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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2016AP1688, 2016AP2502

CLEAN WISCONSIN, INC.,
LYNDA COCHART, AMY COCHART,
ROGER DEJARDIN, SANDRA
WINNEMUELLER and
CHAD COCHART,

Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent-Appellant,

KINNARD FARMS, INC.,

Intervenor-Co-Appellant.

**WISCONSIN DEPARTMENT OF
NATURAL RESOURCES' NOTICE OF
PARTIAL VOLUNTARY DISMISSAL AND
MOTION TO MODIFY BRIEFING SCHEDULE**

Respondent-Appellant Wisconsin Department of Natural Resources (the "Department") hereby provides notice of its dismissal of its appeal in Case No. 2016AP2502. This notice is provided pursuant to Wis. Stat. § (Rule) 809.18 and Wis. Sup. Ct. IOP II.L.4.¹ The Department does not, by

¹ Pursuant to Wis. Stat. § (Rule) 809.14(3)(a), briefing is stayed pending resolution of this notice.

this notice, seek dismissal of the separate appeal in Case No. 2016AP1688, although the Department has determined that certain positions asserted in its briefing to the lower courts in that appeal are not consistent with controlling law. These positions include the validity of the Department's reconsideration decision pursuant to Wis. Admin. Code § NR 2.20, and the effect of 2011 Wis. Act 21 ("Act 21") on the Department's authority to impose certain requirements in WPDES permits.² The Department's merits briefing will reflect its conclusions on these issues, which in most meaningful respects support the judgment below. Accordingly, the Department moves for an order modifying the briefing order, with the Department briefing on the Respondents' schedule.

Further grounds for this partial dismissal are set forth below.

BACKGROUND

Concentrated animal feeding operations (CAFOs)³ require a Wisconsin Pollutant Discharge Elimination System (WPDES) permit. *See* Wis. Stat. § 283.31. Kinnard Farms is a CAFO and, in 2012, applied to the Department for a reissuance of its WPDES permit, indicating it sought to expand its farm. (R. 42:2.⁴) DNR reissued Kinnard's permit in August 2012.

² The Department continues to maintain that it is not explicitly required to impose animal-unit caps as a WPDES permit condition.

³ *See* Wis. Admin. Code § NR 243.03(12) (defining CAFO).

⁴ The records in Case Nos. 2016AP1688 and 2016AP2502 are identical up to R. 58, after which record entries are found only in Case No. 2016AP2502. Citations to the record herein are therefore to Case No. 2016AP2502 unless otherwise indicated.

Five individuals petitioned for administrative review in the form of a contested case hearing under Wis. Stat. § 283.63, asserting that Kinnard Farms' WPDES permit required additional conditions to meet environmental standards under WPDES law. Following a four-day contested-case hearing in February 2014, Administrative Law Judge Jeffrey Boldt ("the ALJ") ordered the Department to add two conditions to Kinnard's permit relevant to the appeal: (1) a requirement to articulate the maximum number of animal units allowed at the facility (the "animal-unit cap"), and (2) a requirement to install, "if practicable," off-site groundwater monitoring wells. The ALJ concluded that the Department had regulatory authority to impose these conditions. (*See* R. 34:674–75 (citing Wis. Stat. § 283.31(3), (4); Wis. Admin. Code §§ NR 243.13(1), (5), 243.15(3)(c)2., (7)).)⁵

⁵ Within the appellate record, the administrative record is docketed at R. 34, and consists of a CD that includes documents from the contested case hearing, a previous judicial-review proceeding (Case No. 14-CV-0073 (Kewaunee Cty.)), and the short-lived appeal that arose from dismissal of that first judicial-review proceeding (Case No. 2015AP1283). Citations to the administrative record (e.g. R. 34:XXX) refer to the Bates pagination of the documents found on the CD.

Kinnard Farms petitioned for review of the ALJ's decision by the Secretary of the Department, pursuant to Wis. Admin. Code § NR 2.20.⁶ The Secretary denied review in November 2014, stating that the issues should be decided on judicial review. (R. 34:718–20.) The Department did not petition for judicial review, and instead began to implement the additional requirements ordered by the ALJ.

Kinnard Farms then timely petitioned for judicial review. That case, however, was dismissed on the ground that the Department's adoption of the ALJ's decision was not yet "final" for purposes of judicial review, because the Department retained the permit for further discretionary action. (R. 34:6580–81.) That case was dismissed in April 2015. (R. 34:6969.)

After the case was dismissed, the Wisconsin Department of Justice advised the Department that the two permit conditions were unlawful under Act 21. (See R. 34:729–41.) On September 11, 2015, after considering the Department of Justice's advice on the permit conditions and procedural options, the Secretary issued a new "final decision" stating that she had reconsidered her

⁶ Under Wis. Admin. Code § NR 2.20, the Secretary has 14 days to decide whether to grant review of the ALJ decision. If the Secretary denies a petition for review filed under Wis. Admin. Code § NR 2.20, and if the Department does not petition for judicial review of the ALJ decision, the ALJ's decision becomes the Department's final decision for purposes of judicial review. See Wis. Stat. § 227.46(3)(a) (the agency may, "by rule," direct that the hearing examiner's decision be the final decision of the agency); see also Wis. Admin. Code § NR 2.155(1) ("Unless the department petitions for judicial review as provided in [Wis. Stat. §] 227.4(8), . . . the [ALJ's] decision shall be the final decision of the department, but may be reviewed in the manner described in [Wis. Admin. Code §] NR 2.20.").

denial of the Wis. Admin. Code § NR 2.20 petition and determined that the Department, rather than the ALJ, would make the final agency decision. (*See* R. 34:725–28.) The Secretary determined that the two conditions were unlawful because no statute or rule explicitly referred to animal-unit caps or offsite groundwater monitoring. (*See* R. 34:725–41.)

The individuals who previously petitioned for the contested case hearing, along with Clean Wisconsin, Inc., sought judicial review of this new decision. (*See generally* R. 1.) The two primary issues in the case were whether the Department used proper procedures in issuing its new “final” decision, and whether the new decision was based on an erroneous interpretation of Act 21. (*See* R. 1.)

On July 14, 2016, the Dane County Circuit Court reversed the Department’s decision. The court concluded that the Department adopted the ALJ’s decision by (1) denying Kinnard’s petition for Secretary review under Wis. Admin. Code § NR 2.20 review; and (2) declining to file its own petition for review from the ALJ’s decision. (*See* R. 42:9.) The court further ruled that the Wis. Admin. Code § NR 2.20 denial could not be “reconsidered” ten months later, especially in the absence of any intervening change in the law, explicit error, or reasonable explanation. (*See* R. 42:12–17.) Finally, after a thorough discussion of the statutes and regulations governing WPDES permitting, the court held that the Department has explicit authority to impose permit conditions necessary to “assure compliance” with various WPDES requirements. (*See* R. 42:17–25.)

The Department appealed, as did Kinnard Farms, which had participated in the judicial-review proceeding as an intervenor. (*See generally* Case No. 2016AP1688.)

Following the circuit court's entry of judgment on the merits, Petitioners sought and obtained a judgment for fees and costs under the Wisconsin Equal Access to Justice Act, Wis. Stat. § 814.245. The Department separately appealed this judgment. (*See generally* Case No. 2016AP2502.)

Following briefing in the Wisconsin Court of Appeals, District II, that court certified to this Court the two appeals at issue here, along with the appeal in Case No. 2018AP0059.⁷ On April 9, 2019, this Court accepted certification and ordered briefing on its typical 30/20/10 schedule. (*See* Order, Apr. 9, 2019 (Wis. Sup. Ct.)) On April 25, 2019, the Wisconsin Legislature's Joint Committee on Legislative Organization moved to intervene.

⁷ During the pendency of the appeals, Kinnard Farms' 2012 WPDES permit expired. (*See* R. 34:3790.) Kinnard applied for and received a new WPDES permit, effective February 1, 2018. (*See* WPDES Permit No. WI-0059536-04-0, January 29, 2018, available at <https://perma.cc/S8SL-P9GC>; <https://perma.cc/QJR7-WGRF>.) The new permit (like the old permit) does not contain off-site groundwater monitoring requirements or an animal-unit limit. A group of citizens has petitioned for a contested case hearing on the new permit, arguing that DNR must follow the circuit court's decision on the 2012 permit and implement the additional requirements. (*See* Verified Petition for Contested Case Hearing, *In re Kinnard Farms Permit No. WI-0059536-04-0 to Discharge Under the Wisconsin Pollutant Discharge Elimination System* ("WPDES"), available at <https://perma.cc/S8SL-P9GC>.) The contested case hearing is currently scheduled for July 2019.

DISCUSSION

I. Voluntary dismissal of Case No. 2016AP2502.

The Department hereby provides notice of voluntary dismissal of its appeal in Case No. 2016AP2502, as authorized under Wis. Stat. § (Rule) 809.18(1) and this Court's Internal Operating Procedures II.L.4.

The Department has now settled its appeal in Case No. 2016AP2502 with the only other parties to that appeal—Lynda Cochart, Amy Cochart, Roger DeJardin, Sandra Winnemueller, Chad Cochart, and Clean Wisconsin, Inc.⁸ Pursuant to that settlement, the parties have resolved the fee issue presented in the judgment below in a mutually agreeable fashion.⁹ Both sides agree that further judicial action on that judgment is unnecessary.

⁸ Whereas Kinnard Farms filed its own notice of appeal in Case No. 2016AP1688 (*see* R. 53), Kinnard did not appeal the separate judgment on fees that is at issue in Case No. 2016AP2502. (*See* R. 69 (sole notice of appeal regarding circuit court's order on fees and costs, filed by the Department).)

Likewise, the Wisconsin Legislature's intervention motion asserts no basis to participate in the fee appeal, Case No. 2016AP2502. Rather, the Legislature's motion refers exclusively to its interest in the construction of Act 21, without addressing the issue of fees or the underlying procedural question regarding the Department's reconsideration decision under Wis. Admin. Code § NR 2.20.

Therefore, the only parties to Case No. 2016AP2502 have resolved the case and agree that dismissal is proper.

⁹ As noted herein, settlement on the issue of fees was particularly appropriate in light of the Department's recognition of its procedural error on reconsideration under Wis. Admin. Code § NR 2.20.

To dismiss an appeal, an appellant need only file a notice of dismissal in the court in which the appeal is pending. Wis. Stat. § (Rule) 809.18(1) (“An appellant may dismiss a filed appeal by filing a notice of dismissal in the court”). This Court has recognized that the plain language of Wis. Stat. § 809.18(1) dictates that no court action is required to effectuate the dismissal. *State v. Lee*, 197 Wis. 2d 959, 964–66, 542 N.W.2d 143 (1996) (noting that “an appellant may dismiss an appeal ‘*without approval of the court or the respondent*’”) (quoting Wis. Stat. § (Rule) 809.18 Jud. Council Comm. Note, 1978). By statute, this procedure applies in both this Court and the Wisconsin Court of Appeals. *See id.*; *see also* Wis. Stat. § (Rule) 809.01(4) (for purposes of Wisconsin’s Rules of Appellate Procedure, “‘Court’ means the court of appeals or, if the appeal or other proceeding is in the supreme court, the supreme court.”).

In *Lee*, this Court discussed the application of Wis. Stat. § (Rule) 809.18(1) to a notice of voluntary dismissal filed in the Wisconsin Court of Appeals. *See Lee*, 197 Wis. 2d at 962–64. The Court’s interpretation of Wis. Stat. § (Rule) 809.18(1) was clear and straightforward: the statute “places the decision of voluntary dismissal with the appellant,” without any reference to a court’s ability to reject or deny a notice of voluntary dismissal. *Id.* at 964.

Although the court in *Lee* noted the possibility that Wis. Stat. § (Rule) 809.18(1) might apply differently to notices of dismissal filed in this Court, the court declined to depart from the statute’s plain language in that case. *See Lee*, 197 Wis. 2d at 969–70, 972. Instead, the court held that under that plain language, the court of appeals “*must* dismiss an appeal when an appellant files a notice of voluntary dismissal” before the court issues a decision on the appeal. *Id.* at 972 (emphasis added). And while this Court

has rejected voluntary dismissals in limited circumstances, those dismissals arose after briefs were filed in this Court, after argument, and, in at least two instances, after the opinion had been assigned to a justice for writing. See *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 440a–40b, 480 N.W.2d 444 (1992) (rejecting parties’ stipulated dismissal which was filed after briefing, argument, and assignment of opinion for writing); accord *Prince Corp. v. Vandenberg*, 2016 WI 49, n.l, 369 Wis. 2d 387, 882 N.W.2d 371 (same, citing *Faust*).¹⁰ No published decision suggests that this Court would apply Wis. Stat. § (Rule) 809.18(1) differently where those factors are not present.

As this Court noted in *Faust*, the Court promulgated Internal Operating Procedure II.L.4. to codify its procedure for processing notices of voluntary dismissal under Wis. Stat. § (Rule) 809.18(1). See *Foust*, 165 Wis. 2d at 440a–40b. This procedure distinguishes between notices of dismissal filed before briefing is completed and those filed after the briefs have been filed. See Wis. Sup. Ct. IOP II.L.4. Whereas the entire court must review a notice of dismissal

¹⁰ In addition to the factors noted above, at least one member of this Court has also expressed concern about granting parties’ joint, stipulated dismissals, based on the concern that the nature of the stipulated dismissal was such that it would disturb or overturn portions of a previous judgment or appellate decision. See, e.g., *State v. Tjepelman*, 2006 WI 66, ¶ 55, 291 Wis. 2d 179, 717 N.W.2d 1 (Roggensack, J., dissenting) (expressing concern with Court’s decision granting parties’ stipulated dismissal, as the dismissal would “overturn the decisions of two constitutionally established courts,” including overturning a criminal sentence). No such concern is present here, where the Department simply accepts the judgment below and independently seeks to dismiss its appeal.

filed *after* briefing is completed, the chief justice may summarily accept a notice of dismissal filed *before* all the briefs are filed. *Id.* This line of demarcation strikes an apparent balance between, on the one hand, giving effect to the plain language of Wis. Stat. § (Rule) 809.18(1), and, on the other hand, preserving this Court's core function of resolving squarely presented disputes of statewide importance. *See Lee*, 197 Wis. 2d at 970–72; *Prince Corp.*, 369 Wis. 2d at 392 n.1. Moreover, this published procedure also provides guidance and transparency to litigants and the public about how this Court will process notices of voluntary dismissal. *See Wis. Sup. Ct. IOP Intro.*

In the current matter, no briefs have been filed in this Court, no argument or decision conference has been held, nor has any opinion been assigned. And while the Department's dismissal here is pursuant to a settlement agreement with Petitioners-Respondents, that settlement does not seek to disturb the judgment below, and instead effectuates a mutually agreeable satisfaction of that judgment.

Further, the Department's voluntary dismissal of its appeal in Case No. 2016AP2502 has no bearing on the resolution of Case No. 2016AP1688. That appeal presents the merits issues raised in the underlying petition for judicial review, namely, (1) whether the Department has authority to impose certain conditions in a WPDES permit; and (2) whether the Department committed procedural error when it reconsidered its previous decision to adopt the ALJ's final decision as that of the agency. The appeal addressing those issues is unaffected by the Department's notice of voluntary dismissal in Case No. 2016AP2502, and the Department intends to brief those merits issues in accordance with the Department's view of controlling law.

Because this case does not present any of the considerations that have supported denying voluntary dismissal, *see Lee*, 197 Wis. 2d at 970–72; Wis. Sup. Ct. IOP II.L.4., the appeal in Case No. 2016AP2502 should be deemed dismissed with prejudice and without costs to either party.

II. Request to modify briefing schedule.

As noted above, the Department has determined that certain positions asserted in its merits briefing to the lower courts were not consistent with controlling law, including the validity of the Department's reconsideration decision, as well as the effect of Act 21 on the Department's authority to impose requirements in WPDES permits. Based on its determination on these points, the Department's briefing in this Court will support the judgment below in most meaningful respects.

Accordingly, the Department requests an order modifying the briefing schedule to reflect the Department filing its opening brief on the Respondents' schedule. The Department would have no objection to granting additional time for the filing of any brief challenging the judgment below.

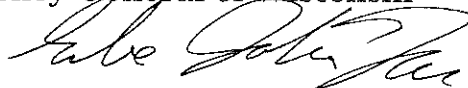
CONCLUSION

For the reasons discussed, the Department voluntarily dismisses its appeal in Case No. 2016AP2502. The Department also requests an order modifying the briefing schedule, as discussed herein.

Dated this 2nd day of May, 2019.

Respectfully submitted,

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