

Appeal No. 12-2969 and 12-3434

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

WISCONSIN RESOURCES PROTECTION COUNCIL, et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

FLAMBEAU MINING COMPANY,

Defendant-Appellant/Cross-Appellee.

---

Appeal from the United States District Court for the Western District of Wisconsin, No.  
3:11-cv-00045-bbc Honorable Barbara B. Crabb, Presiding

---

**BRIEF OF AMICUS CURAE  
MUNICIPAL ENVIRONMENTAL GROUP – WASTEWATER DIVISION AND  
WISCONSIN MANUFACTURERS AND COMMERCE**

---

Paul G. Kent (#1002924)  
Margaret I. Hoefer (#1036470)  
Stafford Rosenbaum, LLP  
P.O. Box 1784  
Madison, WI 53701-1784  
Phone: 608-256-0226  
Counsel For Municipal Environmental Group

Andrew C. Cook ( #1071146)  
Great Lakes Legal Foundation  
10 East Doty Street, Suite 504  
Madison, WI 53703  
Phone: (608) 310-5315  
Counsel for Wisconsin Manufacturers and Commerce

Dated: January 14, 2013

**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No.: 12-2969 and 12-3434

Short Caption: Wisconsin Resources Protection Council, et al.

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Municipal Environmental Group – Wastewater Division is not a corporation, it is an association of municipalities.

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Stafford Rosenbaum, LLP

- (3) If the party or amicus is a corporation: N/A
i) Identify all its parent corporations, if any; and
ii) list any publicly held company that owns 10% or more of the party’s or amicus’ stock:

Attorney’s Signature: Paul G. Kent Date: 1/14/2013

Attorney’s Printed Name: Paul G. Kent

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No     .

Address: Stafford Rosenbaum, LLP
222 West Washington, Suite 900, P.O. Box 1784, Madison, WI 53701-1784

Phone Number: 608-256-0226 Fax Number: 608-259-2600

E-Mail Address: pkent@staffordlaw.com

**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No.: 12-2969 and 12-3434

Short Caption: Wisconsin Resources Protection Council, et al.

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Wisconsin Manufacturers and Commerce

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Great Lakes Legal Foundation

- (3) If the party or amicus is a corporation: \_\_\_\_  
i) Identify all its parent corporations, if any; and  
None.  
ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:  
None.



Attorney's Signature: Andrew C. Cook

Date: 1/14/2013

Attorney's Printed Name: Andrew C. Cook

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No \_\_\_\_ .

Address: Great Lakes Legal Foundation  
10 East Doty Street, Suite 504, Madison, WI 53703

Phone Number: (608) 310-5315 Fax Number: (608) 283-2589

E-Mail Address: cook@greatlakeslegalfoundation.org

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
ARGUMENT .....	2
I. UNDER THE CWA, REVIEW OF STATE RULES AND THE PERMIT SHIELD ARE SEPARATE PROVISIONS SERVING SEPARATE PURPOSES.....	2
A. Program Delegation and Review Under 33 U.S.C. §§ 1342(b) and (c).....	2
1. State Delegation .....	2
2. DNR Regulations and Permits Pursuant to the Delegation.....	3
3. Remedies for Deficient Programs.....	4
B. The Permit Shield Is Designed to Protect Clean Water Act Permit Holders from Enforcement When They Are in Compliance with Their Permit.....	6
II. THE DISTRICT COURT’S OPINION COULD ADVERSELY IMPACT ALL CWA PERMIT HOLDERS IN WISCONSIN .....	7
A. The District Court Failed to Recognize that the Permit Shield Is A Separate CWA Provision from Program Review .....	7
B. The District Court’s Ruling Could Adversely Affect All Wastewater and Stormwater Permittees.....	8
1. The Practical Implications of the District Court’s Ruling on Municipal and Industrial Wastewater Dischargers .....	8
2. The Practical Implications of the District Court’s Ruling on Stormwater Dischargers Holding Individual or General Permits.....	11
3. The Practical Implications of the District Court’s Ruling on Permittees Similarly Situated to Flambeau .....	12
III. THE COURT’S RULING SHOULD BE REVERSED AND THE RULE REVIEW AND PERMIT SHIELD PROVISIONS RECONCILED .....	14
A. Flambeau’s Reliance on the Permit Shield Was Reasonable and Appropriate.....	14
B. The EPA Review Process Was Not Deficient and If It Was, There Are Other Adequate Remedies .....	16
1. The Court Applied the Wrong Standard in Evaluating Compliance with 40 C.F.R. § 123.62 .....	16
2. Adequate Remedies Have Been and Continue to Be Available.....	17
CONCLUSION .....	18
CERTIFICATE OF COMPLIANCE.....	20
CERTIFICATE OF SERVICE.....	21

## TABLE OF AUTHORITIES

### Cases

<i>Aminoil U.S.A. v. Cal. State</i> , 674 F.2d 1227 (9th Cir. 1982).....	3
<i>Andersen v. Department of Natural Resources</i> , 2011 WI 19, 332 Wis 2d 41, 796 N.W.2d 1.....	6
<i>Atlantic States Legal Foundation, Inc. v. Eastman Kodak, Co.</i> , 12 F.3d 353 (2nd Cir. 1994).....	7
<i>Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.</i> , 426 U.S. 200 (1976) .....	6
<i>Piney Run Preservation Ass’n v. County Com’rs of Carroll County, Md.</i> , 268 F.3d 255 (4th Cir. 2001) .....	7, 11

### State Statutes and Administrative Rules

Wis. Admin. Code § NR 205.08.....	4
Wis. Admin. Code § NR 216.21(4) .....	12, 15, 17, 18
Wis. Admin. Code ch. NR 102.....	9
Wis. Admin. Code ch. NR 105.....	9
Wis. Admin. Code ch. NR 106.....	9
Wis. Admin. Code ch. NR 110.....	9
Wis. Admin. Code ch. NR 114.....	10
Wis. Admin. Code ch. NR 149.....	9
Wis. Admin. Code ch. NR 202.....	9
Wis. Admin. Code ch. NR 204.....	9
Wis. Admin. Code ch. NR 205.....	9
Wis. Admin. Code ch. NR 208.....	9
Wis. Admin. Code ch. NR 210.....	9
Wis. Admin. Code ch. NR 211.....	9
Wis. Admin. Code ch. NR 216.....	1, 4, 8, 12, 13, 15, 16, 17
Wis. Admin. Code ch. NR 217.....	9
Wis. Admin. Code ch. NR 218.....	9
Wis. Admin. Code ch. NR 219.....	9
Wis. Admin. Code chs. NR 200-299. ....	3

Wis. Stat. § 283.35 .....	4
Wis. Stat. ch. 283 .....	1
Other Authorities	
33 U.S.C. § 1311 .....	1
33 U.S.C. § 1317.....	7
33 U.S.C. § 1342 .....	1, 5
33 U.S.C. § 1342(b) .....	3, 5, 6, 7
33 U.S.C. § 1342(c).....	3, 6, 7
33 U.S.C. § 1342(k) .....	5, 6, 7, 11, 15, 18
33 U.S.C. § 1342(p) .....	11
33 U.S.C. § 1365(a)(2) .....	6
33 U.S.C. § 1369(b)(1)(D).....	5
40 C.F.R. § 123.62.....	3, 5, 8, 16, 17
40 C.F.R. § 123.62(a) .....	16
40 C.F.R. § 123.62(b)(1) .....	16
40 C.F.R. § 123.62(b)(2) .....	16
40 C.F.R. § 123.62(b)(4) .....	17
40 C.F.R. § 123.62(e).....	17
40 C.F.R. Part 123.....	3
<a href="http://dnr.wi.gov/about/nrb/2010/June/06-10-NRB-Minutes.pdf">http://dnr.wi.gov/about/nrb/2010/June/06-10-NRB-Minutes.pdf</a> .....	10
<a href="http://dnr.wi.gov/about/nrb/2012/january/01-12-8a1.pdf">http://dnr.wi.gov/about/nrb/2012/january/01-12-8a1.pdf</a> .....	5
<a href="http://dnr.wi.gov/about/nrb/2012/june/06-12-3c4.pdf">http://dnr.wi.gov/about/nrb/2012/june/06-12-3c4.pdf</a> .....	5
<a href="http://dnr.wi.gov/news/breakingnews_lookup.asp?id=2443">http://dnr.wi.gov/news/breakingnews_lookup.asp?id=2443</a> .....	10
<a href="http://dnr.wi.gov/topic/wastewater/documents/elroy_perm.pdf">http://dnr.wi.gov/topic/wastewater/documents/elroy_perm.pdf</a> .....	9
<a href="http://dnr.wi.gov/topic/wastewater/Permits.html">http://dnr.wi.gov/topic/wastewater/Permits.html</a> .....	1
<a href="http://www.dnr.state.wi.us/org/water/wm/ww/gpindex/gpinfo.htm">http://www.dnr.state.wi.us/org/water/wm/ww/gpindex/gpinfo.htm</a> .....	4
Wisconsin Administrative Register No. 466, October 1994 .....	12

## INTRODUCTION

The Municipal Environmental Group – Wastewater Division (MEG) is comprised of over 100 municipal members throughout Wisconsin who own and operate wastewater treatment plants. Many of its members are municipalities whose stormwater is also regulated. Wisconsin Manufacturers and Commerce (WMC) is the state’s largest general business trade association, whose member companies employ roughly one-fourth of Wisconsin’s private sector workforce. Many of its members operate wastewater treatment plants and many others have regulated stormwater discharges.

Under provisions of the federal Clean Water Act (CWA), including 33 U.S.C. §§ 1311 and 1342, discharges of wastewater and stormwater require permits. In Wisconsin, the Wisconsin Department of Natural Resources (DNR) administers the CWA permit program pursuant to Wis. Stat. ch. 283 and authorization from the Environmental Protection Agency (EPA). As of 2012, the DNR issued individual wastewater discharge permits to approximately 358 industrial facilities and approximately 649 municipalities.<sup>1</sup> In addition, the DNR requires stormwater permits for approximately 220 municipalities, 42 categories of industries and any construction site larger than 1 acre.<sup>2</sup>

MEG and WMC are submitting this brief because they are concerned that the District Court’s decision could have broad and sweeping impacts on all state-issued CWA permits.

---

<sup>1</sup> <http://dnr.wi.gov/topic/wastewater/Permits.html>.

<sup>2</sup> *See* Wis. Admin. Code ch. NR 216. Pursuant to Federal Rule of Appellate Procedure 29(c), this brief does not contain an addendum with a reproduction of statutes, rules, regulations, etc., as required for party briefs in F.R.A.P. 28(f). If deemed necessary by the court, MEG and WMC will provide an addendum upon request.

The District Court's opinion suggests that if there are any alleged defects in EPA's review of state regulations designed to implement the Clean Water Act, then CWA permits issued by the DNR are not effectual and may be the subject of challenge by third parties. *See* Decision at SA.96-97.<sup>3</sup> Such a determination would create enormous uncertainty for hundreds of communities and businesses throughout the State. MEG and WMC's members must be able to rely on CWA permits issued by the DNR based on published state regulations.

The District Court's decision in this case appears to conflate two separate CWA provisions. The first involves EPA's review of state regulations. This provision governs the relationship between the federal and state governments in implementing the CWA. The second provision is the permit shield which governs the relationship between the government and permittees. The permit shield provides protection for permittees operating in compliance with state-issued CWA permits. Any defects in the EPA rule review process do not and should not impact the validity of CWA permits issued by the State. Rather, defects in the approval process are subject to a separate set of remedies as set forth in the CWA.

## **ARGUMENT**

### **I. UNDER THE CWA, REVIEW OF STATE RULES AND THE PERMIT SHIELD ARE SEPARATE PROVISIONS SERVING SEPARATE PURPOSES**

#### **A. Program Delegation and Review Under 33 U.S.C. §§ 1342(b) and (c)**

##### **1. State Delegation**

The permit program established by the CWA is a federal-state partnership in which the states are delegated authority to implement its provisions subject to continued oversight by

---

<sup>3</sup> References to SA are to Flambeau Mining Company's Short Appendix.



EPA. *See* 33 U.S.C. § 1342(b). This oversight includes review of state rules under 33 U.S.C. § 1342(c).<sup>4</sup>

In *Aminoil U.S.A. v. Cal. State*, 674 F.2d 1227, 1229-30 (9th Cir. 1982), the court summarized this federal-state relationship as follows:

The Administrator [of EPA] must approve a proposed state permit program unless he determines that the program does not provide "adequate authority" to enforce the Act. *Id.* . . . .

The EPA, however, retains independent supervisory authority over approved state programs. It may withdraw its approval of a state program if it determines that the state program is not being administered in accordance with the requirements of the Act, § 402(c)(3), 33 U.S.C. § 1342 (c)(3), . . . .

Despite this residual federal supervisory responsibility, the scheme of cooperative federalism established by the Act remains "a system for the mandatory approval of a conforming State program and the consequent suspension of the federal program [which] creates a separate and independent State authority to administer the NPDES pollution controls. . . ." (Citations Omitted).

## 2. DNR Regulations And Permits Pursuant To The Delegation

Wisconsin was one of the first states to be delegated authority under the CWA in 1974. In the nearly 40 years since that time, DNR has adopted over dozens of administrative code chapters implementing CWA provisions which comprise hundreds of pages of regulations and are frequently revised.<sup>5</sup>

Pursuant to these regulations, DNR has issued thousands of permits.<sup>6</sup> It is important to note that there are several different types of permits that have been used and approved as part of the state program. In addition to the more than 1,000 current individual wastewater

---

<sup>4</sup> 33 U.S.C. § 1342(b) requires that states submit program revisions to EPA for approval, and § 1342(c) provides EPA with authority to review and notify the State of any revisions or modifications necessary to comply with the CWA provisions. The regulations for program approvals are in 40 C.F.R. Part 123 and the provisions for program revisions are in 40 C.F.R. §123.62.

<sup>5</sup> *See e.g.* Wis. Admin. Code chs. NR 200-299.

<sup>6</sup> Permits are limited to 5 years and then must be renewed. As a result, most of the more than 1,000 current permittees have received multiple permits over the years.

discharge permits to municipalities and industry noted above, the DNR also has specific authorization to issue general permits.<sup>7</sup> A general permit (GP) is a five-year permit subject to public notice and hearing for an entire class of dischargers. GPs typically contain effluent limitations, monitoring requirements, reporting requirements, general conditions and applicability criteria. Once the GP is issued, persons seeking coverage under a GP must conform to the conditions of the GP. There is no formal public notice or public hearing required of persons seeking coverage under a GP.

For wastewater discharges, there are 21 categories of GPs. These wastewater GPs include land application of industrial wastes, discharges of pesticides, sanitary sewer overflows, nonmetallic mining operations, concentrated animal feeding operations and 16 other types of discharges.

For stormwater discharges, the DNR can issue individual permits, but more commonly the DNR controls stormwater through general permits for industrial, municipal and construction sites.<sup>8</sup> In addition, as is noted in more detail below, there are several stormwater regulations that allow for this permit obligation to be satisfied by other state permits that are at least as stringent as a regular stormwater permit.

### 3. Remedies For Deficient Programs

If there is a deficiency with the state program, there are several remedies. The first remedy is with the EPA itself. The EPA has the authority to review, comment and approve

---

<sup>7</sup> Wis. Stat. § 283.35. DNR has adopted rules to implement this authorization. Wis. Admin. Code § NR 205.08. The DNR also has detailed fact sheets, and permit information on line at: <http://www.dnr.state.wi.us/org/water/wm/ww/gpindex/gpinfo.htm>.

<sup>8</sup> See Wis. Admin. Code ch. NR 216.

specific program elements and revisions to the program as part of the state rulemaking process and the federal review process under 33 U.S.C. § 1342 when they are proposed.

In addition, the EPA has the authority under 33 U.S.C. § 1342 to request that the State correct any program deficiencies. In fact, the EPA has recently exercised this authority in Wisconsin. On July 18, 2011, the EPA sent a letter to the DNR outlining several program issues including the extent to which certain program elements required additional review under 40 C.F.R. § 123.62. The DNR has responded to that letter by, among other things, proposing some additional rule amendments.<sup>9</sup> Thus, to the extent there are program issues between the EPA and the states, there is a process to address those issues. That process operates wholly apart from and does not interfere with the permit shield under 33 U.S.C. § 1342(k).

Furthermore, if third parties such as the Wisconsin Resources Protection Council, believe that EPA has not undertaken its responsibilities, there are additional remedies. A person could seek judicial review under the provisions in 33 U.S.C. § 1369(b)(1)(D) which provide that an EPA's determination as to a state program submitted under 33 U.S.C. § 1342(b) is reviewable in the Court of Appeals. Alternatively, if the EPA fails to undertake such a review, a person could bring a citizen suit in federal district court "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 33 U.S.C.

---

<sup>9</sup> For a detailed discussion of these issues, see the DNR report to the Natural Resources Board at its meetings in January and June 2012. <http://dnr.wi.gov/about/nrb/2012/january/01-12-8a1.pdf>; and <http://dnr.wi.gov/about/nrb/2012/june/06-12-3c4.pdf>.

§ 1365(a)(2). In either case, the remedy is against the EPA, not against the permittee who has relied on the published rules and its permit.

B. The Permit Shield Is Designed to Protect Clean Water Act Permit Holders from Enforcement When They Are in Compliance with Their Permit

In contrast to the provisions of 33 U.S.C. §§ 1342(b) and (c), which describe the relationship between federal and state agencies, the provision in 33 U.S.C. § 1342(k) describes the relationship between the government and the permittee. Section 1342(k) provides the following protection for permit holders:

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317 and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health...

The purpose of this provision is to allow permit holders to rely on the validity of the permits terms and conditions, and to insulate permit holders from an enforcement action claiming that the permit conditions are not sufficient.

This purpose was summarized recently by the Wisconsin Supreme Court in *Andersen v. Department of Natural Resources*, 2011 WI 19, ¶64, 332 Wis 2d 41, 796 N.W.2d 1 when it reviewed the federal-state permit process under the Clean Water Act:

*When the DNR properly issues a permit under the state's statutory and regulatory authority, the permittee should be able to rely on the validity of the permit's terms and conditions.* In other words, when there is no dispute that a permit's terms and conditions comply with state statutes and regulations, and when the permittee acts in accordance with those terms and conditions, the permittee is entitled to assurance that it is complying with the Clean Water Act. Indeed, Congress expressed that very point in 33 U.S.C. § 1342(k). ... *As recognized by the United States Supreme Court, the purpose of § 1342(k) is to give permits finality.* *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n. 28, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977) (Emphasis added)

*See also, Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 223 (1976) (“For enforcement purposes, s. 402(k) deems a permit holder who is in

compliance with the terms of its permit to be in compliance “with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health.””) and *Piney Run Preservation Ass’n v. County Com’rs of Carroll County, Md.*, 268 F.3d 255, 266 (4th Cir. 2001) (“It is clear therefore, that if a permit holder discharges pollutants precisely in accordance with the terms of its permit, the permit will “shield” its holder from CWA liability.”).

This basic purpose is reflected in the broad language of § 1342(k). Section 1342(k) has one and only one exception to the permit shield – it does not apply to “any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health.”<sup>10</sup> The only other restriction imposed on the permit shield is that the permittee properly comply with the CWA permit, including reporting requirements. *See Atlantic States Legal Foundation, Inc. v. Eastman Kodak, Co.*, 12 F.3d 353, 357 (2nd Cir. 1994). Nothing in the permit shield language suggests that the liability immunity can be lost based on EPA’s failure to comply with the review process in 33 U.S.C. §§ 1342(b) and (c).

## II. THE DISTRICT COURT’S OPINION COULD ADVERSELY IMPACT ALL CWA PERMIT HOLDERS IN WISCONSIN

### A. The District Court Failed to Recognize that the Permit Shield Is A Separate CWA Provision from Program Review

Although the specific question in this case involves the application of the permit shield to provisions relating to the regulation of stormwater from a mining operation, the underlying rationale for the Court’s holding has potentially broad, even if unintended, consequences for all CWA permit holders.

---

<sup>10</sup> 33 U.S.C. § 1317 only applies to specific effluent limits and has no relevance to this case.

The District Court held the permit shield did not apply because it believed the approval process in 40 C.F.R. § 123.62 was not fully satisfied with respect to EPA's review of DNR's stormwater rule, Wis. Admin. Code ch. NR 216:

Federal regulations set forth a specific process by which states gain approval for permitting programs and revisions to those programs under 33 U.S.C. §1342. ...

Defendant has adduced no evidence to support its contentions that the state submitted § NR 216.21(4) in conformance with the process set forth in 40 C.F.R. § 123.62 or that the EPA has approved use of § NR 216.21(4) to allow a state mining permit stand in for a discharge permit under the Wisconsin Pollutant Discharge Elimination System permit program. The only evidence in the record is that the state submitted ch. NR 216 to the EPA for review, the EPA made a suggestion about phrasing and the Department adopted the regulations. However, 40.C.F.R. § 123.62 requires explicit approval, not lack of disapproval....

Applying these principles to the present case, I conclude that defendant is not entitled to a permit shield defense under § 402. Defendant has not shown that the EPA has approved use of state mining permits via § NR 216.21(4) as a substitute for Wisconsin Pollutant Discharge Elimination System permit; ...”

Decision at SA.95-96 and 102.

Under the District Court's decision, the permit shield is not available unless the rule upon which the permit was issued was “explicitly approved.” If that is the standard, then any person holding a CWA permit could be affected by this ruling. Taken to its logical conclusion, any CWA permit could be subject to a federal citizen suit in the absence of a formal written approval from the EPA of every DNR regulation relating to that permit.

- B. The District Court's Ruling Could Adversely Affect All Wastewater and Stormwater Permittees
  - 1. The Practical Implications of the District Court's Ruling on Municipal and Industrial Wastewater Dischargers

The practical implications of this ruling can be illustrated by review of just one of the nearly 650 municipal Wisconsin Pollutant Discharge Elimination System (WPDES) permits that the DNR has recently noticed for reissuance. The City of Elroy is a community of 1,442

persons in Juneau County that operates a municipal treatment plant with a design capacity of 0.33 million gallons per day. Its permit is currently in the process of being renewed.<sup>11</sup> The proposed permit includes the following requirements:

- Effluent limitations and monitoring on its surface water discharge to the Baraboo River. Limits are established for biological oxygen demand, total suspended solids, ammonia, coliform, phosphorus, temperature and pH. These limits are derived from administrative codes including: Wis. Admin. Code chs. NR 102, NR 105, NR 106, NR 210 and NR 217.
- Restrictions on land application of sewage treatment plant sludges. Limits are established for 25 specific compounds in addition to pathogen control, pursuant to the requirements in Wis. Admin. Code ch. NR 204.
- Requirements on effluent sampling in accordance with sampling procedures in Wis. Admin. Code ch. NR 218 and NR 219, by laboratories certified in accordance with Wis. Admin. Code ch. NR 149.
- Restrictions on the acceptance of certain industrial wastewaters in accordance with the provisions of Wis. Admin. Code ch. NR 202 and the pretreatment requirements of Wis. Admin. Code ch. NR 211.
- Restrictions on the bypassing of effluent during wet weather events or system repairs in Wis. Admin. Code chs. NR 110 and NR 210.
- Reporting of effluent data monthly and Compliance Maintenance Annual Reports in accordance with Wis. Admin. Code chs. NR 205 and NR 208.

---

<sup>11</sup> [http://dnr.wi.gov/topic/wastewater/documents/elroy\\_perm.pdf](http://dnr.wi.gov/topic/wastewater/documents/elroy_perm.pdf).

- Requirements for the use of wastewater operators certified under Wis. Admin. Code ch. NR 114.

In short, this routine WPDES permit for a relatively small facility in central Wisconsin is dependent on at least 15 separate chapters of DNR administrative rules comprising several hundred pages. Some of these rules are relatively new, some go back to the 1970s when the CWA was first enacted. Nearly all of them have been revised multiple times over the course of the past 40 years.

This process is further complicated by practical issues associated with the EPA approval process itself. Often formal EPA approval comes years after the rule is approved. For example, new phosphorus effluent rules applicable to municipal and industrial discharges were approved by the Natural Resources Board at its meeting in June 2010.<sup>12</sup> Formal EPA approval was not granted until April 2012, nearly two years later.<sup>13</sup> If a permit includes provisions under a rule that is effective as a matter of Wisconsin law but has not been approved by EPA, could the permittee be subject to claims that they are operating under an invalid permit unless and until “explicit approval” of that program change is granted by EPA?

The City of Elroy was given 30 days to comment on its draft permit as part of the public notice process. To suggest that, as part of this review process, Elroy should determine whether all of the hundreds of pages of state rules upon which its WPDES permit was issued were “expressly approved” by the EPA sometime over the past 40 years is neither

---

<sup>12</sup> <http://dnr.wi.gov/about/nrb/2010/June/06-10-NRB-Minutes.pdf>.

<sup>13</sup> [http://dnr.wi.gov/news/breakingnews\\_lookup.asp?id=2443](http://dnr.wi.gov/news/breakingnews_lookup.asp?id=2443).



reasonable nor required under the CWA. Even if the City found a potential issue with EPA's review process, the City is not in a position to resolve that problem. These are issues for the EPA and the DNR to resolve, not the City.

As noted above, the entire purpose of § 1342(k) is to provide certainty for the permittee, and ensure that the permittee can rely on permits. There is no question that a permittee is allowed to rely on its WPDES permit even if it is discharging a pollutant that is not – but should have been – covered by the permit. *Piney Run*, 268 F.3d at 268. If a permittee is protected from liability for an agency oversight that could have actual environmental consequences, how is it possible to suggest that the permittee is not protected if an agency simply did not complete the formal review process for a state regulation? Such an interpretation would destroy the certainty that WPDES permits and the permit shield is intended to provide. Whether it is the City of Elroy or some other municipal or industrial permit holder, the permit shield in 33 U.S.C. § 1342(k) should apply to a CWA permit issued by the DNR, regardless of whether all of the formal EPA review and approval has been completed.

## 2. The Practical Implications of the District Court's Ruling on Stormwater Dischargers Holding Individual or General Permits

Holders of industrial, municipal and construction site stormwater permits from DNR face similar concerns from the Court's Decision. The Clean Water Act requirements for municipal and industrial stormwater in 33 U.S.C. § 1342(p) were enacted as part of the 1987 Water Quality Act Amendments to the CWA. As a delegated CWA state, the DNR

developed a new stormwater administrative rule known as Wis. Admin. Code ch. NR 216 through its standard notice and public hearing process in 1994.<sup>14</sup>

The record in this case demonstrates that as part of the rulemaking process, the DNR submitted NR 216 to the EPA for comment. In response, the EPA wrote back to the DNR with some specific language changes, and those changes were reflected in the final rule. (R.62-1, 132-133) Nevertheless, the Court found the review process insufficient to satisfy the provisions of federal law because the State could not produce evidence of explicit EPA approval of NR 216.

While the specific issue for Flambeau is the provision in NR 216.21(4), the same rationale would arguably apply with equal force to any of the other provisions of NR 216. If that is the case, then every one of the thousands of stormwater permits issued since 1994 is arguably subject to the same objection – and citizen suits.

### 3. The Practical Implications of the District Court's Ruling on Permittees Similarly Situated to Flambeau

The specific provision in NR 216 at issue for Flambeau was whether CWA permit coverage could be obtained through its mining permit. Since 1994, NR 216 contained a provision that authorized the DNR to use other permits to provide Clean Water Act coverage for industrial stormwater, if such permits were at least as stringent as what would otherwise be required. This section provides in relevant part as follows:

NR 216.21 (4) OTHER ENVIRONMENTAL PROGRAMS. If one of the following conditions is met, the department may determine that a facility is in compliance with permit coverage required under s. 283.33, Stats., and will not be required to hold a separate permit under s. 283.33, Stats.:

---

<sup>14</sup> See Wisconsin Administrative Register No. 466, October 1994.

(a) The storm water discharge is in compliance with a department permit or approval, which includes storm water control requirements that are at least as stringent as those required under this subchapter.<sup>15</sup>

Thus, apart from the potential consequences of the Court's Decision to wastewater and stormwater permittees, even confined to its narrowest facts, the Court's decision has broad implications. That is because similar language is currently in use throughout NR 216 to allow other state-issued permits to satisfy stormwater construction permit requirements. The following are among the numerous such provisions in NR 216:

#### Municipal Program Authorizations:

NR 216.022 Other environmental programs. The department may determine that a municipal separate storm sewer system *is in compliance with permit coverage required under s.283.33, Stats.*, and will not be required to hold a permit under s. 283.33, Stats., where the storm water discharge is in compliance with a memorandum of understanding with another agency of the state that implements rules that are equivalent to this subchapter and that include storm water control requirements *that are at least as stringent as this subchapter requires.* (Emphasis added.)

#### Construction Site Stormwater Authorizations:

##### NR 216.42 Applicability

(4) COMMERCIAL BUILDINGS. Storm water discharges from construction sites for public buildings and buildings that are places of employment regulated by the department of safety and professional services pursuant to s. 101.1206, Stats., in a manner which is equivalent to this subchapter *shall be deemed to hold a WPDES permit* issued pursuant to this subchapter.

(5) DEPARTMENT OF TRANSPORTATION PROJECTS. Storm water discharges from projects directed and supervised by the department of transportation, regulated by ch. Trans 401, and subject to the department of transportation and department of natural resources liaison cooperative agreement, if in compliance with ch. Trans 401 and the liaison cooperative agreement *shall be deemed to be in compliance with s. 283.33, Stats.*, and the requirements of this subchapter. The department of transportation shall notify the department of projects under this subsection which shall constitute the notice of intent for these projects.

(6) OTHER ENVIRONMENTAL PROGRAMS. If a storm water discharge is in compliance with a department permit or approval which includes storm water control *requirements that are at least as stringent as requirements under this subchapter*, the department may determine that a facility *is in compliance with permit coverage required under s. 283.33 Stats.*, and will not be required to hold a separate permit under s. 283.33, Stats.

---

<sup>15</sup> This section was re-numbered in 2004, but the language has not changed.

(9) ONE- AND TWO-FAMILY DWELLINGS. Storm water discharges from construction sites of one- and two-family dwellings regulated by the department of safety and professional services pursuant to s. 101.653, Stats., *in a manner which is equivalent to the requirements of this subchapter* as determined by the department in writing, *shall be deemed to hold a WPDES permit* issued pursuant to this subchapter. (Emphasis added)

In theory, holders of stormwater permits for commercial buildings, one and two family buildings, transportation facilities, and other facilities such as landfills could now lose the permit shield and be subject to citizen suits. And the exposure to suit may well be more than theoretical. In its motion for attorneys fees, counsel for the Wisconsin Resources Protection Council stated,

I obtained records identifying hundreds of other industrial facilities in Wisconsin (including landfills, commercial construction site and transportation facilities) that are or may be discharging pollutants without an NPDES permit because they are purportedly authorized to do so by the same state regulation relied upon by Defendant in this case – Wis. Admin. Code § NR 216.21(4) – or other similar (and thus unlawful) NPDES permit exemptions in state law.

(R.258-6:5, ¶ 15) Thus, permits that have controlled stormwater from potentially hundreds of municipal, industrial and construction sites – sometimes for decades – are now potentially subject to citizen suits. An interpretation of the permit shield that allows the spawning of hundreds of potential citizen suits is neither warranted nor authorized under the CWA.

### III. THE COURT'S RULING SHOULD BE REVERSED AND THE RULE REVIEW AND PERMIT SHIELD PROVISIONS RECONCILED

The potential impact of the District Court's decision could be far reaching even given its narrowest interpretation. Given its broadest interpretation, the entire Wisconsin CWA permit program could be at risk. An application of the law to the facts of this case illustrates that the CWA provisions regulating to review of state rules and the permit shield can be reconciled without raising these broader issues.

#### A. Flambeau's Reliance on the Permit Shield Was Reasonable and Appropriate

Flambeau relied on a permit issued by the DNR under the provisions of NR 216 – one of the regulations the DNR uses to implement the CWA. This provision allowed Flambeau to rely on its mining permit for compliance with its CWA permit obligations. As noted above, nothing in the permit shield provisions of 33 U.S.C. § 1342(k) abrogates that protection for parties that have relied upon permits issued by state authorities under Clean Water Act provisions like NR 216. In this regard, two other points applicable to other permittees should be noted.

First, each of the NR 216 provisions cited above, including NR 216.21(4), is not an *exemption* from the CWA but rather a means of *complying* with the CWA. In each case, the language expressly provides that the permittee, “is in compliance with permit coverage required under s. 283.33, Stats.” or “shall be deemed to be in compliance with s. 283.33, Stats.” or “shall be deemed to hold a WPDES permit issued pursuant to this subchapter.” On its face, it is a CWA permit authorization, not an exemption. There is no reason for the permittee to believe that it is not entitled to the CWA permit shield for such authorizations. The certainty that the permit shield is intended to provide is no less applicable here than to any other CWA permit.

Second, this provision is not a radical concept, especially in the stormwater context. As noted above, most stormwater permittees use general permits and coverage under those permits occurs with no formal public notice or hearing. Moreover, stormwater permits typically rely on best management practices rather than specific numeric limits and monitoring. Given the ubiquitous nature of stormwater and the control through best management practices, coordination with other state permit programs only makes sense.

Indeed, in this case, use of the mining permit resulted in increased notice and hearing and more specific permit limits and monitoring than would have been required under standard stormwater general permits.

Under the District Court’s Decision, a permittee obtaining a permit under one of the NR 216 provisions, would have to undertake the following to determine whether its permit was valid: (1) determine when all applicable rules for the permit were adopted along with any of the amendments to those sections, (2) undertake a public records request of the DNR or other research to obtain the documents associated with each of the rule revisions, (3) determine whether the rules were sent to the EPA and whether the EPA responded to each rule revision, and (4) determine whether the EPA response was sufficiently “explicit” in authorizing the proposed rule. That is an unreasonable burden to place upon a permittee. Moreover, even assuming a permittee discovers a problem, what can the permittee do to correct it? This is a matter within the control of the DNR and EPA, not the permittee. Permittees should not be held hostage to alleged defects in the underlying rules on which a state permit is based. They should be shielded from such liability.

B. The EPA Review Process Was Not Deficient, and If It Was, There Are Other Adequate Remedies

1. The Court Applied the Wrong Standard in Evaluating Compliance with 40 C.F.R. § 123.62

The provisions of 40 C.F.R. § 123.62 ensure that when there are program revisions to a state program, the State provides the EPA with notice and opportunity to comment. 40 C.F.R. § 123.62(a) and (b)(1). Depending on the scope of the change, EPA has the option of choosing a formal response through the Federal Register, 40 C.F.R. § 123.62(b)(2), or an

informal response by letter, 40 C.F.R. § 123.62(b)(4). The State must then respond to any EPA comments. 40 C.F.R. § 123.62(e).

In this case, all of those things happened, and the purposes of the regulations were fulfilled. There is no dispute that the DNR submitted NR 216 to the EPA in 1994 for approval. (R.62-1:132-133) There is no dispute that the EPA sent a letter to the DNR on the rule package and indicated that it had some minor comments on the very section at issue here, NR 216.21(4). *Id.* There is no dispute the DNR adopted those comments. There is no dispute that this rule has now been in effect for nearly two decades. The District Court acknowledged all of that but held, “However, 40.C.F.R. § 123.62 requires explicit approval, not lack of disapproval....” In fact, the regulations provide in part as follows:

Notice of approval of non-substantive program revisions may be given by a letter from the Administrator to the State Governor or his designee. §123.62(b)(4).

The regulations do not require an “explicit” approval, merely a letter expressing approval. EPA has an option for a formal notice process and it chose not to use that here. That being the case, there was no need to unnecessarily formalize the informal process by requiring “magic words” for every authorization. Based on this record, the EPA’s review of NR 216 was adequate.

## 2. Adequate Remedies Have Been And Continue to be Available

To the extent there are concerns about the use of the equivalent permit provisions in NR 216, those can be addressed without jeopardizing existing permits. For example, in the EPA’s July 18, 2011 deficiency letter to the DNR, the EPA raised a number of issues associated with the equivalent permit provisions of NR 216, including those cited above. The letter asserted that several provisions authorizing equivalent permits did not have

appropriate EPA approval. (*See* R.87-1, ¶¶ 23, 24, and 26.) (For example, the letter states, “EPA must review and approve any agreement to divide permitting authority before any permits issued by DOT or any other agency of the State will be considered equivalent to NPDES permits.” *Id.* at ¶23) Ironically, the provision at issue in this case, NR 216.21(4) was not included in the original letter.

Whatever the merits of these complaints, EPA’s letter again illustrates that the way to resolve program deficiencies is through the administrative process such as that currently underway, not through complaints against individual permittees who relied on DNR rules and permits. Alternatively, third parties could use the judicial review or citizen suit provisions against EPA, if EPA does not undertake that duty.

### **CONCLUSION**

Municipal and industrial sources regulated under the Clean Water Act should be able to rely on CWA permits issued by DNR in accordance with state rules, regardless of whether there is some alleged defect in the EPA review process of those underlying rules. For the foregoing reasons, MEG and WMC urge the Court to apply the permit shield in 33 U.S.C. § 1342(k) to all permittees operating in compliance with state issued CWA permits.

Dated this 14th day of January, 2013.

Respectfully submitted,

**STAFFORD ROSENBAUM LLP**

By: /s/ Paul G. Kent

Paul G. Kent (#1002924)

P.O. Box 1784

Madison, WI 53701-1784

608-256-0226

Attorneys for the Municipal Environmental  
Group – Wastewater Division



/s/ Andrew C. Cook  
Andrew C. Cook (#1071146)  
Great Lakes Legal Foundation  
10 East Doty Street, Suite 504  
Madison, WI 53703  
Phone: (608) 310-5315  
Attorney for Wisconsin Manufacturers  
and Commerce

## CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,427 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Pursuant to Fed. R. App. P. 32(a)(5), the undersigned certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point font, Garamond typeface, as permitted by Seventh Circuit Rule 32(b).

Dated: January 14, 2013.

Respectfully submitted,

**STAFFORD ROSENBAUM LLP**

By: /s/ Paul G. Kent

Paul G. Kent (#1002924)

P.O. Box 1784

Madison, WI 53701-1784

608-256-0226

Attorneys for the Municipal Environmental  
Group – Wastewater Division

## CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Christa Westerberg, Esq.  
James N. Saul, Esq.  
McGillivray Westerberg & Bender, LLC  
211 S. Paterson St., Suite 320  
Madison, WI 53703

Harry E. Van Camp, Esq.  
DeWitt Ross & Stevens S.C.  
2 East Mifflin Street, Ste. 600  
Madison, WI 53703-2865

Dated: January 14, 2013.

Respectfully submitted,

**STAFFORD ROSENBAUM LLP**

By: /s/ Paul G. Kent  
Paul G. Kent (#1002924)  
P.O. Box 1784  
Madison, WI 53701-1784  
608-256-0226  
Attorneys for the Municipal Environmental  
Group – Wastewater Division