

WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 3, 2010
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a Brown County Circuit Court decision, Judge Timothy Hinkfuss, presiding.

2008AP3235 [Curt Andersen, et al v. DNR](#)

In this case, the Supreme Court examines issues arising from a dispute between environmental advocates and the state Department of Natural Resources (DNR) over re-issuing a wastewater discharge permit for a paper manufacturing plant in Green Bay. A decision by the Supreme Court could have broad statewide implications for industries regulated by the permits.

Some background: On May 27, 2005, the DNR issued a public notice of its intent to re-issue a Wisconsin Pollutant Discharge Elimination System (WPDES) permit to Fort James Operating Co., which was subsequently acquired by Georgia-Pacific Consumer Products.

The DNR instructed interested citizens to submit written comments or request a public hearing on the proposed permit within 30 days.

A copy of the proposed permit accompanied the public notice. In lieu of limiting mercury discharges, the proposed permit required mercury sampling under an alternative limitation plan authorized by Wis. Admin. Code § NR 106.145 (May 2005). The proposed permit also included a phosphorus effluent limitation that was to be determined as a rolling 12-month average.

The Cleanwater Action Council of Northeastern Wisconsin (the Council) objected to the proposed phosphorus limitations, claiming the DNR failed to conduct a “reasonable potential analysis” required by federal law to determine the impact of additional phosphorus discharges on water quality. The comment also alleged state rules permitting phosphorus effluent limitations as a rolling 12-month average violated federal law, and that the DNR violated state law by failing to perform an anti-degradation analysis. The Council did not contest the permit terms governing mercury sampling.

On Aug. 24, 2005, the DNR determined none of the Council’s objections merited further action and decided to re-issue the permit. The Council was ultimately denied a public hearing on many of its challenges to permitted phosphorus discharges because the DNR summarily concluded it lacked authority to resolve any challenge based on federal law.

On April 13, 2006, the Council petitioned for judicial review. It also requested a judgment declaring that the availability of a § 383.63, Stats., public hearing is not conditioned on having raised issues during the public comment period.

The Council claimed the DNR and Brown County Circuit Court (1) incorrectly interpreted Wis. Stat. § 283.63 to require that contested issues be raised during the public comment period to preserve them for consideration during later proceedings; and (2) improperly concluded the DNR lacks authority to determine whether the permit violates federal law.

The Council also sought judgment declaring that the DNR was required to comply with federal regulations and invalidating several state administrative code provisions relating to phosphorus and mercury discharges as conflicting with federal law.

The circuit court dismissed the Council's petition and affirmed the DNR's decision. The Council appealed, and the Court of Appeals reversed and remanded for a public hearing to be conducted in accordance with the procedures set forth in § 283.63. The Court of Appeals concluded, among other things, that the DNR possesses authority to determine whether provisions within a state-issued wastewater discharge permit comply with federal law.

The DNR now asks the Supreme Court to review whether an administrative permit review hearing is the appropriate forum for dispute over the application of federal law.