



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

April 24, 2014

To:

Hon. Raymond S. Huber
Circuit Court Judge
Waupaca County Courthouse
811 Harding Street
Waupaca, WI 54981

Terrie J. Tews
Clerk of Circuit Court
Waupaca County Courthouse
811 Harding Street
Waupaca, WI 54981

Bradley J. Motl
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Philip Nolan
E3362 Royalton Street
Waupaca, WI 54981

Michael L. Orr
E3362 Royalton Street
Waupaca, WI 54981

Waupaca Coalition for Public Response
E3362 Royalton Street
Waupaca, WI 54981

You are hereby notified that the Court has entered the following opinion and order:

2013AP2017

Waupaca Coalition for Public Response v. DNR
(L.C. # 2013CV15)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

Waupaca Coalition for Public Response, Philip Nolan, and Michael Orr (collectively, the coalition) appeal a circuit court order that affirmed, upon administrative review under Chapter 227 of the Wisconsin Statutes, a decision by the Wisconsin Department of Natural Resources to grant an air pollution control construction permit to Waupaca Foundry, Inc.-Plants 2/3. The permit authorizes the foundry to construct a new thermal sand reclamation system and to modify an existing facility to increase its capacity to manufacture iron castings—subject to emission limits, monitoring, recordkeeping and reporting requirements, and other conditions. Although

specific legal arguments are not developed, as a general matter, the coalition contends that the department failed to follow certain statutory and administrative procedures in its permit approval process. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).¹ We affirm.

We first note that the argument section of the coalition’s brief is less than two pages long and makes broad assertions that numerous statutory and administrative code sections have been violated without developing any coherent legal arguments to explain why relief is warranted. While we will make some allowances for the failings of pro se briefs, “[w]e cannot serve as both advocate and judge,” and will not scour the record to develop viable, fact-supported legal theories on the appellant’s behalf. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992); *see also State v. Jackson*, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999); WIS. STAT. RULE 809.19(1)(d) and (e) (setting forth requirements for appellate briefs). Accordingly, we will limit our discussion to what appear to be the coalition’s primary complaints that: (1) the department improperly relied upon statistical models and information from a prior 2007 permit application to determine whether emissions from the proposed facilities would exceed permissible levels for any air contaminants or violate other air quality standards, without conducting a new air quality analysis taking into account the foundry’s actual emissions as documented in its NR 438 emission reports from 2010 and 2011; and (2) the conditions set forth in the permit did not comply with requirements in WIS. ADMIN. CODE § NR 445.08(1) and (8) (March 2012) regarding “greatest actual emissions” and “cumulative inhalation impact”

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

compliance determinations.² Any additional arguments that we do not explicitly address are deemed denied. See *Libertarian Party of Wisconsin v. State*, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (an appellate court need not discuss arguments that “lack sufficient merit to warrant individual attention”).

The coalition’s arguments are based upon a flawed understanding of the permit process and the department’s statutory and administrative obligations. When, as here, an applicant seeks a permit to construct or modify a facility that may emit air contaminants (*i.e.*, a “stationary source”), the department “shall prepare an analysis regarding the effect of the proposed construction ... or modification on ambient air quality and [make] a preliminary determination on the approvability of the construction permit application” WIS. STAT. §§ 285.01(41) and 285.61(3). After providing the public an opportunity to review and comment upon the source’s application and the department’s analysis and preliminary determination, and after taking into consideration the environmental impact and any public comments, the department may issue a permit “according to the criteria established under s. 285.63.” Sec. 285.61(4) through (8). Among the criteria set forth in WIS. STAT. § 285.63 are requirements that the source will meet all applicable emission limitations, standards of performance for new stationary sources, and emission standards for hazardous air contaminants under WIS. STAT. § 285.27(1) and (2), and that the source will not cause or exacerbate a violation of any ambient air quality standard or ambient air increment under WIS. STAT. § 285.21(1) or (2). Sec. 285.63(1) and (2). Sections 285.21 and 285.27, in turn, authorize the department to promulgate administrative rules

² The coalition also takes issue with the deferential standard of review accorded to agency decisions. We need not address the standard of review in this opinion, however, because we would reach the same conclusion on *de novo* review.

for emission and ambient air quality standards, so long as the administrative rules are not more restrictive than similar rules under the federal clean air act. The relevant emission standards promulgated by administrative rule are set forth in tables contained in WIS. ADMIN. CODE § NR 445.07.

Contrary to the coalition's assertions, there is no requirement that the department utilize data from WIS. ADMIN. CODE § NR 438 emission reports on existing facilities when conducting its preliminary analysis of the effect on air quality of the proposed construction of a new or modified source, or that it use the methodology for conducting compliance reviews under WIS. ADMIN. CODE § NR 445.08 when setting permit conditions for the construction of a new or modified source. Thus, the department was entitled to incorporate models and data from a prior analysis of the existing facility as the starting point for its calculation of the cumulative emissions that would be produced from the proposed expansion of the foundry, and so far as is argued by either party appropriately relied upon its modeling projections to set conditions for the permit.

IT IS ORDERED that the order affirming the air pollution control construction permit is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals