STATE OF WISCONSIN TREMPEALEAU COUNTY CIRCUIT COURT

DONNA BROGAN, BERT HODOUS, PETER AND KARY JONAS, BETH KILLIAN, REBECCA LARSEN, MARGARET OLSEN, SHIRLEY ROBERTS, AND PAUL AND NANCYANNE WINEY

Petitioners,

Case No. 13-CV-144
Case Code: 30607
Administrative Agency Review

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent.

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

Petitioners Donna Brogan, Bret Hodous, Peter and Kary Jonas, Beth Killian, Rebecca Larsen, Margaret Olsen, Shirley Roberts, and Paul and Nancyanne Winey ("Petitioners") submit this brief in support of their petition for judicial review of the Department of Natural Resources' ("DNR") final decision to issue Construction Permit No. 12-POY-079 ("FML Permit"). The FML Permit is an air pollution control permit that authorizes FML Sand, LLC[1] to construct and operate an industrial frac sand mine and processing facility on a 315-acre site located near the Town of Arcadia, Wisconsin.

[1] The DNR originally issued Construction Permit No. 12-POY-079 to FTS International Proppants, LLC. FML Sand, LLC is the successor in interest to the permit having acquired the permit from FTS International Proppants pursuant to an asset purchase that closed in September of 2013. (Intervenor FML Sand's Notice of Appearance and Statement of Position at 2.)

There is only one issue before this Court—whether the DNR failed to uphold its obligations under the Wisconsin Environmental Protection Act ("WEPA") and the agency's own regulations to determine whether the issuance of the FML Permit will significantly affect the environment, thereby triggering the need for the DNR to prepare an Environmental Impact Statement ("EIS"). The Wisconsin Supreme Court cautioned in *Wisconsin's Environmental Decade v. PSC* that "an agency called upon to make the threshold decision about the need for an EIS under WEPA may very well approach the question with a bias favoring a negative conclusion." 79 Wis. 2d 409, 420, 256 N.W.2d 149 (1977) (footnote omitted) (hereinafter "*WED III*"). Thus, the Court concluded that it is correct for a court to subject an agency's threshold decision to a "searching inquiry" and to demand that the agency produce a reviewable record. *Id.*

Here, the DNR failed to develop any semblance of a reviewable record that demonstrates meaningful consideration of the need for an EIS. Instead, the agency attempts to justify its decision not to prepare an EIS with boilerplate conclusory statements and hollow references to the DNR's regulations. Petitioners, therefore, request this Court to revoke the FML Permit and remand it to the DNR with instructions to conduct a proper investigation into the need for an EIS and to develop a reviewable record justifying the agency's decision.

LEGAL BACKGROUND

In Wisconsin, the United States Environmental Protection Agency has delegated to the DNR the authority to implement and enforce the federal Clean Air Act. *Sierra Club v. Dep't of Natural Res.*, 2010 WI App 89, ¶¶ 8-9, 327 Wis. 2d 706, 77 N.W.2d 855. Pursuant to its delegated authority, the DNR issues air pollution control permits to the operators of certain facilities that emit air pollution. Wis. Stat. §§ 285.01(41), 285.60(1). When issuing air pollution control permits, the DNR must comply with WEPA, which requires that agencies such as the

DNR prepare an EIS for major actions that significantly affect the quality of the human environment. Wis. Stat. § 1.11.

WEPA is modeled after a federal version of a similar law, the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (2005). These laws were the first attempts by the federal and state government to create a process that required administrative agencies to systematically incorporate environmental considerations into decision-making. The laws are intended to protect public welfare and adjust the priorities of all government agencies to make protection of the environment an "essential" part of state policy. *WED III*, 79 Wis. 2d at 416.

The DNR's regulations provide the "principles, objectives, definitions and criteria to be used by the department in the implementation of [WEPA]" and the process that the DNR must follow to identify "major actions significantly affecting the quality of the human environment." Wis. Admin. Code §§ NR 150.01(2), (3). In part, the regulations establish four categories of actions (Type I Actions – Type IV Actions) and the minimum environmental review procedures applicable to each category. Wis. Admin. Code § NR 150.02(1)-(4); Wis. Admin. Code § NR 150.20(1).

The issuance of an air pollution control permit to a new or modified source of air pollution is classified as either a Type II or Type III Action depending on the facility's level of emissions and whether it will emit any hazardous air pollutants. Wis. Admin. Code § NR 150.03(8)(b)1. With respect to particulate matter—a pollutant emitted by industrial frac sand mining and processing facilities— the issuance of an air pollution control permit is classified as a Type II Action if the facility will emit more than 100 tons per year of particulate matter after pollution

controls are installed. Wis. Admin. Code § NR 150.03(8)(b)1. The issuance of a permit to a source that will emit less than 100 tons per year is classified as a Type III Action. *Id.*

Type II Actions are presumed "to have the potential to cause significant environmental effects and may involve unresolved conflicts in the use of available resources". Wis. Admin. Code § NR 150.03(2). For these types of actions, the DNR must, at a minimum, prepare an Environmental Assessment ("EA"). An EA is used to determine if a project is a major action resulting in significant impacts to the quality of the human environment. Wis. Admin. Code § NR 150.20(1)(c). If after preparing an EA, the agency concludes that the project will not significantly impact the environment, the agency need not prepare an EIS, and the WEPA process is complete. *Id.*

Type III Actions "normally do not have the potential to cause significant environmental effects, normally do not significantly affect energy usage and normally do not involve unresolved conflicts in the use of available resources." Wis. Admin. Code § NR 150.03(3). Though, the DNR should prepare an EA or EIS for a Type III action where case-specific factors warrant a more thorough review of environmental impacts and alternatives. Wis. Admin. Code § NR 150.20(1)(b)4. The DNR's regulations identify the circumstances which, if present, trigger the need for a more thorough environmental review, stating:

> "The department may require the issue identification, EA and decision stages on the EIS process under ss. NR 150.21, 150.22 and 150.24 or the full EIS process under ss. NR 150.21 to 150.24, if:
>
> a. The department determines that the proposed action may significantly affect the quality of the human environment.
> b. Scarce resources, such as critical habitat for threatened or endangered species, valued fish spawning areas, wetlands, historic, cultural, scenic or recreational areas, may be affected.

c. Substantial acute risk, to human life or health, or to significant natural resources due to failure of pollution control systems, fire or other reasonably foreseen failures at the proposed facility, may be created.
d. An EA or EIS is otherwise required under s. NR 150.20 (2)(b)."

FACTUAL BACKGROUND

On March 30th, 2012, FTS International Proppants, LLC applied for an air pollution control construction permit to begin industrial sand mining operations at a site in Trempealeau County. (R. at 1-2.) At that time, there were already twenty-five permitted industrial sand mining operations in Trempealeau County. (R. at 49.) The site of the proposed FML facility is a 315-acre parcel roughly 1 mile east of Arcadia. (R. at 3.) The planned facility would be equipped to process roughly 200 tons of sandstone (the ore from which frac sand is extracted) per hour. (R. at 3.) The facility includes both mining operations and the full range of processing operations. (R. at 3.) The FML Facility will release air emissions subject to regulation under the Clean Air Act. Specifically, there will be two stack sources of emissions at the FML Facility—the sand dryer and the dry plant operations—and a number of sources of fugitive emissions. (R. at 3-7.)

To "avoid the requirement of an environmental assessment, the company proposed" certain permit limits that would limit their particulate matter emissions to 97.6 tons per year. (R. at 17.) At 97.6 tons per year, the FML Sand Facility's emissions fall just short of the 100 tons per year threshold for Type II actions. Thus, the DNR's regulations classify the issuance of the FML Sand permit as a Type III Action. *See* Wis. Admin. Code § NR 150.03(8)(b)1.

The DNR released a Preliminary Determination, along with a draft of the FML Permit, on February 22nd, 2013. (R. 1.) In the Preliminary Determination, the Department determined that it would not produce an EA or EIS as part of the permit process. (R. 25.) With no further

explanation, the Department stated, "[i]t is proposed that an environmental assessment not be completed." (R. at 25.)

Petitioners, through counsel, submitted comments on the Preliminary Determination on March 27th, 2013, and provided oral comments at a public hearing on April 16th, 2013. In both the written and oral comments, Petitioners raised a range of technical concerns with the permit and requested that the Department's prepare an EA or EIS. (R. 40-66.) The Department responded to the comments and issued the final construction permit on June 24th, 2013. (R. 70-115.) Regarding the EIS issue, the Department's full response was:

> "When determining whether an Environmental Assessment is required, the Department complies with Wis. Stat. s. 1.11 and the provisions of NR 150, Wis. Adm. Code. Specifically, the Department has determined, based on the requirements of NR 150, that an Environmental Assessment is not required in response to FTS International's application for a construction permit in this matter."

(R. 80.)

Petitioners submitted timely requests for a contested case hearing and judicial review on several issues related to the permit, including the DNR's failure to prepare an EA or EIS. (R. 116-132.) Petitioners and the DNR agreed to stay this judicial review proceeding pending the Department's response to Petitioner's request for a contested case hearing. The Department later partially granted Petitioners request for a contested case hearing, denying the request as to the EIS issue. (R. 134.) Following the DNR's response, Petitioners and DNR agreed to move forward with judicial review of the EIS issue given that the it will not be litigated as part of the contested case hearing.

ARGUMENT

I. Standard of review in WEPA cases

When reviewing WEPA decisions, courts apply a two-pronged "reasonableness" test in light of the court's careful consideration of the facts:

> 1. Did the agency develop a reviewable record based on a preliminary factual investigation of the relevant areas of environmental concern in sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences or impacts of the proposed action?
>
> 2. Giving due regard to the agency's expertise, where it has actually been applied, did the agency's determination that the action is not a major action significantly affecting the quality of the human environment reasonably follow from a good faith investigation by the agency pursuant to WEPA?

See WED III, 79 Wis. 2d at 425.

If the Court answers either of the above questions in the negative after reviewing the administrative record, it must determine that the agency has not complied with WEPA.

II. The DNR failed to develop a reviewable record demonstrating consideration of the circumstances that would trigger the need for an EA or EIS for Type III Actions

The DNR has not developed a reviewable record in this case demonstrating a preliminary factual investigation of the relevant areas of environmental concern.[2] Rather, the record contains only conclusory statements pointing out that the issuance of the FML Permit is a Type III action and therefore, the DNR argues, no EA or EIS needs to be prepared. While the classification of an

[2] When engaging in the WEPA process, the DNR is required to consider more than just air quality impacts. Under Wis. Admin. Code § NR 150.22(2), the relevant areas of environmental concern include:

1. The extent of short-term and long-term environmental effects including secondary effects; particularly to geographically scarce resources such as historic or cultural resources, scenic and recreational resources, prime farmlands, threatened or endangered species or ecologically critical areas.
2. The extent of cumulative effects of repeated actions of the same type, or related actions or other activities occurring locally that can be reasonably anticipated and that would compound impacts.
3. The degree of risk or uncertainty in predicting environmental effects or effectively controlling potential environmental impacts including those relating to public health or safety.
4. The degree in which the action may establish a precedent for future actions or foreclose future options. This includes consistency with plans or policy of local, state or federal government.

action as a Type III Action establishes a presumption that the action will not result in significant environmental impacts, it does not discharge the DNR's obligation to undertake a meaningful environmental review to determine whether the agency should prepare an EA or EIS. *See WED III* at 426, 430 (holding that even where an agency establishes presumptions as to the need for an EIS for certain categories of actions, conclusory statements are not sufficient to discharge the agency's obligations under WEPA and the agency must "undertake a sufficient good faith factual investigation").

Petitioners acknowledge that as a Type III action, the regulations do not automatically require the agency to conduct the same level of investigation into the environmental consequences of a proposed action as they require for Type I and II actions. However, the regulations also do not permit the agency to provide no analysis and come to an unsupported conclusion—as they apparently have here. As discussed above, the DNR has the discretion to prepare an EA or EIS for a Type III action if case-specific factors warrant a more thorough review of environmental impacts and alternatives. Because the regulations provide factors to guide the DNR's exercise of that discretion, it follows that the DNR is required to consider whether any of these factors are present in a particular case.[3] Moreover, the Wisconsin Supreme Court instructs that "where issues of arguably significant environmental impart are raised," the agency must show justification for its determination not to prepare an EIS. *WED III*, 79 Wis. 2d at 424.

[3] By their very nature, discretionary decisions require the agency to follow the required reasoning process under the factors that the agency is required by law to consider. See *Reidinger v. Optometry Examining Bd.*, 81 Wis. 2d 292, 297-98, 260 N.W.2d 270 (1977) ("Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. The process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.")

In oral and written comments on the draft permit, Petitioners raised a number of serious concerns related to the environmental impact of the FML Sand facility. Petitioners noted the impacts stemming from "the use of roads, and railroads for transportation of sand, and the noise, light and environmental hazards posed by silica dust". (R. at 45.) Petitioners also noted that there are already 25 permitted industrial sand mines and processing facilities in Trempealeau County, that 12 of those facilities are located within the Township of Arcadia and that 6 of them are located along the same 4-mile stretch of Highway 95 as the FML facility. (R. at 141.) They pointed out that there are 2 housing subdivisions within a mile of the FML facility; that residents living near other mines have reported dust coating the inside and outside of their homes and that they have difficulty breathing. (R. at 146-147.) The Petitioners supplied the DNR with pictures of dust plumes at other sand mining facilities and air monitoring data collected by Dr. Crispin Pierce, Associate Professor of Environmental Public Health, University of Wisconsin - Eau Claire, which indicates that at least one sand mine may be emitting particulate matter at rates higher than modeled by the DNR. (R. 148-150, 157-58.) The Petitioners also raised concerns about the aesthetic impact that the mine will have on the area. (R. at 146.)

Despite the numerous environmental concerns raised by the Petitioners, the DNR refused to explain its decision not to prepare an EA or EIS, providing only a brief conclusory statement that it complied with WEPA. (R. at 80.) There is no evidence that the DNR considered the multitude of environmental impacts that they are required to study prior to determining that an EA or EIS is not warranted. Nowhere does the record discuss the potential impacts on the environment from noise, increased traffic, or light pollution. Furthermore, the record does not reflect whether the DNR evaluated potential impacts to wetlands, fish spawning areas, or scenic or recreational areas.

In the entire record, there are only 5 conclusory statements regarding the DNR's decision not to prepare an EA or EIS—none of which provide for the meaningful evaluation of the nature of the agency's investigation or the reasoning and basis for its conclusion. The only statements with regard to an EA or EIS contained in the DNR's Preliminary Determination are as follows:

> "To limit the particulate matter (PM) emissions from the entire facility to less than 100 tons per year so that no environmental assessment is required under chapter NR 150, Wis. Adm. Code, the company proposed to limit the PM emissions from S01 to 2.05 pounds per hour."

(R. at 9.)

> "To limit the PM (filterable and condensable particulates combined) potential to emit from the entire facility to less than 100 tons per year so as to avoid the requirement of an environmental assessment, the company proposed a PM emission limit of 2.05 pounds per hour from the dryer stack."

(R. at 17.)

> "The proposed project is a Type III action under Chapter NR 150, Wis. Adm. Code, because there is a potential increase in hazardous emissions and the potential to emit of the project is less than 100 TPY for each criteria pollutant. It is proposed that an environmental assessment not be completed."

(R. at 25.) The DNR's explanation for its decision not to conduct an EA or EIS in response to written comments and public testimony is just as devoid of reasoning as the Preliminary Determination:

> "When determining whether an Environmental Assessment is required, the Department complies with Wis. Stat. s. 1.11 and the provisions of NR 150, Wis. Adm. Code. Specifically, the Department has determined, based on the requirements of NR 150, that an Environmental Assessment is not required in response to FTS International's application for a construction permit in this matter."

(R. at 80.) And in the final FML Permit, the DNR notes:

> "The permittee proposed this emission limit to keep the facility total PM potential to emit below 100 tons per year. According to ch. NR 150, Wis. Adm. Code, an environmental assessment for this project is not required."

(R. at 93.) These statements do not reflect in any way that the DNR considered whether the issuance of an air pollution control permit to FML Sand will have significant impacts on the nearby environment. Nor does it evince any consideration of the factors listed in Wis. Admin. Code § NR 150.20(1)(b)4 which, if present, trigger the need for further environmental review. The Department's unsubstantiated statement that it "determined, based on the requirements of NR 150, that an Environmental Assessment is not required" is not sufficient to demonstrate that the agency has complied with its obligations under WEPA. The agency has not assembled a reviewable record which would allow this court to assess whether the agency investigated the "relevant areas of environmental concern in sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences or impacts of the proposed action." *WED III*, 79 Wis. 2d at 425.

What the DNR's statements do show is that the DNR predetermined that it was not going to prepare an EA or EIS based on the fact that the permit issuance is a Type III Action and not on any meaningful consideration of the environmental consequences of issuing the FML Permit. Classification of an action as a Type III Action is automatic and ministerial—all air pollution control construction permits for minor sources are Type III actions—it does not settle the issue of whether the action will have significant environmental impact. Rather, as discussed above, the Type III classification determines what issues the Department should investigate to making a preliminary determination on the need for an EA or EIS: threats to scarce resources, risks from failure of control measures, cumulative impacts when considered along with similar and related

projects, and any other apparent issues that arise. Wis. Admin. Code, NR § 150.20(1)(b)4. Based on the record before the court, the Department apparently made no effort, at any stage of the process, to determine whether these concerns applied.

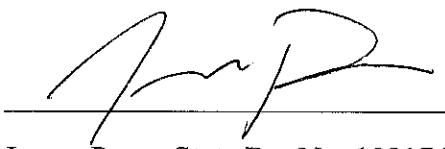
CONCLUSION

For the reasons stated above, the Court should reverse the DNR's decision to issue the FML Permit and remand the permit application to the Department with instructions to conduct investigation into the need for an EA or EIS and to develop a reviewable record justifying the agency's decision.

Respectfully submitted this 6th day of March, 2013

MIDWEST ENVIRONMENTAL ADVOCATES, INC.

Sarah Williams, State Bar No. 1066948



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