STATE OF WISCONSIN | CIRCUIT COURT BRANCH 8 | DANE COUNTY

MIDWEST ENVIRONMENTAL DEFENSE CENTER INC.

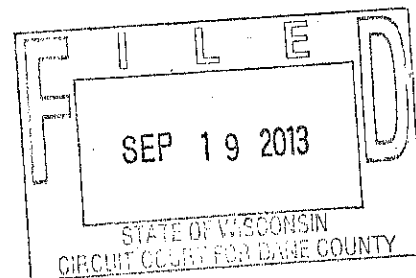
Petitioner,

v.

Case No. 12CV3352

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent,



FOREMOST FARMS USA,

Intervenor.

DECISION AND ORDER

Petitioner Midwest Environmental Defense Center, Inc. seeks judicial review pursuant to Wis. Stat. chapter 227 of the decision by Respondent Wisconsin Department of Natural Resources ("DNR") to issue a Wisconsin Pollutant Discharge Elimination System permit to Intervenor Foremost Farms USA ("Foremost Farms"). Specifically, Petitioner challenges the DNR's decision to calculate phosphorus water quality based effluent limits considering water quality standards at the point of discharge, and not upon the impact of the discharge's impact in downstream waters. The DNR and Foremost Farms argue that under Wis. Admin. Code § NR 217.13(1)(b), setting limits based on impacts to downstream waters is "optional." Petitioner

argues, however, that Wis. Admin. Code § NR 217.13(1)(b), along with other applicable administrative rules, Wisconsin statutes and federal laws, requires the DNR to consider the impact of phosphorus discharge on downstream waters and set appropriate limits.

I. INTRODUCTION

The Petitioner argues that because the DNR must consider an exceedence in the downstream water, if there is an exceedence, then the statutes, and the rules that implement the statutes, require that the effluent limits address those exceedences in the permit. According to the Petitioner, there is nothing preventing the DNR from utilizing the years of data already collected to calculate and impose limits to protect downstream waters right now. The Petitioner appears to take umbrage particularly at the Deputy Administrator who apparently rejected a staff recommendation and instead "deferred" consideration of downstream impacts. Characterizing WQBELs set to protect downstream waters as "optional", the Petitioner claims the DNR has abrogated its duty and violated state law.

Perhaps reflecting a kindred spirit, the DNR accepts much of what the Petitioner says, but argues that it is not required to set standards based on an exceedence to downstream water even if there is one, when, as here, the time is not yet right to do so. Both groups claim, or at least like to think, they stand in defense of the environment. Neither suggests there is not a problem with the two lakes. The DNR argues in this case that it is not ignoring the impact to downstream waters, that it takes the matter "seriously" and "is engaged in extensive monitoring and modeling of the Wisconsin River Basin in order to produce a phosphorus TMDL." The DNR pleads that the most "rational" way to address the problem is by setting the total maximum daily load for the downstream water, ("TMDL"). According to the DNR because these things are complicated, it is rational for it to have discretion when and how to calculate WQBELs based on the water

quality criteria for downstream waters. Tellingly, the DNR does not argue it has the discretion whether or not to calculate WQBELs based on the water quality criteria for downstream waters, only that in this case, it believes that the TMDL process will provide the best way to assess whether Foremost Farms' phosphorous WQBELs should be adjusted to protect water quality in the Petenwell and Castle Rock Lakes.

To its credit, Foremost Farms does not distance itself from or resist this administrative process, the limits placed upon it, or even the prospect that some day its WQBELs may be adjusted to reflect downstream impacts after the TMDL process. Indeed, it makes the point that the DNR at least did not continue the old effluent limitations while studying the matter. Foremost Farms joins with the DNR in advocating patience.

The Petitioner hammers the DNR saying it cannot legally ignore the impact to downstream water; doing nothing is not an option. Foremost Farms defends itself by pointing out that the DNR did not ignore downstream waters, but instead "carefully evaluated limits based on downstream waters" and "reasonably determined that in the complex Wisconsin River system it could not calculate limits based on downstream waters prior to the completion of an ongoing study meant to produce a Total Maximum Daily Load ("TMDL") from which WQBELs protective of downstream waters can be derived." Foremost goes on to remind the court that in its opinion the DNR "chose the environmentally protective option because [the permit] provides some reduction in phosphorus discharges while awaiting the result of the basin-wide TMDL study." The DNR similarly describes its actions in this same way.

II. THE PETITION FOR JUDICIAL REVIEW AND DECLARATORY JUDGMENT

In its petition, the Petitioner asked for three separate forms of relief. The third request was for this court to conclude that under Wis. Admin. Code including a WQBEL that is

protective of downstream waters is not optional. Depending on how this court answered that question, the Petitioner asked the court to declare that if downstream waters were impacted, this court should declare that the rules require a WQBEL for phosphorus that is protective of those waters. Finally, depending on that, the Petitioners ask this court to either set aside the permit or at least remand the matter back to the agency. For the reasons set forth below, this court concludes the consideration of downstream water is not optional and thus remands the matter back to the DNR for further proceedings consistent with this decision.

III. PRIOR AGENCY DECISIONS, GUIDANCE DOCUMENTS AND APPLICABLE STATUTORY AND REGULATORY FRAMEWORK

A. Reading the subsections of Wis. Admin. Code ch. §. 217 *in para materia.*

As discussed, the DNR and Foremost Farms take the position that setting limits based on impact to downstream waters is "optional." The DNR and Foremost Farms point to the plain language of the regulations in Wis. Admin. Code § NR 217. All parties acknowledge that NR 217 requires the DNR to consider whether a discharge has a "reasonable potential" to cause water quality criteria exceedances in either the receiving water or downstream water. (Intervenor Br. 7; Pet'r Br. 13) However, the DNR and Foremost Farms argue that NR 217.12(1)(a) and 217.15(1)(a), requiring the DNR to consider impacts in downstream water, merely trigger the requirement that WQBELs be included in a permit. (Resp't Br. 13; Intervenor 7) These regulations provide:

> (1) Water quality based effluent limitations for phosphorus shall be included in a permit whenever the department determines:
>
> (a) The discharge from a point source contains phosphorus at concentrations or loadings which will cause, has the reasonable potential to cause or contribute to an exceedance of the criteria in s. NR 102.06 in either the receiving water or downstream waters; and

Wis. Admin. Code § NR 217.12.

> (1) (a) *General.* The department shall include a water quality based effluent limitation for phosphorus in a permit whenever the discharge or discharges from a point source or point sources contain phosphorus at concentrations or loadings which will cause, has the reasonable potential to cause or contribute to, an exceedance of the water quality standards in s. NR 102.06 in either the receiving water or downstream waters. The department shall use the procedures in this section to make this determination.

Wis. Admin. Code § NR 217.15.

What NR 217.12 and 217.15 do not do, argue the DNR and Foremost Farms, is determine the actual calculation of the WQBEL, which instead is controlled entirely by Wis. Admin. Code § NR 217.13. This regulation provides in part:

> (1) BASIS FOR LIMITATIONS. (a) The department shall calculate potential water quality based effluent limitations for point source dischargers of phosphorus using the procedures in this section.
>
> (b) Water quality based effluent limitations for phosphorus shall be calculated based on the applicable phosphorus criteria in s. NR 102.06 at the point of discharge, except that the department may calculate the limitation to protect downstream waters.

Wis. Admin. Code § NR 217.13.

The DNR argues that under NR 217.13(1)(b), considering downstream waters in calculating phosphorus WQBELs is "optional". (Resp't Br. 7.) Thus, the DNR concludes, it was only required to base its calculation of the phosphorus WQBEL in the Foremost Farms WPDES permit on the water quality criteria of the receiving water, the Wisconsin River, and not required to consider exceeded water quality standards in downstream reservoirs. (Resp't Br. 7.)

B. The conclusion that downstream impact is "optional" and the DNR's own guidance documents.

As to the question of whether the administrative rules make it "optional" to consider downstream impacts, the DNR has sent mixed messages. In support of their interpretation of this

rule, the DNR and Foremost Farms claim it is "optional" because the best way to set the WQBELs is to wait until the TDML process is complete. At that time, and only then, they claim will the DNR have enough data or information. But the record before this court contains information reflecting an apparent internal disagreement on this question of fact, whether or not the DNR had enough information to set limits in the permit to address downstream impact.

On September 20, 2011, Patrick Oldenburg, a water resource engineer for the DNR, issued a memo recommending phosphorus limits of 100 μg/L in the WPDES permits for dischargers to the Wisconsin River between the Tomahawk and Castle Rock Lakes, which includes Foremost Farms. (R. 56-57.) In his memo, Mr. Oldenburg described how data from previous studies demonstrate that meeting the larger river standard (100 μg/L) is not sufficient to meet the water quality criteria from the Petenwell and Castle Rock lakes (40 μg/L). He cited this "wealth of empirical evidence" as the basis for his recommendation for a 100 μg/L limit for dischargers, and his conclusion that meeting the large river criteria of the Wisconsin River will result in exceeding the criteria for the downstream lakes. (R. 57.)

A month later Russ Rasmussen, Deputy Administrator of the DNR's Division of Water, directed that the DNR would not be implementing Mr. Oldenburg's recommendations. Mr. Oldenburg reported that the DNR would instead "defer the implementation of water quality based limits to protect downstream uses until the TMDL plays out." (R. 201.) The recommended phosphorus limits for discharges to the Wisconsin River between Stevens Point to Biron were then increased from the 100 μg/L to 930 μg/L. The higher limit was calculated based on meeting water quality criteria in the Wisconsin River at the point of discharge. (R. 56-60.) Although the DNR recognized that there were impaired reservoirs downstream, the DNR did not discuss, as it

had previously, the impact that the proposed phosphorus limits would have on the water quality in Pentenwell and Castle Rock Lakes. (R. 58-59.)[1]

The purpose of quoting Mr. Oldenburg and Mr. Rasmussen is not for the purpose of highlighting a difference of opinion or even questioning the chain of command in the agency. The information is relevant to the question of whether there is a factual basis to support a conclusion that the DNR cannot set Foremost Farm's WQBELs based on the current information, or must rather, wait until later, after the TMDL "plays out." The test for reviewing findings of fact is whether taking into account all the evidence in the record, "reasonable minds could arrive at the same conclusion as the agency." *Kitten v. DWD*, 202 WI 54, para. 5, 252 Wis.2d 561. This court is mindful that it must not substitute its judgment for that of any agency as to the weight of the evidence. See §227.57(6). Indeed, this court must affirm the agency's finding, even if against the weight or clear preponderance of the evidence, as long as reasonable persons could reach the same conclusion based on the evidence in the entire record. Hamilton v. DIHLR, 94 Wis.2d 611, 617-18 (1980).

Assuming that the DNR could have set the limits based on downstream impact, the question is whether the administrative rules allow the DNR to ignore the impacts, at least for the time being. As to whether this is truly "optional" the record contains some inconsistencies. The parties have cited the DNR Guidance that provides "where downstream waters require more protection than the immediate receiving water, a more stringent [effluent] limit will be included in the WPDES permit." Obviously, that was not done here. The language in this Guidance is not that it "should be" or even "can be", but instead "will be".

[1] It is not entirely clear whether the new limit was set in complete disregard to the downstream water or whether it was a compromise of sorts. The email in the record simply said the DNR was going to "defer".

The DNR's "rule summary" contains similar language contraindicative of the choice truly being "optional".[2] In this publication, the DNR explains:

> 4. When are Phosphorus Limits Required?
>
> Technology-based phosphorus limits are required for any point source discharge that exceeds the thresholds as described in NR 217.04(a)(1-6). Phosphorus WQBELs are required if a point source discharge has the potential to cause phosphorus criteria exceedance in either the receiving water or downstream waters (NR 217.12(1)(a)). It is possible that a discharge may be subject to technology-based limits and WQBELs. In these cases, the limit that is most protective of the water quality will be used in the WPDES permit- NR 217.12(1)(b) and NR 217.12(2).

In its "Guidance for Implementing Wisconsin's Phosphorus Water Quality Standards for Point Source Discharges" dated January 3, 2012, the DNR produces a flow chart that begins the process with "set water quality criteria for Wisconsin's waters: NR 102.06". Immediately below, the next step directs the process to "use criteria to calculate water quality based effluent limits (WQBEL): NR 217, Subchapter III". Only then does the DNR apparently "compare limits: TMDL vs. WQBEL limits." In that same document, the DNR explains "in what cases are phosphorus limits required?' It states: "phosphorus WQBELs are required as of December 1, 2010, and are required if a point source discharge has the potential to cause phosphorus criteria exceedence in either the receiving water or downstream waters (s. NR 217.12(1)(a), Wis. Admin. Code)." There appears from this document that Wis. Admin. Code §ch. NR 217 has some "flexibility", but ignoring, or deferring, a consideration of the impact to downstream water does not appear to be one of the bulleted options. Indeed Chapter 2.05 in this document contains an entire section on "consideration of downstream waters". Nowhere in that chapter is there support for the notion that the DNR can ignore the impact to downstream water or do nothing while it undertakes a multi-year study.

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[2] See: http://dnr.wi.gov/topic/surfacewater/documents/Phosphorus_Rule_Summary.pdf .

C. The regulatory framework established by State statutes and federal law.

The Petitioner argues that the DNR's authority to issue permits to discharge phosphorus into Wisconsin waterways is limited by a number of state and federal laws beyond Wis. Admin. Code § NR 217.13(1)(b). (Pet'r Br. 7.) In calculating phosphorus WQBELs, the Petitioner further argues, the DNR must consider whether the discharge will meet all applicable federal or state water quality standards. *See* Wis. Stat. § 283.31(3)(d)1. These water quality standards apply to entire waterways, not specific permits. (Pet'r Reply Br. 4.) Thus, the Petitioner argues, if a discharge will contribute to any water quality standard being exceeded, including water quality standards in both receiving and downstream waters, the DNR must take these exceeded water quality standards into account when calculating phosphorus WQBELs. (Pet'r Reply Br. 6.) According to the Petitioner, Wis. Admin. Code § NR 217.13(1)(b) does not give the DNR the ability to disregard exceeded downstream water quality standards. Instead, this administrative code section gives the DNR the explicit authority to base WQBELs on exceeded water quality standards on downstream, which they are already required to consider by both state and federal statutes. (Pet'r Br. 13.)

The Petitioner additionally argues that the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) prohibit the discharge of pollutants into navigable waters without a properly issued National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. §§ 1311(a), and 1342(a). The Clean Water Act allows the Environmental Protection Agency (EPA) to delegate the administration of the NPDES to states that have adequate authority to ensure compliance with applicable Clean Water Act requirements. 33 U.S.C. § 1342(b). The EPA approved the WPDES permit program in 1974, delegating to

Wisconsin the authority to administer the NPDES program within the state. *Andersen*, 332 Wis. 2d 41, ¶ 37.

In endeavoring to judge the DNR's interpretation of its rule, this court is guided by the laws set forth in the statutes as promulgated by the Legislature. This court has also considered the impact and effect federal law has on the proper interpretation of the DNR's administrative rule. The Wisconsin Legislature makes the laws and the executive branch, through its agencies, is charged with implementing, and sometimes enforcing those laws. Because agencies are bound by state statutes their rules must be interpreted to be consistent with them. Chapter 283 clearly does not explicitly address this situation, but it also does not appear to support the DNR's argument that it is optional for it to consider impacts to downstream water when issuing a permit. Wis. Stat. ch. 283 authorizes the DNR to implement and administer the Wisconsin Pollutant Discharge Elimination System. Wis. Stat. § 283.001(2). Under chapter 283, the discharge of a pollutant to the waters of the state is prohibited unless authorized pursuant to a WPDES permit. Wis. Stat. § 283.31(1).

The discharge of pollutants allowed in WPDES permits is subject to certain limitations. The discharge must meet all applicable federal and state water quality standards. Wis. Stat. § 283.31(3)(d)1. The DNR has the authority to set water quality standards. Wis. Stat. § 281.15(1). The water quality standards specific to phosphorus are set in Wis. Admin. Code § NR 102.06, which states "[t]his section identifies the water quality criteria for total phosphorus that shall be met in surface waters." *Id.* § NR 102.06(1). This regulation goes on to list the phosphorus water quality criteria applicable to various streams, lakes, and reservoirs. *Id.* § NR 102.06 (3)-(4).

If necessary to meet "applicable water quality standards . . . or any other state or federal law, rule or regulation," WPDES permits must include WQBELs. Wis. Stat. § 283.13(5). The

procedures for determining the need and calculation of WQBELs are established in Wis. Admin. Code § NR 217.The parties agree that Wis. Admin. Code § NR 217.12(1)(a) and NR 217.15(1)(a) determine when the requirement for a phosphorus WQBEL is a permit is triggered. Both regulations provide that WQBELs must included in a permit if the discharge in question "has the reasonable potential to cause or contribute to an exceedance of" the water quality standards in s. NR 102.06 "in either the receiving or downstream waters."

IV. STANDARD OF REVIEW

Selecting the proper standard of review of the DNR's interpretation depends in part on the nature of the administrative decision. It is has been stated often, that court's defer to an administrative agency when the agency is applying its own regulations and when it has demonstrated expertise in the area or field. It is generally thought that this is wise or even judicious because in extraordinarily complex matters it is generally accepted that expertise yields a more comprehensive understanding of the facts and the science and the connection both have to the regulatory framework. What courts and judges do not ordinarily concede is that in certain complex cases, where the science is complicated and the process comprehensive, (or sometimes convoluted), it is better to defer than to expose the court's confusion.

A. Applicable standards.

Great weight deference is due to an agency's interpretation only when all of the following four criteria are met: (1) the agency is charged by the legislature with the duty of administering the statute; (2) the agency 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. *Racine Harley-Davidson, Inc. v. State, Div. of Hearing & Appeals*, 2006 WI 86, ¶ 16, 292 Wis. 2d 549, 717 N.W.2d 184.

A high level of deference is especially appropriate in "complex environmental cases in which the legislature has charged the DNR with the duty administering applicable and highly technical statutes. *Andersen DNR,* 2011 WI 19, 332 Wis. 2d 41, ¶ 30. Such deference is appropriate because, generally, the DNR is comparatively more qualified and capable than the court at making legal determinations based on relevant technical and scientific facts. *Id.* If the agency decided an issue of "first impression", lacks experience or expertise in deciding a legal issue, or has taken inconsistent positions on a legal issue, the court owes no deference to the agency's interpretation. *Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res.*, 2013 WI 74, ¶ 60, 833 N.W.2d 800.

Foremost Farm's permit required the DNR to apply a number of technical environmental rules that are part of the WPDES permit program, and also demanded the expertise of its staff in considering environmental impact and developing a response. The legislature expressly charged the DNR with the duty of carrying out the permit program, and the DNR's interpretation and application of chapter 283 is longstanding. *See Id.*¶ 31. Under great weight deference, the agency's interpretation will be upheld if it is reasonable, even if the court concludes another interpretation is equally reasonable or more reasonable. *Racine Harley-Davidson, Inc*, 292 Wis. 2d 549, ¶ 17.

An agency's interpretation and application of its own regulations are entitled to controlling weight deference. *Sierra Club v. Wisconsin Dep't of Natural Res.*, 2010 WI App 89, ¶ 24, 327 Wis. 2d 706, 787 N.W.2d 855. Under controlling weight deference, the court must uphold the agency's interpretation if it is reasonable and is not inconsistent with the language of the regulation or clearly erroneous. *Id.*

Recently the Wisconsin Supreme Court restated these principles in Rock-Koshkonong Lake Dist. V. DNR, 2008 AP 1523. Concluding in the end that the court would afford no deference, the Supreme Court wrote:

> ¶58 Agency determinations involving questions of law, including interpretation and application of statutes, are reviewable by this court under Wis. Stat. § 227.57(5). ABKA Ltd. P'ship v. DNR, 2002 WI 106, ¶30, 255 Wis. 2d 486, 648 N.W.2d 854. Section 227.57(5) provides that "[t]he court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law."
>
> ¶59 While statutory interpretation is normally a question of law determined independently by a court, a court may give an agency's interpretation of a statute great weight deference,[22] or due weight deference,[23] or no deference.[24] Racine Harley-Davidson, Inc. v. Wis. Div. of Hearings & Appeals, 2006 WI 86, ¶¶11, 19, 292 Wis. 2d 549, 717 N.W.2d 184. See generally Salvatore Massa, The Standards of Review for Agency Interpretations of Statutes in Wisconsin, 83 Marq. L. Rev. 597 (2000). Deference, however, "does not mean that the court accepts the agency interpretation without a critical eye. The court itself must always interpret the statute to determine the reasonableness of the agency interpretation. Only reasonable agency interpretations are given any deference." Racine Harley-Davidson, 292 Wis. 2d 549, ¶15.
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> ¶60 Here the DNR is charged by the legislature with the duty of administering Wis. Stat. § 31.02(1), and it brought to its enforcement of the statute a great deal of expertise and specialized knowledge. However, the DNR's interpretation of the statute is not long-standing with respect to some of the issues before this court, and, as will be seen, its interpretation is not likely to be uniform and consistent in its application because of the diverse factual circumstances that will be presented. Thus, the DNR's conclusions of law in statutory interpretation are not entitled to great weight deference.
>
> ¶61 Another factor works against deference. "The nature and scope of an agency's powers are issues of statutory interpretation." Wis. Citizens Concerned for Cranes & Doves v. DNR, 2004 WI 40, ¶6, 270 Wis. 2d 318, 677 N.W.2d 612 (citing GTE N., Inc. v. Pub. Serv. Comm'n, 176 Wis. 2d 559, 564, 500 N.W.2d 284 (1993)). Courts are not bound by an agency's decision concerning the scope of its own power. Wis. Citizens Concerned, 270 Wis. 2d 318, ¶11; Wis.'s Envtl. Decade, Inc. v. Pub. Serv. Comm'n, 81 Wis. 2d 344, 351, 260 N.W.2d 712 (1978); Big Foot Country Club v. DOR, 70 Wis. 2d 871, 875, 235 N.W.2d 696 (1975); Nekoosa-Edwards Paper Co. v. Pub. Serv. Comm'n, 8 Wis. 2d 582, 592, 99 N.W.2d 821 (1959) (citing cases).

> ¶62 In this case, the DNR is at odds with the District over the scope of the agency's power. As will be seen, the DNR has given new interpretations to both the Wisconsin Constitution (Article IX, Section 1) and Wisconsin Statutes, disregarded some past decisions of this court, and acted inconsistently with some of its own prior positions. Under these circumstances, we afford no deference to the DNR's interpretation and application of Wis. Stat. § 31.02(1) and consider the legal issues presented de novo.

(paragraphs 58-62, footnotes omitted). Foremost Farms argues that *Rock-Koshkonong* is distinguishable and urges this court to rely instead on *Anderson v. DNR*. But the court in *Anderson* also recognized that " … we accord no deference to an agency's interpretation and application of a statute when the issue is one of first impression or when the agency's position has been so inconsistent as to offer no real guidance." 332 Wis. 41, 56 at para. 29. The inconsistency between what the DNR has written in its published information and what it did with regard to the Foremost Farm's permit is readily apparent. Setting aside the question of interpretation, this inconsistency undermines and ultimately negates any claim for judicial deference.

B. Whether the limits in Foremost Farm's permit address downstream impact, even in part, is unclear.

It is easy to repeat the standard of review, string cite the cases, and then say this court will give deference to the DNR. If there ever was a complicated case laced with technical jargon framed in a complex regulatory structure this is it. The problem is deference to what or to whom or according to which guidance or interpretation. Did the DNR do "nothing" as suggested by the Petitioner, or is it doing "something" that it considers to be rational, as well as lawful.

The case law directs this court to examine the final agency decision. But so too is the importance of how this state agency has expressed itself in apply these same rules in other situations. The Petitioner argues not only was the final decision contrary to the administrative rules, (as it interprets them), but was also inconsistent with the agency's guidance and other

regulatory publications interpreting those rules to assist the public in their application. As discussed below, the court finds that the DNR has taken inconsistent positions on whether it must include a WQBEL that is protective of downstream waters.

The Petitioner claims the DNR has not done "anything"[3]. As mentioned above, Foremost Farms claims that their limits were adjusted, but not just in the way that the Petitioner would have liked them. The importance of this disconnect is not just an academic exercise. This court is prepared to address the question of whether Wis. Admin. Code requires the DNR to consider downstream impact when issuing the permit. The Petitioner specifically and explicitly asked this question and the DNR has risen to the occasion and argued that the rules allow it to not consider impacts to downstream water when setting the limits.

The challenge in deciding this case has been in large part due to the way the parties framed the issue, but then constructed their arguments. The question presented, (and decided) is whether Wis. Admin. Code §NR 217.13 makes setting Foremost Farm's WQBELs based on its impact to downstream water "optional". The DNR claims it is "optional; the Petitioners argue it is not. Even though perhaps the DNR did something, the fact it claims it is "optional" to set limits based on downstream water effectively means the agency takes the position it can, as Petitioner's claim, do "nothing".

[3] On page 6 of its brief-in-chief, the Petitioner claims DNR is awaiting the development of a TMDL before it will impose **any** limits to protect downstream waters and cites pp. 159-60 of the record. (emphasis in the original). The cited portion does not contain those exact words. In response to the comment that the Department should consider impact and set WQBELs based on downstream impact, the DNR stated that it has chosen instead to develop a water quality management plan with total maximum daily loads rather than imposing WQBELs based on downstream water quality criteria on individual point sources. Although the WQBELs were not set in consideration of downstream impact, the limits in the permit issued may have a salutary effect on water quality nonetheless.

C. The court gives no[4] deference to the administrative agency in deciding whether the administrative rules allow the DNR to do nothing.

This court interprets the word, "may", contained in Wis. Admin. Code §NR 217.13 *de novo*. The DNR "may" or "may not" calculate limits based on downstream impact depending on whether the downstream water is impacted. If the discharge has a reasonable potential to cause or contribute to an exceedence downstream, the DNR shall set those limits to protect both the receiving water and the downstream water.

This court makes this conclusion based on the department's own regulations, read together and considering the departments own guidance documents against the backdrop of state and federal statutes. In doing so, the court will not defer the DNR on this question. First, the question presented by the parties is clearly one of first impression. No party has cited any judicial interpretation of this word or even these rules, (in an analogous context), and this court has found none. Regardless, courts are frequently asked to interpret and apply the laws written by the legislative branch and the rules drafted by the executive branch. Interpreting the administrative code is an exercise in "statutory" interpretation. See generally *Bosco v. LIRC*, 2004 WI 77, 272 Wis.2d 586. In examining the rules as a whole *in para materi,* the interpretation of §NR 217.13 must be read together with §NR 217.12.

Additionally, as discussed herein, the DNR's interpretation is inconsistent, or at least incongruent, with its published guidance documents. See *Keip v. DHFS*, 2000 WI App. 13, 232 Wis.2d 380. As mentioned, these differences cloud the concept of deference that would ordinarily be applied to the DNR.

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[4] Technically the court is giving deference to the DNR in ways other than deferring to its final decision regarding the WQBELs in Foremost Farm's WPDES permit. It gives deference to the DNR by referencing its Guidance documents and it gives deference to its water resource engineer.

V. DISCUSSION AND APPROPRIATE REMEDY

The court agrees with the Petitioner that the calculation of phosphorus limits to protect downstream waters is not "optional". If the DNR concludes Foremost Farm's discharge contributes to an exceedence downstream, it does not have the discretion to ignore that exceedence. This court makes this conclusion based on the text of the administrative rules, read together, and according to the well stated and accepted canons of "statutory" construction.

> ¶ 24 When interpreting a statute, we begin by examining the language of the statute, and our analysis ends there if the meaning is plain. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110. Statutory language is interpreted "in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*, ¶ 46. This includes "the scope, context, and purpose" of the statute if it is evident from the statutory language. *Id.*, ¶¶ 48–49. If our interpretation "yields a plain, clear statutory meaning," then the statute is unambiguous and we need not resort to other sources, such as legislative history, to aid our interpretation. *Id.*, ¶ 46.

Lake Beulah Mgmt. Dist. V. State, 2011 WI 54, para. 24. Courts interpret administrative regulations in the same manner as they do statutes. *County of Milwaukee v. Superior of Wis., Inc.*, 2000 WI App 75, ¶ 11, 234 Wis. 2d 218, 610 N.W.2d 484.

A. The plain meaning of Wis. Admin. Code §NR 217.13 requires consideration of downstream impact.

The DNR suggests that the "may" in Wis. Admin. Code §NR 217.13 is meant to give it discretion in how it sets WQBELs even in the face of demonstrated impact to downstream water. Courts have long struggled with interpreting rules and statutes that seemingly use the words "shall" and "may" interchangeably. An early case debating this very point is found at *Wauwatosa v. Milwaukee County*, 22 Wis. 2d 184, 125 N.W.2d 386 (1963). In that case, the issue was framed there as it is here.

"The complaint was grounded upon sec. 59.07(52)(a), Stats., which authorizes the defendant to reimburse municipalities in which county buildings are situated for the expense of the

> transmission and disposal of sewage from such buildings. Our decision turns upon the meaning of the word 'may' as used in the section. If the word 'may' means may and is discretionary, the trial court was correct in dismissing the complaint, but if 'may' means must or shall and is thus mandatory, a reversal is required.

22 Wis.2d at 187. (footnote omitted). Courts have grappled with the term "may" repeatedly in interpreting the criminal code. See, *State v. Wilson*, 77 Wis.2d 15, 252 N.W.2d 64 (1977), and have construed "may" as not permissive, but rather reflecting the conditional nature of the task dependent on an earlier act. Although the term "may" ordinarily connotes permissiveness, it can be construed as mandatory in order to carry out the clear intent set by the larger regulatory or statutory framework.

Wisconsin. Admin. Code §NR 217.12 clearly requires the DNR to look at both the impact at the source of the discharge and downstream impacts. The issuance of a WPDES permit is conditioned upon the finding that there is a discharge that impacts our water. Thus, in the context of these permits, there will always be an impact at the point of discharge, but there "may" be a further impact downstream. In drafting Wis. Admin. Code §NR 217.13, language was used not to make the act of addressing the impact "optional" but instead to reflect not all discharges will affect downstream waters. When read together, these two rules require the DNR to consider both impacts, and if the downstream water is impacted, those impacts will be addressed in the permit. Wisconsin Admin. Code §NR 217.13 uses "may' only to reflect the conditional nature of whether or not downstream water is affected, not, in this court's opinion, the ability to disregard the demonstrated water quality exceedences in waters downstream of the point source.

B. DNR's own guidance, as well as state and federal statutes supports the interpretation that the clear intent of the Legislature was that downstream impact will and should be addressed.

Against the statutory backdrop set by the Legislature mandating the DNR to protect water quality, it would not make sense to read NR 217.12(1)(a) that requires the DNR to set WQBELs if either there is an exceedence at the point of discharge or downstream, only to then read NR 217.13(1)(b) as authority for ignoring half of the aforesaid equation. The DNR's own guidance documents contradict that construction. (see portions this opinion ante).

After careful consideration of the statutes and rules, this court concludes NR 217 requires the DNR to set water quality standards that are protective of downstream water when those waters have been shown to be impacted. Having made this conclusion, the court will remand the matter back to the DNR for further proceedings. See Wis. Stat. §227.57(5); see also *Geen v. LIRC,* 2002 WI App. 269, 258 Wis.2d 498.

C. This matter is remanded back to the DNR for further proceedings in consideration of this court's interpretation of Wis. Admin. Code §NR 217.13

The record is not sufficient for this court to set aside Foremost Farm's permit or even suggest what discharge levels should be contained therein. It may be that the DNR Guidance will apply. The DNR has publicly reported that in setting WQBELs when a TMDL is also underway the following should occur:

> In the interim, phosphorus limits should be included in the permit equal to the water quality criteria to ensure that further degradation does not occur. Staff should use professional discretion to determine if the point source should be set equal to the criteria at the point of discharge or the downstream criteria. In cases where the point source is immediately upstream of a reservoir or lake, the downstream criteria should be selected. Dischargers or other third parties can develop a TMDL with Department support. In the absence of a TMDL the conservation of mass equation in s.NR 217.13, Wis. Adm. Code, should be used.

Now, it may be likely that upon remand, in endeavoring to implement the court's order and findings, the parties will draw more from the decision for what it does not say, than for what

it says. There is no doubt in the court's mind that considering downstream impact is not optional. And it is equally clear that even when a TMDL is being developed, the DNR has stated that it should set the WQBELs so that further degradation does not occur. To the extent Wis. Admin. Code §NR 217.13 has any discretion; it allows the DNR set WQBELs at the point source if the science and/or the facts prevent the agency from doing otherwise.

Foremost Farms argues that the DNR "reasonably determined that in the complex Wisconsin River system it could not calculate limits based on downstream waters prior to the completion of an ongoing study meant to produce a Total Maximum Daily Load, ("TNDL") from which WQBELs protective of downstream waters can be derived." The record does not support the claim that the DNR could not calculate these limits, only that it did not want to, saying it was "optional". An agency's exercise of its discretion is reviewed in the same manner as the Court of Appeals reviews a Circuit Court's exercise of discretion. See *In re Altshuler*, 171 Wis.2d 1, 8 (1992). Because there are no facts in the record, nor any meaningful articulation supporting a claim that the DNR cannot set those or any more restrictive limit[5], this court is left with no choice but to remand this matter back to the Department for further administrative proceedings.

Foremost Farms argues forcefully that the DNR's use of the term "optional" to describe the calculation of limits to protect downstream waters should be discounted, or even set "aside" because "the record contains ample evidence that far from treating the issue cavalierly, DNR gave careful consideration to downstream waters and decided to address that issue through its ongoing TMDL study." (brief at p. 9, f.n. 3). A circuit court erroneously exercises its discretion

[5] Although Mr. Oldenburg's work was cited earlier relating to whether the DNR had enough information and data to set levels to address downstream impact he did concede that "at this time there is insufficient guidance on how to develop effluent limitations in situations covering multiple discharges which are contributing to a downstream impairment, particularly as complex as the upper Wisconsin River basin." (R. 57). Nonetheless, the point is made that the DNR has the discretion what levels to set, but again, not the option of doing nothing.

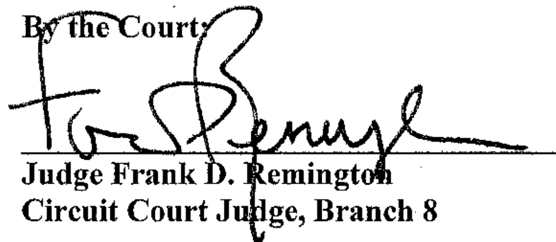
if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record. An analogous standard applies to administrative agencies. This court cannot so easily ignore the explicit pronouncement that setting limits to protect downstream waters is "optional", because to do so applies an incorrect legal standard and in this instance, does not appear to be supported by the facts. Accordingly, the DNR erroneously exercised its discretion when it relied on a mistaken interpretation of its rules that addressing downstream impact is "optional"

In the interest of clarity, this court expects on remand the following. First, because the receiving water and the waters of Lake Petenwell and Rock Lake are affected by Foremost Farm's discharge, the DNR is required to set WQBELs. In setting those limits, the DNR shall calculate the limitation to protect downstream waters. What those limits will be are for the DNR to determine. For now, the alternative of simply saying it is "optional" is no longer available.

This is a final decision for purposes of appeal.

SO ORDERED,

Dated: This 19th day of September, 2013.



By the Court:

Judge Frank D. Remington
Circuit Court Judge, Branch 8