STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE 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.

REPLY BRIEF

Petitioners concede that their petition for judicial review should be dismissed. So it should.

Their rule challenge under Wis. Stat. § 227.40 is equally ripe for dismissal. The settlement agreement that they assert is a "rule" fails to meet four out of five criteria necessary to be considered a rule. Because any one of those failings is dispositive, their declaratory judgment action should also be dismissed, and this Court should dismiss the complaint and petition in its entirety.

I. A motion to dismiss is a proper vehicle to decide whether an alleged rule presents a cognizable claim for a declaratory judgment under Wis. Stat. § 227.40.

Petitioners suggest that a motion to dismiss is not a proper vehicle to resolve a declaratory judgment action under Wis. Stat. § 227.40. (*See* Petrs' Br. 2;

see also Petrs' Letter 1–2 (Jan. 22, 2018).) Case law clearly supports the use of motions to dismiss in situations like that presented here.

For example, in *Liberty Homes, Inc. v. DILHR*, 136 Wis. 2d 368, 376–77, 401 N.W.2d 805 (1987), the court expressly recognized that "trial courts should insist that parties challenging administrative rules clearly" and "precise[ly]" state the bases for their challenge. Doing so, the court held, "will force litigants to clarify their theory of the case at the point when it should be clarified—before the action for declaratory judgment is filed." *Id.* at 377. Subsequent case law confirms that pleadings under Wis. Stat. ch. 227 may be dismissed for failure to state a cognizable claim, just like pleadings in any other type of case. *See PRN Assocs. LLC v. DOA*, 2009 WI 53, ¶¶ 26–27, 68, 317 Wis. 2d 656, 766 N.W.2d 559 (setting forth legal standard for motions to dismiss under Wis. Stat. ch. 227, and affirming grant of motion to dismiss under Wis. Stat. ch. 227); *see also Turkow v. DNR*, 216 Wis. 2d 273, 280, 576 N.W.2d 288 (Ct. App. 1998) (holding that circuit court should have granted DNR's motion to dismiss in Wis. Stat. ch. 227 proceeding based on sovereign immunity).

Petitioners' purported "rule challenge" is just such a claim for which a motion to dismiss is proper. They have labeled something a rule, and have alleged that it must be reviewed under Wis. Stat. § 227.40. But simply calling something a rule does not make it so. *See Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693 (legal conclusions are insufficient to defeat a motion to dismiss). Instead, this threshold issue—whether the settlement agreement can

even be reviewed as a rule under Wis. Stat. § 227.40—is properly resolved on a motion to dismiss.

II. The settlement agreement fails to satisfy four of the five criteria to be a "rule" subject to review under Wis. Stat. § 227.40.

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

As discussed in the opening brief, *Schoolway Transportation Co. v. DMV*, 72 Wis. 2d 223, 240 N.W.2d 403 (1976), demonstrates that the settlement agreement was not itself a "regulation, standard, statement of policy, or general order" subject to review under Wis. Stat. § 227.40. In their attempt to distinguish *Schoolway*, Petitioners mischaracterize the terms of the settlement agreement and misapply *Schoolway*.

Schoolway involved challenges to two sets of rules: the "dual licensing" provisions and the "urban mass transportation" provisions. *See Schoolway Transp. Co.*, 72 Wis. 2d at 232–36. Relevant here, the challenge to the dual licensing rules arose after DMV disavowed a previous interpretation of those rules, following an Attorney General opinion finding DMV's interpretation legally erroneous. *See id.* at 235–36. When the agency changed its practice to conform with that opinion, the bus company asserted that that change amounted to an invalid, un-promulgated rule.

The *Schoolway* court disagreed. The court stated that DMV, by following its previous, legally invalid interpretation, had "acted outside of the authority conferred upon it." *Id.* at 236. Adopting the updated interpretation simply "serve[d] 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.* Bringing the agency's interpretation "into conformity" with controlling law was therefore not a "rule" for purposes of review under Wis. Stat. § 227.40 (then Wis. Stat. § 227.05).

The current case is identical to *Schoolway*'s dual-licensing analysis: (1) an agency had in place legally invalid "rules" (here, the guidance documents); (2) the interpretation in the invalid "rules" was determined to violate clear statutory requirements; and (3) the agency changed its practice to disavow the earlier, invalid approach. Just as in *Schoolway*, DNR was obliged to repudiate its earlier interpretation, and just as in *Schoolway*, that repudiation does not itself constitute a "rule" subject to review under Wis. Stat. § 227.40.

Petitioners rely on *Schoolway*'s treatment of the "urban mass transportation" rules, which the court held *did* constitute a rule that required formal rulemaking. (*See* Petrs' Br. 9–13.) Petitioners assert that, like the update to the mass transportation rules, the settlement agreement "interprets a complex legal framework," (the CAFO WPDES program), and that that "interpretation" required formal rulemaking. (*Id.* at 9.) They further assert that the terms of the settlement agreement conflict with state law. (*Id*. at 11.) Their arguments ignore the invalidity of the guidance documents and the actual effect of the settlement agreement's terms.

For one thing, the fact that the guidance documents were themselves invalid from the outset distinguishes them from the original urban mass transportation rules in *Schoolway*. For those underlying rules, there had been no suggestion that they were invalid, so the updated interpretation was a departure from an otherwise valid

interpretation. *See Schoolway Transp. Co.*, 72 Wis. 2d at 236–37. *Schoolway*'s controlling principle on this point is that where the underlying agency interpretation was legally invalid, no "rule" is required to disavow those invalid provisions. *See id.* at 235–36.

Petitioners also spend a significant portion of their brief commending the substance of the guidance documents, effectively suggesting that existing law required the procedures therein. (*See* Petrs' Br. 4–6, 10–13.) Their argument is both incorrect and inapposite.

Their argument is incorrect as a substantive matter because nothing in Wisconsin law compels the policies or procedures in the guidance documents. Moreover, nothing in the settlement agreement conflicts with Wisconsin law.[1] While Petitioners apparently believe that the requirements in the guidance documents were better policy (*see, e.g.*, *id.* at 12), that does not mean that DNR's regulatory program

[1] For example, contrary to Petitioners' assertions, Wisconsin law does not require that DNR "presum[e] the presence or future occurrence of a discharge from a CAFO production area." (Petrs' Br. 11.) In fact, Wisconsin's WPDES permitting program (like the federal Clean Water Act on which the WPDES program is based) *does not apply* to "presumed" discharges. *Cf. Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 751 (5th Cir. 2011) (recognizing "there must be an *actual* discharge into navigable waters to trigger the CWA's requirements and the EPA's authority," and holding that any attempt to regulate anything other than *actual* discharges "exceeds the EPA's statutory authority"); *see also* Wis. Stat. § 283.31(1) (limiting regulation under WPDES to "[t]he discharge of any pollutant").

Likewise, nothing in Wisconsin law compels DNR to require CAFO permittees "to submit evaluations of existing VTAs based on factors including effluent limits and permit conditions." (Petrs' Br. 11.) Rather, DNR "may require" such evaluation; nothing in Wisconsin law compels the agency to do so. *See* Wis. Admin. Code § NR 243.16(2). And nothing in Wisconsin law *requires* DNR to consider calf hutch lots as coming within the definition of "reviewable facility or system," under Wis. Admin. Code § NR 243.03(56). (*See* Petrs' Br. 11.) No existing statutory or regulatory provision demands this interpretation, which is out of accord with the governing statutory definition, and is thus impermissible. *See* Wis. Stat. §§ 227.10(2m), .11(2)(a).

is insufficient without them. Indeed, even the fact that U.S. EPA suggested that DNR's rules may need updating (*see* Compl. Ex. A:3; Ex. B) does not dictate that DNR was required to adopt the specific policies or procedures in the guidance documents.

But the more important point is that any discussion about substance is inapposite: regardless of any arguable merit of the substantive policies in the guidance documents, those policies *had to* go through formal rulemaking to be valid and enforceable. Because the guidance documents did not go through formal rulemaking, they were invalid and unenforceable. *See* Wis. Stat. §§ 227.10(1), .11(1), (2); *see also* Wis. Stat. §§ 227.135–.22.

Returning to *Schoolway*, then, this invalidity is what makes the guidance documents here identical to the invalid interpretation of the dual licensing provisions in that case. It is irrelevant that the invalidity in *Schoolway* was based on the substance of the governing statute, whereas here the invalidity was based on DNR's failure to follow rulemaking procedures. In both cases, the agency was "obliged" to repudiate the earlier interpretation once it was confronted with its invalidity. *See Schoolway Transp. Co.*, 72 Wis. 2d at 236. Under *Schoolway*, then, the settlement agreement was not a rule, and dismissal is proper on this basis alone.

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

Petitioners are incorrect when they allege that "the Settlement Agreement is being used in DNR's permitting decisions." (Petrs' Br. 14.) Existing law, not the settlement agreement, is what *applies* to WPDES permit decisions.

In fact, the settlement agreement expressly requires DNR to exercise its permitting authority in accordance with "lawfully enacted statute[s] or promulgated rule[s]." (*See* Compl. Ex. F ¶ 4.c.i.; *see also id.* ¶ 4.e. ("[n]othing in this Agreement shall be construed as authorizing a violation of federal or state law").) Thus, even assuming DNR were "applying" the settlement agreement, the agency would nonetheless be obligated to "apply" already controlling law. As stated in Petitioners' Exhibit H: "The agreement does not change any current environmental protections. Discharges from vegetative treatment areas to navigable waters are still regulated under state and federal law." (Geers Aff. Ex. H:2.)

But what is more, Petitioners are wrong when they assert that the settlement agreement "is being used in DNR's permitting decisions." (Petrs' Br. 14.) Specifically, Petitioners' suggest that *by virtue of* the settlement agreement, DNR is "waiving engineering evaluations for existing VTAs." (*Id.*) But as noted *supra*, n.1, Wisconsin law already vests discretion in DNR as to whether to require such evaluations. *See* Wis. Admin. Code § NR 243.16(2). It is that law, not the settlement agreement, that guides DNR's decision to require evaluations. The agreement simply effected a return to that rule-based status quo.

The fact that some DNR staff refer to the settlement as controlling does not alter the legal conclusion that existing law, not the settlement agreement, guides permitting decisions. (*See* Petrs' Br. 14.) Regardless of how some staff might characterize the settlement agreement, the agreement cannot "apply" to anyone other than the two parties to that agreement. The standards that "apply" to permittees

are the properly promulgated standards in the statutes and regulations.[2] *See, e.g.*, Wis. Stat. § 281.31; Wis. Admin. Code §§ NR 243.13, .15.

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

To have the effect of law, a rule must have the ability to legally affect an individual's interests "through enforcement of the agency action." *Cholvin v. DHFS*, 2008 WI App 127, ¶ 26, 313 Wis. 2d 749, 758 N.W.2d 118. It is nonsensical to think of "enforcing" the settlement agreement against any individual permittee. There is no mechanism by which the agreement would be "enforced" against a permittee, and no way of requiring that the permittee comply with the agreement. This is clear in the settlement agreement's "[e]nforcement" section, which says nothing about enforcement of any standards against a particular permittee. (*See* Compl. Ex. F ¶ 5.) Instead, the agreement's enforcement mechanisms are between DNR and DBA (the only other party to the agreement), and relate primarily to DBA's ability to initiate further proceedings in the event DNR ceases to apply governing law. (*See id.*)

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[2] Interestingly, Petitioners rely on *Wisconsin Electric Power Co. v. DNR*, 93 Wis. 2d 222, 287 N.W.2d 113 (1980), for the proposition that the settlement agreement "applies" to a class of permittees. The situation presented in that case, however, is most analogous to DNR's adoption of substantive standards in the guidance documents. In both instances, DNR adopted substantive changes to its permitting standards, based on U.S. EPA's suggestion about what Wisconsin law required. *Compare Wis. Elec. Power Co.*, 93 Wis. 2d at 235 (noting that standards at issue were EPA recommendations), *with* Compl. Ex. A:3 (feed storage guidance "developed in response to U.S. EPA communications" regarding Wisconsin's administration of CAFO permitting). And in *Wisconsin Electric*, the court concluded that DNR's *unpromulgated* adoption of EPA's standards constituted an invalid rule. *See Wis. Elec. Power Co.*, 93 Wis. 2d at 234–40. Thus, far from supporting Petitioners' position, *Wisconsin Electric* lends further support to the invalidity of the guidance documents, and the need to disavow those documents, as the settlement agreement did.

The situation in this case is therefore distinguishable from that in *Wisconsin Electric*, on which Petitioners rely. There, DNR relied on a letter from EPA when the Wisconsin agency began incorporating EPA's newly suggested standards into WPDES permits. *See Wis. Elec. Power Co.*, 93 Wis. 2d at 234–35. The court concluded that the standards in the letter had the "effect of law" because DNR incorporated those standards into WPDES permits, which were themselves enforceable. As noted *supra* n.3, *Wisconsin Electric*'s treatment of new standards is analogous to DNR's promulgation of the guidance documents, not the settlement agreement. By repudiating the guidance, DNR did not create another standard with the effect of law. The only standards with the effect of law already existed as statutes and properly promulgated rules.[3]

D. The settlement agreement does not implement or interpret legislation.

For the same reasons already discussed, DNR's entry into the settlement agreement did not constitute a new "implementation or interpretation" of any legislation. As discussed in detail above, existing law already does what Petitioners contend the settlement agreement does. Nothing in the settlement agreement changed any existing law.

[3] This is most evident when considering the practical effect of a favorable decision for Petitioners. Even if this Court were to "invalidate" portions of the settlement agreement as Petitioners request (Compl. 18–19), DNR would nonetheless be obligated to apply current law. DNR would not—indeed, could not—apply the invalid standards in the guidance documents. Striking portions of the settlement agreement would not erase that invalidity. Rather, what remains are "lawfully enacted statute[s] or promulgated rule[s]," as the agreement contemplates. (Compl. Ex. F ¶ 4.c.i.)

For this reason, along with all others, the agreement is not a rule subject to review under Wis. Stat. § 227.40. Petitioners' declaratory judgment action must be dismissed.

CONCLUSION

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

Dated this 5th day of March, 2018.

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed the foregoing Reply Brief 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 5th day of March, 2018.

/s/ Gabe Johnson-Karp
GABE JOHNSON-KARP