STATE OF WISCONSINCIRCUIT COURTMILWAUKEE COUNTY
BRANCH 41

CLEAN WATER ACTION COUNCIL OF NORTHEAST WISCONSIN, FRIENDS OF THE CENTRAL SANDS, MILWAUKEE RIVERKEEPER, and WISCONSIN WILDLIFE FEDERATION,

Petitioners,

v. Case No. 17-CV-12861

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, DANIEL MEYER, and MARK D. AQUINO,

Respondents.

RESPONDENTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Petitioners have filed a joint petition for judicial review and declaratory judgment. Their petition must be dismissed, and judgment entered for the Department of Natural Resources (DNR).

For one, the "petition for judicial review" is based on the premise that a settlement agreement that DNR entered in a separate case is a "final agency decision" subject to judicial review under Wis. Stat. § 227.52. But Wis. Stat. § 227.52 provides for judicial review of only a limited subset of agency decisions. To be reviewable under

that statute, the agency decision at issue must be adjudicative in nature, as well as "final" in the sense of conclusively determining a party's legal rights at the culmination of the administrative process. Where an agency decision is not final, a circuit court must dismiss for lack of jurisdiction.

The settlement agreement that Petitioners hold up as a final agency decision is neither adjudicative in nature, nor is it final in the sense of determining Petitioners' (or anyone's) legal rights. Instead, the settlement agreement embodies DNR's commitment to enforce existing law whenever the agency makes permit decisions *in the future* under the Wisconsin Pollution Discharges Elimination System (WPDES). The agreement does not adjudicate any permit applications or other requests for regulatory approval, and it does not mandate any particular result. Moreover, for anyone who seeks review of individual permit decisions, the statutes specifically provide for judicial review of those individual decisions.

Because the settlement agreement is not a final agency decision for purposes of judicial review under Wis. Stat. § 227.52, this Court must dismiss the petition for judicial review.

Second, Petitioners' declaratory judgment action must be dismissed as well. Under the governing statutory factors, the settlement agreement is not a "rule," and thus is not subject to a declaratory judgment action under Wis. Stat. § 227.40. In particular, the settlement agreement fails four of the five statutory elements for a rule under Wis. Stat. § 227.01(13): the settlement is not a regulation, standard, or statement of policy; the settlement is not "of general application," in that the

agreement itself will not guide DNR's permitting decisions; the settlement does not have the effect of law, in that no citizens can suffer legal consequences for "failing to comply" with the settlement agreement; and the agreement does not "implement or interpret" any legislation that the agency is charged with administering. For any of these reasons, the agreement is not a rule, and Petitioners' declaratory judgment action must be dismissed.

Because both the petition for judicial review and the declaratory judgment action fail to state a viable claim, the petition must be dismissed in its entirety.

BACKGROUND

This case arises from a settlement agreement entered in a separate case, *Dairy Business Ass'n v. DNR*, Case No. 17-CV-1014 (Brown Cty.). (*See* Compl. Ex. D.)[1] In that case, the Dairy Business Association (DBA) asserted three claims against DNR, two of which are relevant to the current lawsuit. (*See id.* at 19–23.) In those two claims, DBA challenged two of DNR's informal guidance documents, one relating to the management of leachate from stored agricultural feed (the "feed storage guidance") and another relating to DNR's regulation of "calf hutch lots" (the "calf hutch memo").[2] (*See id.* at 20–23.) DBA alleged that these two guidance documents amounted to invalid administrative rules because the policies in those documents

[1] For purposes of this motion to dismiss, the relevant factual allegations are taken from Petitioner's complaint and accompanying exhibits, and are accepted as true, as is required.

[2] As noted in the *DBA* complaint, "calf hutches" are the small huts that shelter individual calves, and the "lots" are those portions of a livestock production area that contain "rows or groupings of calf hutches." (Compl. Ex. D:4 n.2.)

were being implemented and enforced without having undergone formal rulemaking, as is required for valid administrative rules. (*See id.* at 12–19.)

In response to DBA's complaint, DNR acknowledged that the policies embodied in the two guidance documents had not gone through the required rulemaking procedures. (*See* Compl. Ex. F ¶ 4.c.ii., d.ii.) DNR therefore agreed not to enforce the unpromulgated rules embodied in the two guidance documents. (*See id.*) The agency further agreed that it would "not enforce any standards or requirements . . . except those standards and requirements explicitly permitted by Wisconsin law." (*Id.* ¶ 4.c.i.; *see also id.* ¶ 4.d.i.)

DNR and DBA entered a written agreement to that effect, in which DBA agreed to voluntarily dismiss its complaint against DNR. (*See* Compl. Ex. F.) For its part, DNR agreed to rescind any official support for the guidance documents and once again enforce the applicable, properly promulgated administrative rules. (*See id.* at 3–4.)

In particular, DNR agreed that its feed storage guidance "constitutes a rule under Wis. Stat. § 227.01(13)," and that the guidance was therefore required to be formally promulgated as an administrative rule, pursuant to Wis. Stat. § 227.10. (*See id.* at ¶ 4.c.ii.) Because the guidance "was not lawfully promulgated under Wis. Stat. § 227.10," DNR agreed that it "cannot be enforced, is null and void, and cannot be used for any purpose." (*See id.*) DNR therefore agreed to formally withdraw the guidance within 30 days. (*See id.*) DNR further agreed that agricultural runoff treatment systems that are constructed in compliance with existing, properly

promulgated standards would "constitute valid and lawful runoff control systems." (*See id.* ¶ 4.c.iii.)

With regard to the calf hutch memo, DNR likewise agreed that the memo constituted a rule under Wis. Stat. § 227.01(13), and that it, too, was invalid as a statement of agency policy since it had not been promulgated in accordance with the relevant statutory procedures. (*See id.* ¶ 4.d.ii.) DNR thus agreed that the memo and associated standards "cannot be enforced, are null and void, and cannot be used for any purpose by DNR." (*See id.*) Like the feed storage guidance, DNR agreed to formally withdraw the calf hutch memo and associated standards within 30 days. (*See id.*)

In the settlement agreement, the parties also agreed that nothing in that agreement "shall be construed as authorizing a violation of federal or state law." (*See id.* ¶ 4.e.)

Following entry of the settlement agreement, DBA voluntarily dismissed its complaint on October 18, 2017. (Compl. Ex. E.)

Approximately one month later, Petitioners filed this case, alleging that the settlement agreement in the *DBA* case itself amounted to an invalid rule. (*See* Compl. 13–18.) In addition, Petitioners caption their challenge as a petition for judicial review, purportedly seeking separate review of the settlement agreement as a "final agency decision" under Wis. Stat. § 227.52. (*See id.* at 5 (caption), 8 (jurisdictional section), asserting that "[t]he Settlement Agreement at issue in this case is a final agency decision reviewable pursuant to Wis. Stat. § 227.52").

ARGUMENT

The *DBA* settlement agreement is neither a "final agency action" subject to review under Wis. Stat. § 227.52, nor a "rule" subject to review under Wis. Stat. § 227.40. The petition for judicial review and declaratory judgment should therefore be dismissed in its entirety.

I. The petition for judicial review should be dismissed because the settlement agreement is not a final agency action subject to judicial review under Wis. Stat. § 227.52.

A. Principles governing judicial review of final agency decisions.

Agency actions or decisions "are not reviewable unless made so by statute." *Waste Mgmt. of Wis., Inc. v. DNR*, 128 Wis. 2d 59, 87, 381 N.W.2d 318 (1986). Where a party seeks judicial review of an agency action or decision that is not made reviewable by the statutes, a circuit court "does not have jurisdiction for any purpose, except to dismiss." *Pasch v. DOR*, 58 Wis. 2d 346, 353, 206 N.W.2d 157 (1973) (quoting *Universal Org. of Mun. Foremen, Supervisors & Admin. Pers. v. WERC*, 42 Wis. 2d 315, 322, 166 N.W.2d 239 (1969)).

The applicable statute here, Wis. Stat. § 227.52, provides that "[a]dministrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter." *See also Sierra Club v. DNR*, 2007 WI App 181, ¶ 13, 304 Wis. 2d 614, 736 N.W.2d 918.

Not every agency action or decision is subject to judicial review. *See Waste Mgmt.*, 128 Wis. 2d at 89–90. Two considerations inform whether an agency decision is reviewable under Wis. Stat. § 227.52.

First, the agency's decision must be *adjudicative* in nature. *See id.* This includes dispositions of individuals' rights through contested case hearings, as well as individual adjudications outside of contested case hearings. *See Collins v. Policano*, 231 Wis. 2d 420, 427, 605 N.W.2d 260 (Ct. App. 1999); *see also Wis. Envtl. Decade, Inc. v. PSC*, 93 Wis. 2d 650, 658, 287 N.W.2d 737 (1980) (noting that predecessor of Wis. Stat. § 227.52 "envisions a review of a decision which must be supported by a record and be based upon findings of fact and conclusions of law"). No published case in Wisconsin has held that an agency's settlement agreement with a private party fell within this *adjudicative* category. *Contra, e.g.*, *id.* at 655 (concluding that agency's decision not to investigate citizens' complaint was "nonreviewable, discretionary determination" not subject to review).

Second, to be reviewable, an agency decision must be "final" in the sense that the decision "conclusively 'determine[s] the further legal rights of the person seeking review.'" *Kimberly Area Sch. Dist. v. LIRC*, 2005 WI App 262, ¶ 12, 288 Wis. 2d 542, 707 N.W.2d 872 (alternation in original) (quoting *Waste Mgmt.*, 128 Wis. 2d at 90).[3]

[3] Although the text of Wis. Stat. § 227.52 does not expressly require that an administrative decision be "final" to be subject to judicial review, "case law has established that the legislative intent was to limit judicial review to 'final orders of the agency.'" *Sierra Club*, 304 Wis. 2d 614, ¶ 13 (citation omitted).

A decision is not final, and is instead "preliminary" or "interlocutory," "when 'the substantial rights of the parties involved in the action remain undetermined.'" *Kimberly Area Sch. Dist.*, 288 Wis. 2d 542, ¶ 12 (quoting *Pasch*, 58 Wis. 2d at 354). Such preliminary or interlocutory determinations are "excluded from judicial review to prevent administrative proceedings from being 'constantly interrupted and shifted back and forth between the agencies and the courts.'" *Id.* (quoting *State v. WERC*, 65 Wis. 2d 624, 637, 223 N.W.2d 543 (1974)). For finality, the administrative process must have "been completed in its entirety." *Id.* ¶ 13.

A "critical" consideration in determining whether a decision is final is "whether the party objecting to it will have a later opportunity for review." *Sierra Club*, 304 Wis. 2d 614, ¶ 27. Thus, in evaluating finality, courts do not look to whether a determination was final on a single, substantive issue when multiple issues would eventually be subject to judicial review. *See id.* ¶ 24. Allowing such piecemeal, successive review "would result in more than one appeal in many administrative proceedings concerning a challenge to a permit," thereby creating the potential for inconsistent judicial decisions and making "the administrative process more complicated and less efficient." *Id.* The quintessential example of further review being available is when the challenger will have the opportunity to seek review of the agency's ultimate decision to grant, deny, or modify a permit. *See id.* ¶¶ 24–27.

To illustrate, an example of a final decision subject to review under Wis. Stat. § 227.52 is a DNR order modifying a plan of operation for a waste disposal site. *See Waste Mgmt.*, 128 Wis. 2d at 90–91. This type of formal permit modification is

final for purposes of judicial review because "unless the applicant complied with the modified requirements, it risked denial, suspension, or revocation of the license." *Sierra Club*, 304 Wis. 2d 614, ¶ 18 (discussing *Waste Mgmt.*, 128 Wis. 2d at 90–91).

In contrast, examples of decisions that are not final, and thus not subject to judicial review under Wis. Stat. § 227.52, include administrative decisions denying motions to dismiss and allowing further proceedings, *see, e.g.*, *WERC*, 65 Wis. 2d at 630–33; *Kimberly Area Sch. Dist.*, 288 Wis. 2d 542, ¶ 13; or a decision denying a motion to quash before the administrative agency, *see Pasch*, 58 Wis. 2d at 354–58.

Notably, in *Friends of the Earth v. PSC*, the court held that even a binding but interim utility ratemaking order by the Public Service Commission was not final for purposes of judicial review, where the rates imposed were subject to refund if the final order deemed necessary. 78 Wis. 2d 388, 405–06, 410, 254 N.W.2d 299 (1977). In holding that the binding interim order was not final, the court emphasized the opportunity to seek judicial review of the ultimate ratemaking order. *See id.* at 405–06, 410–11.[4]

Importantly, in denying judicial review of nonfinal orders, courts have consistently recognized that while allowing interlocutory review "might avoid the

[4] In *Sierra Club*, 304 Wis. 2d 614, ¶ 18, the court referred to *Friends of the Earth* as having held that an interim ratemaking order "was . . . final for purposes of judicial review." In *Friends of the Earth*, the court noted that certain interim orders *could be* final for purposes of judicial review, where it was apparent that the administrative process had "run its course," and legal rights "ha[d] been established," with the decision having "an immediate impact upon the parties concerned." *See Friends of the Earth*, 78 Wis. 2d at 405–06. But the court concluded that the interim order *in that case* was not final for purposes of judicial review, holding that "an interim rate order of the character involved here is not immediately subject to judicial review, but may be reviewed in connection with review of the final order in the case." *Id.* at 410–11.

expense and inconvenience of further administrative proceedings," such a consideration "is not a basis for concluding that [a decision] is subject to judicial review." *See, e.g.*, *Sierra Club*, 304 Wis. 2d 614, ¶ 16. Whatever benefits such interlocutory review might afford are "outweighed by the resultant delay that would accompany review of these agency determinations and the disruption of the agency's orderly process of adjudication in reaching its ultimate determination." *Id.* (quoting *Pasch*, 58 Wis. 2d at 357).

Whether an agency decision is "final" for purposes of judicial review is a question of law, properly subject to resolution on a motion to dismiss. *See id.* ¶¶ 7, 13.

B. The settlement agreement was not a final agency decision subject to judicial review under Wis. Stat. § 227.52.

The settlement agreement in the *DBA* case does not satisfy either consideration for a final, reviewable decision under Wis. Stat. § 227.52. First, the settlement agreement is not the type of adjudicative decision for which judicial review is contemplated. Second, the settlement agreement does not conclusively determine Petitioners' (or anyone's) legal rights. For either of these reasons, the agreement is not a final agency decision for purposes of Wis. Stat. § 227.52, and this Court must dismiss the petition for judicial review for lack of subject matter jurisdiction.

1. The settlement agreement is not the adjudicative type of agency action for which judicial review is allowed.

The settlement agreement in the *DBA* case is not the type of adjudicative decision contemplated by the statutes governing petitions for judicial review. Decisions that are subject to review are those that adjudicate rights, whether through

a contested case hearing or otherwise. *See Collins*, 231 Wis. 2d at 427. But the myriad discretionary decisions that an agency might make *without* adjudicating rights are not subject to judicial review under Wis. Stat. § 227.52. *See, e.g.*, *Wis. Envtl. Decade, Inc.*, 93 Wis. 2d at 654–55.

The settlement agreement is not the type of decision subject to judicial review. The settlement agreement arose in the context of litigation between DNR and another litigant. (*See* Compl. Exs. D, F.) Through the agreement, DNR made a litigation-based, discretionary decision regarding how best to proceed with the agency's operations. The agreement is thus comparable to PSC's order in *Wis. Envtl. Decade, Inc.*, 93 Wis. 2d at 654. In that case, the court denied judicial review of an order that PSC issued denying a request to conduct further investigation. *See id.* That type of discretionary administrative decision, the court held, simply did not fall within the type of adjudicative decisions contemplated for judicial review. *See id.* at 657–59.

Like the decision to pursue or decline investigation, the decision to enter a settlement agreement is just the type of discretionary, non-adjudicative decision-making that is excluded from judicial review. *Cf. Sierra Club*, 304 Wis. 2d 614, ¶ 20. The petition for judicial review should be dismissed on this basis alone.

2. The settlement agreement did not conclusively determine the legal rights of Petitioners or any other party.

The settlement agreement does not conclusively affect Petitioners' rights—or anyone else's rights, for that matter.[5] The agreement simply outlines existing law governing DNR's administration of WPDES determinations, and confirms that DNR will apply existing, *properly promulgated* law when making future individual WPDES permit decisions. (*See, e.g.*, Compl. Ex. F ¶¶ 4.c.ii., d.ii. (agreement provision confirming that DNR may not use feed storage guidance or calf hutch memo for any future regulatory determinations). As noted above, the settlement agreement did not adjudicate any permit applications or other regulatory decisions—and certainly not "conclusively," as is required to establish the finality necessary to support judicial review under Wis. Stat. § 227.52. *See Kimberly Area Sch. Dist.*, 288 Wis. 2d 542, ¶¶ 12–13.

Most notable for purposes of evaluating finality here is that anyone who might wish to challenge specific applications of existing law will have the opportunity to do so through the statutory procedures for reviewing WPDES permits. *See* Wis. Stat. § 283.63(1) (providing for review of, among other things, "any permit denial, modification, termination, or revocation and reissuance, the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit");

[5] DNR maintains that Petitioners also are not "aggrieved" by the settlement agreement, as is required to have standing to seek judicial review under Wis. Stat. § 227.52. *See Waste Mgmt. of Wis., Inc. v. DNR*, 144 Wis. 2d 499, 505, 424 N.W.2d 685 (1988). Standing to pursue judicial review of a particular agency action requires challengers to show both that they have sustained injury due to the agency decision, and that that injury "is to an interest which the law recognizes or seeks to regulate or protect." *Id.* For purposes of the motion to dismiss, however, DNR believes that the question of finality is dispositive.

see also Clean Water Action Council of Ne. Wis. v. DNR, 2014 WI App 61, ¶¶ 7–24, 354 Wis. 2d 286, 848 N.W.2d 336 (discussing applicable procedure for obtaining judicial review of WPDES permit decisions). Indeed, Petitioners point to specific DNR decisions regarding individual WPDES permits, all of which are entirely separate agency decisions, and each of which ultimately *could be* subject to judicial review. (*See* Compl. ¶ 41.) In their complaint, Petitioners refer to notices of "intent to issue or reissue five (5) WPDES permits to CAFOs in Kewaunee County." (*See id.*)

It is *that* type of decision—the grant, denial, or modification of a permit—that will ultimately be subject to judicial review. *See Sierra Club*, 304 Wis. 2d 614, ¶ 20. But following the entry of the settlement agreement, there remain multiple steps (on every individual permit application and decision) before the administrative process will have "run its course." *See Kimberly Area Sch. Dist.*, 288 Wis. 2d 542, ¶ 13. The settlement agreement, which merely confirmed that permits will be evaluated in accordance with existing law, simply is not the type of "final" agency decision for which Wis. Stat. § 227.52 allows review.

Because the agreement is neither adjudicative in nature nor "final" in the sense of conclusively determining any legal rights, Petitioners fail to point to a decision that is reviewable under Wis. Stat. § 227.52. The petition for judicial review therefore must be dismissed.

II. Petitioners fail to state a claim to challenge the validity of a "rule" under Wis. Stat. § 227.40 because the settlement agreement is not a "rule."

In addition to their challenge to the settlement agreement as an alleged "final agency decision," Petitioners also assert that the settlement agreement is a "rule," and that the agreement itself is therefore invalid because it did not undergo the formal rulemaking process. (*See* Compl. ¶¶ 35–43.) The settlement agreement is not a rule, in either character or effect. Because the settlement agreement fails to meet at least four of the elements of a "rule," Petitioners' declaratory judgment action must be dismissed in its entirety.[6]

A. Principles governing agency rules and rulemaking.

Wisconsin Stat. § 227.10(1) provides that an agency must "promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Under Wis. Stat. § 227.40(4)(a), if a court concludes that an agency implemented a "rule" without complying with statutory rule-making procedures, the court shall declare that rule invalid.

The term "rule" is defined by statute. Wisconsin Stat. § 227.01(13) provides that a "rule" is "a regulation, standard, statement of policy, or general order of general application which has the effect of law and which is issued by an agency to implement,

[6] Whether the settlement agreement is a "rule" is a question of law, properly subject to resolution on a motion to dismiss. *See Cholvin v. DHFS*, 2008 WI App 127, ¶ 11, 313 Wis. 2d 749, 758 N.W.2d 118. Therefore, Petitioners' legal assertions that the settlement is a rule (*see, e.g.*, Compl. ¶¶ 35–43), are insufficient to defeat a motion to dismiss. *See Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693.

interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency."

For purposes of evaluating whether a particular agency action amounts to a rule, courts break the inquiry into five elements, derived from the statute. *See Cholvin*, 313 Wis. 2d 749, ¶ 22. Courts examine whether the agency action is "(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency." *Id.* (quoting *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979).

If an agency action fails to satisfy any one of the elements, it is not a "rule" for purposes of stating a claim under Wis. Stat. § 227.40(4)(a). *See Schoolway Transp. Co. v. DOT*, 72 Wis. 2d 223, 236, 240 N.W.2d 403 (1976) (holding that agency need not have complied with formal rulemaking procedures, after concluding that alleged rule was not a "regulation, standard, or statement of policy").

B. The settlement agreement fails to satisfy four elements of a "rule."

1. The settlement agreement is not a regulation, standard, statement of policy, or general order.

In *Schoolway Transportation Co.*, 72 Wis. 2d at 235–36, the court examined whether the Department of Motor Vehicles' (DMV) practice of disallowing "dual registration" of buses amounted to a rule, focusing on whether the challenged practice was itself a "regulation, standard, statement of policy or general order." Notable for

present purposes, the alleged rule in *Schoolway* was the agency's *changed* approach to a previous practice: Previously, DMV had allowed bus companies to "dual register" school buses and charter buses; however, after the Attorney General interpreted the governing statute as plainly disallowing such dual registration, the agency stopped the practice. *See id.* As the court described the change, DMV's "revised application of these statutes serves to bring its practices into conformity with the plain meaning of the statute, a course the Department was obliged to pursue when confronted with its error." *Id.* at 236.

Despite the impact that the change had on regulated entities, the court declined to find that the "new" practice amounted to a rule for which formal rulemaking was required. Because the change "in no way modifie[d] the duty of the Department to administer the statute according to its plain terms and to correct its error," the court held that the change itself was "not a regulation, standard, statement of policy or general order." *Id.*

The same analysis establishes that the settlement agreement in this case is also not itself a "regulation, standard, statement of policy or general order." As is plain in the terms of the agreement, DNR concluded that its feed storage guidance and calf hutch memo were themselves invalid as imposing substantive standards without having complied with formal rulemaking. (*See* Compl. Ex. F ¶ 4.c., d.) The settlement agreement sought to correct those errors and to bring the agency's practices back in line with properly promulgated rules and statutory standards. (*See id.*) In the settlement agreement, DNR agreed not to "enforce any standards or

requirements . . . except those standards and requirements explicitly permitted by Wisconsin law." (*Id.* ¶ 4.c.i.; *see also id.* ¶ 4.d.i.)

Just as in *Schoolway*, 72 Wis. 2d at 236, DNR's discovery of its error "in no way modifies" the agency's duty to administer the law. And just as in *Schoolway*, the agency's correction of its error "is not a regulation, standard, statement of policy or general order." *Id.* For this reason alone, the settlement agreement is not a "rule" subject to review under Wis. Stat. § 227.40.

2. The settlement agreement is not of "general application."

For an agency action to be "of general application" as required under the second element of a rule, the action must apply to a "class" that can be "described in general terms" and to which "new members can be added." *Citizens for Sensible Zoning, Inc.*, 90 Wis. 2d at 816. This inquiry turns on the existence of a group to whom the alleged rule *applies*. *See Cholvin*, 313 Wis. 2d 749, ¶ 25 (noting that challenged policy was "of general application" because it "*applies* to all applicants even though it may *affect* only some of them").

The settlement agreement does not *apply* to anyone other than the two parties to the agreement: DNR and DBA. (*See generally* Compl. Ex. F.) DNR would never "apply" the settlement agreement when evaluating a WPDES permit application. Instead, the agency will rely on the substantive law governing WPDES permits, including Wis. Stat. ch. 283 and Wis. Admin. Code ch. NR 243. Because it is that substantive law—and not the settlement agreement—that DNR will apply, the settlement agreement itself is not "of general application," and thus cannot be a rule.

3. The settlement agreement does not have the "effect of law."

An agency policy, practice, or action will have the "'effect of law' where criminal or civil sanctions can result as a violation; where licensure can be denied; and where the interest of individuals in a class can be legally affected through enforcement of the agency action." *Cholvin*, 313 Wis. 2d 749, ¶ 26 (citation omitted).

Similar to the lack of "general application," the settlement agreement itself does not have the force of law as to the WPDES permitting process. To be sure, the agreement is binding as to DNR and DBA, but the agreement would never be the basis for any legal disposition that DNR might make in an individual permitting or regulatory decision. No one's permit will be evaluated based on the terms of the settlement agreement; no one will be denied a permit because they did not "comply with" the settlement agreement. In short, the settlement agreement will not "legally affect[ ]" anyone's rights.

The agreement is therefore not a "rule" for this additional reason.

4. The settlement agreement does not implement or interpret legislation that is enforced or administered by DNR.

Similar to the preceding elements, the settlement agreement is not a rule because the agreement does not implement or interpret the governing statutory standards. Those interpretations are instead embodied in the properly promulgated provisions of Wis. Admin. Code ch. NR 243.

Indeed, the settlement agreement makes clear that it is those standards that must govern DNR's WPDES permitting decisions, rather than the unpromulgated

"guidance documents" that the agency was implementing before the *DBA* lawsuit. (*See, e.g.*, Compl. Ex. F ¶ 4.c.iii.) In fact, it is precisely because those guidance documents *did not* comply with existing standards that DBA sued the agency. (*See generally* Compl. Ex. D.) The settlement agreement simply resolved that DNR would return to enforcing the existing, properly promulgated regulations or statutes.

The agreement therefore did not interpret any legislation, and is not a "rule" for this final reason.

CONCLUSION

For the reasons discussed, the petition for judicial review and declaratory judgment should be dismissed in its entirety, and judgment entered for DNR.

Dated this 16th day of January, 2018.

BRAD D. SCHIMEL
Wisconsin Attorney General

Electronically signed by:

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed the foregoing Respondent's Brief in Support of Motion to Dismiss with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 16th day of January, 2018.

/s/ Gabe Johnson-Karp
GABE JOHNSON-KARP