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DISTRICT IV

November 19, 2015

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

2014AP2465

Petenwell and Castle Rock Stewards, Inc. and River Alliance of Wisconsin, Inc. v. Wisconsin Department of Natural Resources and Domtar A.W. LLC (L.C. # 2013CV290)

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

Petenwell and Castle Rock Stewards, Inc., and River Alliance of Wisconsin, Inc., appeal an order dismissing their petition for judicial review of an administrative decision by the Department of Natural Resources. 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 (2013-14).¹

We further conclude that the circuit court’s “final decision and order” identifies and applies the proper legal standards to the relevant facts and reaches the correct conclusion. We therefore adopt as our own the circuit court’s decision and incorporate it by reference into this order. We also attach the court’s order. On that basis, we summarily affirm. *See* WIS. CT. APP. IOP VI(5)(a).

Our adoption of the circuit court’s order makes it unnecessary to consider the arguments of the Department and cross-appellant-respondent Domtar that the petition for judicial review should have been dismissed for failure to exhaust administrative remedies. Even if we were to reach that conclusion, it appears to lead to the same result that we have already affirmed, namely, dismissal of the petition with prejudice.

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

Diane M. Fremgen
Clerk of Court of Appeals

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

STATE OF WISCONSIN

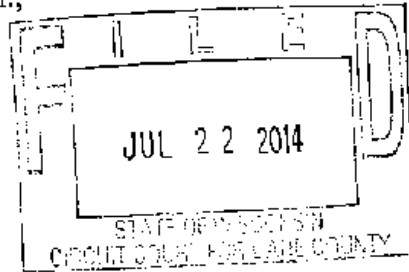
CIRCUIT COURT
Branch 10

DANE COUNTY

Petenwell and Castle Rock Stewards, Inc. et al.,
Petitioners

vs.

Wisconsin Department of Natural Resources,
Respondent



Case No. 13CV290

FINAL DECISION AND ORDER

Pctitioners seek review of the decision by the Wisconsin Department of Natural Resources (“the DNR” or “the Department”) to issue to Domtar A.W. L.L.C. (“Domtar”) a Wisconsin Pollutant Discharge Elimination System permit (“WPDES permit” or “permit”) authorizing discharge of phosphorous into the Wisconsin River (the “receiving water”). The Petenwell and Castle Rock flowages, or reservoirs, are downstream from the points at which Domtar’s permit authorizes the discharges to occur (“downstream waters.”) The phosphorous levels allowed by water quality regulations for both flowages are lower than those allowed for the Wisconsin River at the points of the Domtar discharge.

The question is whether the DNR had the authority to issue the permit without including a Water Quality Based Effluent Level (“WQBEL”) calculated to protect the downstream waters. The DNR elected to defer setting a level based on protection of the downstream waters until completion of a comprehensive, complex and multi-year study of all point and non-point sources of phosphorous in the entire Upper Wisconsin River Basin. The study is intended to determine the Total Maximum Daily Load (“TMDL”) of phosphorous for the entire system and is expected to be completed in 2017.

Wisconsin Administrative Code s. NR217.13(1)(b) states that the WQBELs for phosphorous “shall be calculated based on the applicable phosphorous criteria in s. NR 102.06 at the point of discharge, **except the department may calculate the limitation to protect downstream waters** [emphasis

added].” The DNR reads the last clause as allowing it to issue a permit without making such a calculation. Petitioners argue that such an interpretation is incorrect because it is contrary to other state and federal law.

The DNR and Domtar believe the DNR’s interpretation should be given great (controlling) weight. An agency’s interpretation of a statute is given great weight when 1) the agency is charged with interpreting the statute, 2) the agency’s interpretation is 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. *Andersen v. DNR*, 2011 WI 19, par. 27, 332 Wis. 2d 41, 796 N.W.2d 1. The DNR also argues that its interpretation of its own regulations is entitled to great weight deference, citing *Sierra Club v. DNR*, 2010 WI App 89, par. 24, 327 Wis. 2d 706, 787 N.W.2d 855.

In this case the DNR is charged with carrying out Ch. 283, has long experience in interpreting and applying the statute and expertise and specialized knowledge were used in forming its interpretation. However, the application of Ch. 283 to WQBEL limitations of phosphorous discharges is not long-standing. Subchapter III of Wis. Adm. Code Ch. NR 217, of which NR 217.13 is a part, had been in effect only 2 years when the Domtar permit was issued. Neither the DNR nor Domtar point to any judicial or administrative decisions interpreting Ch. 283 and Ch. NR 217 as they apply to phosphorous discharges. In addition, NR 217.13,(1)(b), as interpreted by the DNR, purports to give the DNR discretion in whether and when to calculate WQBEL limits for phosphorous based on the protection of downstream waters. As an interpretation concerning the scope of the agency’s own authority and discretion, it is owed no deference by the courts. *Loomis v. Wisconsin Personnel Com’n*, 179 Wis.2d 25, 30, 505 N.W.2d 462.

Therefore, the court will give no weight to the DNR’s interpretation of NR 217.13(1)(b) and due weight deference to the DNR’s interpretation of Ch. 238. Nonetheless, the plain meaning of the language of NR 217.13(1)(b) in its context is unambiguous. It uses the word “may” in contrast with the use of “shall” in NR 217.13(1)(a). It authorizes, but does not require, the DNR to calculate a WQBEL limit on phosphorous in order to protect downstream waters.

The petitioners argue that a reading allowing the DNR to consider only the applicable standards at the point of discharge is contrary to Wis. Stat. secs. 283.13(5) and 283.31(3) and (4). Petitioners do not clearly identify specific language in the cited statutes that requires the DNR to calculate WQBELs using the impact on downstream waters and it is not apparent to the court that it is so. A reading of NR 217.13(1)(b) as permissive, not mandatory, is not inconsistent with or contrary to Ch. 283.

The remaining issue is whether the DNR properly exercised that discretion. It electing to base the permit's WQBEL on the water quality standards of the receiving water at the point of discharge and wait until completion of the TMDL studies before setting WQBELs for Domtar that include consideration of protection of downstream waters. There is substantial evidence in the record to support the DNR's conclusion, though other decisions might also have been reasonable. Under those circumstances the court will not substitute its judgment for the agency's decision.

CONCLUSION AND ORDER

For the reasons stated above, the issuance of the permit is affirmed and the petition is dismissed with prejudice. This is a final order for purposes of appeal as defined by Wis. Stat. sec. 808.03(1).

Dated: July 22, 2014

BY THE COURT:

Juan B. Colás
Circuit Court Judge

Copy: Counsel BY FAX ONLY