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DISTRICT IV

December 10, 2014

To:

Hon. Frank D. Remington
Circuit Court Judge
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Madison, WI 53703

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

2013AP2746

Midwest Environmental Defense Center, Inc. v. DNR and
Foremost Farms USA (L.C. # 2012CV3352)

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

The Department of Natural Resources (DNR) and Foremost Farms USA appeal an order remanding this case back to DNR. Based upon our review of the briefs and record, we conclude

at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We reverse.

We have received supplemental letter briefing on the effect of *Clean Water Action Council of Northeast Wisconsin v. DNR*, 2014 WI App 61, 354 Wis. 2d 286, 848 N.W.2d 336, *review denied*, 2014 WI 122, ___ Wis. 2d ___, 855 N.W.2d 697 (“*CWAC*”). In its supplemental brief, respondent Midwest Environmental Defense Center concedes that it was required to seek a contested case hearing under WIS. STAT. § 283.63 as a prerequisite to judicial review of the DNR decision before us. In other words, the Center concedes that it failed to exhaust its administrative remedies.

The remainder of the Center’s brief focuses on whether there are sufficient reasons for a discretionary decision not to apply the exhaustion doctrine in this particular case. However, the Center does not attempt to demonstrate that the circuit court made such a discretionary determination as an alternative to the court’s legal conclusion about the applicability of WIS. STAT. § 283.63. Our review of the record shows that the court did not make such a decision. The Center does not explain how we could affirm on the basis of discretion that was not exercised. Nor does the Center ask that we remand to the circuit court for an exercise of that discretion.

The Center may also be arguing that we should make such a discretionary determination ourselves, although the Center does not clearly ask us to do that. It provides no authority for the proposition that we can be the first court to exercise that discretion. However, even if we assume

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

without deciding that we can exercise that discretion, we would not excuse the failure to exhaust here. The circumstances here are similar to those in *CWAC* in the sense that there is no reason to believe that the Center could not find four other petitioners. See *CWAC*, 354 Wis. 2d 286, ¶26. Furthermore, there are benefits to contested hearings, see *id.*, ¶23, and the Center has not persuaded us that there would be no benefit to such a hearing in this case.

IT IS ORDERED that the order appealed is summarily reversed under WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals