2. is due great weight deference in light of its 36 years of administering the WPDES program and its consistent reliance on that interpretation in permit reviews.

DNR's conclusions of law interpreting and applying the WPDES permitting statutes and rules are entitled to great weight deference, the highest degree of deference. Great weight deference is due an agency decision where: "(1) the agency is charged by the legislature with the duty of administering the statute; (2) the agency interpretation is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming its interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute." *Racine Harley-Davidson, Inc. v. State*, 2006 WI 86, ¶16, 292 Wis.

2d 549, 717 N.W.2d 184; *Hilton v. DNR*, 2006 WI 84, ¶15, 293 Wis. 2d 1, 717 N.W.2d 166 ("the correct test [for great weight deference] is whether the agency "has experience in interpreting [the] particular statutory scheme" at issue" (citation omitted); *Clean Wisconsin v. PSC*, 2005 WI 93, ¶¶38-41, 282 Wis. 2d 250, 700 N.W.2d 768 (great weight deference due agency with expertise and experience in interpreting the particular statutory scheme at issue, and with primary responsibility for determination of fact and policy).

"It is not necessary that the agency has previously ruled on the application of the statute to a factual situation similar to the one presented if the agency has extensive experience in administering the statutory scheme in a variety of situations." *Homeward Bound Services v. Office of Ins. Com'r*, 2006 WI App 208, ¶16, 296 Wis. 2d 481, 724 N.W.2d 380 (emphasis added).

Most broadly, "[t]he legislature has delegated to the DNR the duty of enforcing the state's environmental laws." *Hilton*, 293 Wis. 2d 1, ¶20. Here the legislature has charged DNR with administration of the WPDES program specifically. Wis. Stat. §§ 283.001(2), 283.31. DNR has administered the WPDES program since 1974. As a matter of course, it has had to interpret the statutory provisions, including the provision establishing the sources for permit terms, when issuing permits over the past 36 years.

Examples of specific instances in which federal law challenges to permit terms have been made, and DNR has interpreted Wis. Stat. § 283.31(3)(d)2. and declined to hear claims based only on general federal law, are included in Pet-App:351-388. *See* Pet-App:354-355; 358; 370-371; 389-379; 381; 384-385; 386-388.

Because DNR is charged with administering the WPDES program, it has long and consistently applied its programmatic expertise and experience to the development of permit terms, and it has previously

interpreted Wis. Stat. § 283.31(3) consistently with its interpretation here, its interpretation and application of that provision are entitled to great weight deference.

Under great weight deference, the court upholds DNR's interpretation if it is reasonable, "even if an equally reasonable or more reasonable interpretation is offered." *Hilton*, 293 Wis. 2d 1, ¶17.

C. DNR's interpretation is due great weight deference regardless whether the statute is ambiguous.

The Council in its brief at pages 14-15 suggests that no deference is due an agency interpretation of an unambiguous statute. The Council cites no law supporting its suggestion. As established above, this Court must follow the multi-factor analysis recently and fully set forth in *Harley-Davidson* and *Hilton*. Under chapter 227 review of agency decisions, and under state case law applying chapter 227 to state agency decisions, the question is not first whether the law interpreted by the agency is ambiguous, but whether the four factors set out in *Harley-Davidson* and *Hilton* are present. As also shown above, those factors are present here, and DNR's interpretation is due great weight deference.

If this Court reviews DNR's statutory interpretation *de novo*, then the statute is ambiguous because, as shown below, resort to the federal regulations and to EPA's comments in the C.F.R. is necessary to construe the statutory subdivision properly.

II. THE FEDERAL REGULATIONS THAT ARE "APPLICABLE TO STATE PROGRAMS" ARE GENERAL PREREQUISITES THAT STATE PROGRAMS MUST MEET TO OBTAIN EPA APPROVAL.

The Council contends that Wis. Stat. § 283.31(3)(d)2. means that all federal requirements denominated "applicable to state programs" in the federal law are directly applicable to state dischargers through state permits—that state permits must directly implement federal requirements even if there is a state program with state rules in place to meet those requirements. If the Council were correct, then there would be no need for state rules setting requirements to be placed in state permits. No state statute provides for such direct implementation, *see Wis. Elec. Power Co. v. DNR*, 93 Wis. 2d 222, 287 N.W.2d 113 (1980), and EPA's comments in the Federal Register confirm that there is no such direct implementation.

The federal register notice for the revision of 40 C.F.R. Part 123 in 1980 states:

Those sections of Part 122 and Part 124 which are applicable to State program (through reference in Part 123) have been highlighted in the section (or where necessary, paragraph) headings. Indication that a section is "applicable to State programs" does not mean that exactly the same provision will be applicable to owners or operators who receive their permits from a State. Rather, "applicability" means that a State program must have a similar provision in its own statutes and regulations in order to receive approval to operate in lieu of EPA (or the Corps of Engineers for 404). For the corresponding State provisions, these statutes and regulations would have to be consulted.

45 Fed. Reg. 33294.

This Part [123] establishes the requirements for State RCRA, UIC, NPDES, and 404 programs and the process for approval, revision, and withdrawal of these State programs. It also establishes guidelines for EPA overview of these programs, including the requirements for a Memorandum of Agreement between EPA and the State. Although State programs are established and operated under State law, approved State RCRA, UIC, NPDES, and 404 programs also implement Federal law and operate in lieu of Federally administered programs. A permit issued by a State under State law after its program has been approved satisfies the Federal permit requirement . . . the requirements of Part 123 represents the *minimum* requirements which States must meet to qualify for approval. States are allowed some flexibility in how they implement these requirements.

45 Fed. Reg. 33377.

This language establishes that the requirements denominated "applicable to state programs" are federal requirements that states have to meet to get their programs approved at the front end. The regulations cited by the Council as the basis for its federal law claims, 40 C.F.R. §§ 122.44-45, are large compendia of requirements for states to meet to obtain approval of their programs. They are checklists for EPA to use to determine whether state programs suffice to enforce the federal program. They do not mandate results in the form of specific permit terms.

EPA's comments confirm that these front-end program approval requirements are not in addition to the state rules in the approved state programs. If they were, no state would ever promulgate state rules.

III. THE STATE STATUTE REFERS TO SPECIFIC FEDERAL REQUIREMENTS IMPOSED DIRECTLY ON WISCONSIN WATERS AFTER EPA'S PROGRAM APPROVAL.

After EPA determines that a state program suffices to enforce federal requirements, EPA may find specific gaps that need to be filled by direct federal action.

Under the Clean Water Act, States must adopt water quality standards to protect public health and welfare and enhance the quality of water. Section 303(c)(4) of the Clean Water Act authorizes the Administrator of EPA to promulgate Federal standards applicable to a State when: (1) The State submits standards for EPA approval and EPA determines that the State standards fail to meet the requirements of the Act, or (2) in any case where the Administrator determines a new or revised standard is necessary to meet the requirements of the Act. EPA's implementing regulations also make clear that the Administrator may take action to promulgate either when a State fails to adopt changes specified in a disapproval or in any case where the Administrator determines a new or revised standard is necessary (40 CFR 131.22).

57 Fed. Reg. 60871.

What Wis. Stat. § 283.31(3)(d)2. means is that ALJs and circuit courts can interpret federal law only where EPA has clearly sent a message that a federal requirement is directly applicable to Wisconsin water (*see* examples at Pet-Brief:24-25), and so stands in the same shoes as a state rule.² Such a federal requirement is in

² The case cited in footnote 10 of the Council's brief concerned state hearings to determine compliance with state law, not federal law: "for the State of New York to complete its important, yet singular, task in the federal licensing procedure, of issuing a certificate of compliance with certain state laws." *Power Auth. of St. of N.Y. v. Department of Environ. Con.*, 379 F. Supp. 243, 246 (N.D. N.Y. 1974).

addition to the state requirements referred to in Wis. Stat. § 283.31(3)(a)-(d)1. This meaning fulfills the statute's purpose, to ensure that permits contain terms based on all "applicable" sources. Wis. Stat. § 283.31(3)(Intro).

Where EPA has intervened in the state program by overpromulgating, a permit term's compliance with that requirement is subject to state review to determine whether the permit is in compliance with that overpromulgated regulation. Where EPA has not stepped in to supplement or displace a state program that EPA has found consistent with nationwide federal law requirements, then EPA is an indispensable part in any challenge that a state permit term, or rule in an approved state program, is contrary to federal law.

DNR's position harmonizes federal and state law. DNR issues permits with terms based on state law in a state program that EPA has found is consistent with the many federal requirements applicable to state programs, plus any specific federal requirements directed at Wisconsin waters insufficiently addressed in the state program. Any terms based on those sources may be challenged under Wis. Stat. § 283.63.

The Council has proffered no evidence that its claims here rest on either source of permit terms—state law or federal law specifically applicable to Wisconsin waters—and so DNR properly declined to hear its claims as not within the reach of the permit term sources in Wis. Stat. § 283.31(3) and (4).

If neither source of permit terms provides the protection that the Council believes federal law requires, then its recourse is to EPA, to require DNR to revise its program to provide that protection or for EPA to promulgate a federal requirement directed at Wisconsin waters. The Council's contention that the permit is "inconsistent with minimum requirements of federal law required to be imposed by state statutes," Resp-Brief:12-13, is precisely a challenge that there should be rules

imposing those requirements, that DNR's program is deficient. If DNR does not on its own promulgate the missing rules, only EPA can remedy the deficiency.³

IV. THE FEDERAL/STATE
PARTNERSHIP SCHEME
SUPPORTS DNR'S
INTERPRETATION.

The word "delegate" does not appear in the federal law; rather, EPA approves state programs as consistent with the federal law. 40 C.F.R. §§ 123.1(c) and 123.61(b). States are not delegates; they have "primary authority to establish water quality standards" and "maximum responsibility for permitting decisions." Resp-Brief:6, 32. The Council ignores the structure of the partnership—the underlying basis for federal approval of a program's establishment, and the state's subsequent responsibility for permitting decisions. *American Paper Institute, Inc. v. US E.P.A.*, 890 F.2d 869, 874 (7th Cir. 1989). The construction of Wis. Stat. § 283.31(3) and (4) so as to limit sources of permit terms to state law and specifically imposed federal requirements is consistent with a state's maximum permitting responsibility.

While the public's opportunity to challenge EPA's review of state permits is limited, it is not non-existent. *See* Pet-Brief:32-33; *Save the Bay, Inc. v. Administrator of E.P.A.*, 556 F.2d 1282, 1295-96 (5th Cir. 1977) (identifying available avenues of review of EPA failure to object to a state permit). That the public's options for remedying a permit or rule inconsistent with general federal law are post-permit, is a consequence of the federal/state partnership prescribed by federal law.

³ DNR's interpretation does not leave it free to regulate less stringently than other states. The phosphorus rules that DNR is developing suggest to the contrary—the Council cites to no other states with rules that set numeric criteria for streams and lakes statewide for phosphorus.

DNR properly denied review of claims of conflict with federal laws that do not apply to state permit terms.

CONCLUSION

DNR asks this Court to reverse the court of appeals and affirm DNR's denial of a contested case hearing on the Council's general federal law challenges to Ft. James's state permit terms, because general federal law does not apply to those terms.

Respectfully submitted this 23rd day of September, 2010.

J.B. VAN HOLLEN
Attorney General

JOANNE F. KLOPPENBURG
Assistant Attorney General
State Bar #1012239

Attorneys for
Respondent-Respondent-Petitioner
Department of Natural Resources

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9227
(608) 266-2250 (Fax)
kloppenburgjf@doj.state.wi.us

CERTIFICATION

I hereby 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 2,953 words.

Dated this 23rd day of September, 2010.

JoAnne F. Kloppenburg
Assistant Attorney General

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

I hereby 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 23rd day of September, 2010.

JoAnne F. Kloppenburg
Assistant Attorney General