

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE 30<sup>th</sup> JUDICIAL CIRCUIT  
INGHAM COUNTY

NATIONAL WILDLIFE FEDERATION, and LONE  
TREE COUNCIL, et al,

Petitioners/Appellants,

File No. 07-192-AA

Hon. Joyce Draganchuk

v

MICHIGAN DEPARTMENT OF  
ENVIRONMENTAL QUALITY, and STEVEN E.  
CHESTER,

Respondents/Appellees,

and

SAGINAW COUNTY DEPARTMENT OF PUBLIC  
WORKS,

Intervenor-Respondent/Appellee.

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**ORAL ARGUMENT REQUESTED**

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**APPELLEE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY AND STEVEN E.  
CHESTER'S BRIEF ON APPEAL**

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Dated: June 14, 2007  
lf natl wildlife/ingham/brief on appeal

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### **Statement of Basis of Jurisdiction**

The Appellees Michigan Department of Environmental Quality and Steven E. Chester, Director, (collectively, DEQ) do not contest Appellants' (collectively, NWF) Statement of Basis for Jurisdiction other than to note that the Office of Administrative Hearings (OAH) is without jurisdiction to either modify a 401 Certification under the federal Clean Water Act or convert it to a state NPDES permit.<sup>1</sup>

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<sup>1</sup> NPDES permits (National Pollutant Discharge Elimination System) are issued either by the Environmental Protection Agency, itself, or by the states in a federally approved permitting system. See 33 USC § 1342. Michigan has a federally approved permitting system, and, thus, issues such permits. The NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters. *Waterkeeper Alliance, Inc. v United States EPA*, 399 F 3d 486, 491 (2d Cir 2005).

**Statement of Questions Involved**

- I. Did the Office of Administrative Hearings Proposal for Decision as affirmed and adopted by the DEQ correctly find that it is without jurisdiction to nullify or modify a federal 401 Certification under the Clean Water Act?**

DEQ answers "Yes."

NWF impliedly answers "No" by arguing that the 401 Certification is an illegal permit that requires amending.

- II. Can the 401 Certification be considered a *de facto* state NPDES permit?**

DEQ answers, "No."

NWF answers, "Yes."

- III. Would proclaiming the 401 Certification to be a state permit be availing?**

DEQ answers, "No."

NWF impliedly answers, "Yes."

### Statement of Facts

On March 16, 2005, the Michigan Department of Environmental Quality, Water Bureau (DEQ) issued a "Section 401 Certification" under Section 401 of the Federal Clean Water Act,<sup>2</sup> (401 Certification or Certification) to the Department of the Army, Detroit District Corps of Engineers (ACOE) in response to an April 28, 2004 request from the ACOE. (Appendix A, AR 191.) A 401 Certification is sought by the ACOE whenever an ACOE project will result in the discharge of dredged material, fill material, or return water to waters of the United States or waters of the state within which the project takes place.

Any applicant for a Federal license or permit to conduct any activity . . . which may result in a discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316 and 1317 of this title. 33 USC § 1341.

The planned dredging of the Upper Saginaw River Navigational Channel necessitates the dewatering of a large volume of dredged spoils. The ACOE, in partnership with Saginaw County, has proceeded to plan for the construction of a Dredged Material Disposal Facility (DMDF) to manage dredged spoils and discharge return water to the Saginaw River. The dredging project serves the express purpose of improving navigation in the Upper Saginaw River.

The 401 Certification issued by the DEQ for this navigational dredging project requires that the ACOE sample the return water proposed for discharge and submit sample results to the DEQ for review and approval prior to discharging the return water from the DMDF to the Saginaw River. The DMDF is the only facility of its kind in Michigan that must follow this process prior to discharge due to known contamination within the Upper Saginaw River.

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<sup>2</sup> 33 USC § 1341.

In addition to the stringent discharge sampling requirement, return water from the DMDF may not contain concentrations of dioxin, polychlorinated biphenyls, mercury, or total dissolved solids that exceed background concentrations within the Upper Saginaw River, upstream from the navigational dredging project. Finally, the 401 Certification requires that the ACOE not dispose of any dredged spoils in the DMDF until a Management Plan, drafted by the ACOE in accordance with the terms of the 401 Certification, is approved by the DEQ.

NWF filed a petition for a contested case hearing (CCH) seeking the following relief:

Nullify, invalidate, revoke, or declare "Certification Under Section 401 of the Federal Clean Water Act, Upper Saginaw River Navigational Dredging Project and Associated Dredged Materials Disposal Facility" void or not issued as a final decision.

In its statement of legal issues in the Pre-Hearing Statement, NWF asserted that the Certification was actually an NPDES permit. (AR 209.) Its issuance (as an NPDES permit) was unlawful according to NWF because, as it now claims, it authorized the discharge for a fixed term of more than five years. (NWF brief, p 13.)

### Statement of the Case

In light of the NWF's statement of legal issues, the relief sought is not clear. At one point it requested the Administrative Tribunal to nullify the 401 Certification. (AR 248.) Then, in its Pre-Hearing Statement, it argued that the 401 Certification is an NPDES permit that was unlawfully issued. (AR 209.) Now, it requests on appeal to this Court, "to declare that the DEQ issued a discharge permit, as defined by the CWA or NREPA, or both, when it issued the Certification, and that the Tribunal has jurisdiction to review the discharge permit." (NWF brief, p 17.) In other words, NWF is requesting this Court to convert the 401 Certification to an NPDES permit, thereby giving the Administrative Tribunal jurisdiction. Once that is done and the case is remanded, NWF will be in a position to argue that the relabeled "permit" is unlawful because it does not meet certain permitting criteria.<sup>3</sup>

DEQ contends that the contested-case provisions of the Administrative Procedures Act of 1969,<sup>4</sup> do not apply to the issuance of the 401 Certification to the ACOE, and thus, the Administrative Tribunal is without jurisdiction to even hear NWF's claims pertaining to whether issuance of the 401 Certification should be nullified or modified. Furthermore, an attempt to consider the 401 Certification an NPDES permit would necessarily be unavailing in light of the fact that the ACOE never requested such a permit, the WB did not issue the Certification as a permit, and the Administrative Tribunal is without authority to either compel the ACOE to apply for a permit or accept a 401 Certification revised in accordance with NWF's demands. In addition, the ACOE has demonstrated that it will not undertake the project pursuant to a permit or revised Certification.

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<sup>3</sup> Under such a scenario, DEQ is not sure what would become of the 401 Certification once it is "converted" to a permit as requested by NWF.

<sup>4</sup> MCL 24.201 *et seq.*

## Argument

### **Standard of Appellate Review of a State Administrative Agency's Ruling**

NWF has appealed to this Court the Michigan Department of Environmental Quality's Final Determination and Order dated January 23, 2007. That Order affirmed and adopted an Administrative Hearings Officer's Proposal for Decision holding that a Section 401 Certification does not constitute a *de facto* permit under Michigan law, and further, the Administrative Tribunal lacks jurisdiction under MCL 324.3113(3) to conduct a contested case on a certification required under federal law.

An administrative agency decision is reviewed by an appellate court to determine whether the decision was authorized by law and supported by competent, material, and substantial evidence on the whole record.<sup>5</sup> Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence.<sup>6</sup>

When there is sufficient evidence, a reviewing court may not substitute its discretion for that of the administrative tribunal, even if the court might have reached a different result.<sup>7</sup> It does not matter that the contrary position is supported by more evidence but only whether the position adopted by the agency is supported by evidence from which legitimate and supportable inferences were drawn.<sup>8</sup> On the other hand if there is no dispute as to underlying facts, questions presented on appeal are to be treated as matters of law. The same standard applies to the circuit court's review of administrative decisions as well.<sup>9</sup>

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<sup>5</sup> Const 1963, art 6, § 28; *Ansell v Dep't of Commerce (On Remand)*, 222 Mich App 347, 354; 564 NW2d 519 (1997).

<sup>6</sup> See *Korzowski v Pollack Industries*, 213 Mich App 223, 228; 539 NW2d 741 (1995).

<sup>7</sup> *Black v Dept of Social Services*, 195 Mich App 27, 30 (1992).

<sup>8</sup> *McBride v Pontiac School District*, 218 Mich App 113; 553 NW 646 (1996).

<sup>9</sup> *Dow Chemical Co v Curtis*, 158 Mich App 347; 430 NW2d 645 (1987).

As noted by NWF, judicial review is also governed by Section 106(1) of the Administrative Procedures Act (APA)<sup>10</sup>:

Sec. 106. (1) Except when a state or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order in any of the following:

- (a) In violation of the constitution or a statute.
- (b) In excess of the statutory authority or jurisdiction of the agency.
- (c) Made upon unlawful procedure resulting in material prejudice to a party.
- (d) Not supported by competent, material and substantial evidence on the whole record.
- (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
- (f) Affected by other substantial and material error of law."

See also *Tompkins v Social Services Department*.<sup>11</sup>

In *Kurzyniec v Department of Social Servs (In re Kurzyniec Estate)*,<sup>12</sup> the Court of Appeals also explained precedents to be considered when applying the APA standard of review:

When there is sufficient evidence, a reviewing court may not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992). Great deference should be given to an agency's choice between two reasonable differing views as a reflection of the exercise of administrative expertise. *Traverse Oil Co v Chairman, Natural Resources Comm*, 153 Mich App 679, 691; 396 NW2d 498 (1986). To reverse an administrative agency's decision as an abuse of discretion under MCL 24.306(1)(e); MSA 3.560(206)(1)(e), a court must find a result so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Marrs v Bd of Medicine*, 422 Mich 688, 693-694; 375 NW2d 321 (1985). To be arbitrary is to decide without reference to principles, circumstances, or significance. *Brandon School Dist v Michigan Education Special Services Ass'n*, 191 Mich App 257, 265; 477 NW2d 138 (1991).

<sup>10</sup> MCL 24.306(1).

<sup>11</sup> *Tompkins v Social Services Department*, 97 Mich App 218; 293 NW2d 771 (1980).

<sup>12</sup> *Kurzyniec v Department of Social Servs (In re Kurzyniec Estate)*, 207 Mich App 531, 537; 526 NW2d 191 (1994).

Moreover, in *McBride v Pontiac Sch Dist*,<sup>13</sup> the court specifically clarified application of the primary APA standard of review, at MCL 24.306 (1):

With regard to substantiality, "substantial evidence" is that which a reasonable mind would accept as adequate to support a decision. *Dukesherer Farms, Inc v Director of the Dep't of Agriculture*, 172 Mich. App. 524, 535; 432 N.W.2d 721 (1988). Substantial evidence is more than a mere scintilla but less than a preponderance of the evidence. *Consumers Power Co v Public Service Comm*, 189 Mich. App. 151, 187; 472 N.W.2d 77 (1991). Under this test, it does not matter that the contrary position is supported by more evidence, that is, which way the evidence preponderates, but only whether the position adopted by the agency is supported by evidence from which legitimate and supportable inferences were drawn. *In re Payne*, 444 Mich. 679, 692; 514 N.W.2d 121 (1994); *Arkansas v Oklahoma*, 503 U.S. 91, 113; 112 S. Ct. 1046; 117 L. Ed. 2d 239 (1992). [Emphasis added.]

The permitting statute found under Section 3106 of Part 31 of the Natural Resources and Environmental Protection Act (NREPA),<sup>14</sup> expressly confirms that the DEQ shall administer the statute. As the Michigan Supreme Court explained in *In re D'Amico Estate*<sup>15</sup>:

This Court has held that "the construction placed upon a statute by the agency legislatively chosen to administer it is entitled to great weight." *Davis v River Rouge Bd of Ed*, 406 Mich 486, 490; 280 NW2d 453 (1979).

A leading treatise on statutory construction states:

Interpretations and application of regulations by officers, administrative agencies, departmental heads and others officially charged with the duty of administering and enforcing a statute have great weight in determining the operation of a statute. The greatest weight attaches to an administrative interpretation in favor of parties who have reasonably relied upon it.

One of the soundest reasons sustaining contemporaneous interpretations of long standing is the fact that the public has relied on the interpretation . . . . While the principle here is not strictly that of estoppel running against the government there is some analogy to that principle when the interpretation has been made by a government agency or officer. [*Id.*, § 49.07, p 394; Emphasis added.]

<sup>13</sup> *McBride v Pontiac Sch Dist*, 218 Mich App 113, 122-123; 553 NW2d 646 (1996).

<sup>14</sup> MCL 324.3106.

<sup>15</sup> *In re D'Amico Estate*, 435 Mich 551, 559-560; 460 NW2d 198 (1990).

As this Court recently noted in *Danse Corp v City Of Madison Hts* (Exhibit O):

Great weight is given to an agency's construction of a statute that the agency is required to enforce. *In re D'Amico Estate*, 435 Mich. 551, 559; 460 NW2d 198 (1990). Therefore, the tribunal's interpretation is generally given deference. However, this Court will not give a "strained construction that is adverse to legislative intent." *Milk Producers v Dep't of Treasury*, 242 Mich App 486, 493; 618 NW2d 917 (2000), citing *Canterbury Health Care, Inc v Dep't of Treasury*, 220 Mich App 23, 31; 558 NW2d 444 (1996).

**A. The Office of Administrative Hearings is without jurisdiction to nullify or modify a 401 Certification.**

NWF requested a contested case hearing in this matter before the Administrative Tribunal. Again, it requested that the Tribunal "[N]ullify, invalidate, revoke, or declare [the 401 Certification] . . . void or not issued as a final decision." (AR 248.) Now, it is asking this Court in this appeal to declare the 401 Certification to be something it is not--a state issued NPDES permit. As noted, the 401 Certification is a product of federal law. As noted by the Administrative Law Judge:

In sum, the certification issued by the WB [DEQ Water Bureau] is a requirement for the issuance of a federal license or permit and the application review process and issuance of requested license or permit are vested in federal agencies.  
[AR 64.]

One cannot help but question under what authority NWF relies to demonstrate a state administrative tribunal's jurisdiction to take the requested action, much less entertain a contested case hearing on the matter. The Administrative Tribunal, as part of an administrative agency, has no common-law powers. Rather, its powers are conferred expressly or by necessary or fair implication.<sup>16</sup> Certainly, it cannot exceed the power given it by statute, and in fact those powers

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<sup>16</sup> *Soap & Detergent Ass'n v Natural Resources Com*, 415 Mich 728, 736 (1982).

granted must be strictly construed.<sup>17</sup> NWF is hard pressed to find any state authority to support its apparent contention that the Administrative Tribunal can nullify, modify or convert a 401 Certification issued pursuant to the Federal Clean Water Act.

Furthermore, there is nothing in the language of Part 31 or all of NREPA<sup>18</sup> for that matter that provides an opportunity for a hearing with respect to a 401 Certification. There must be a statutory entitlement to an evidentiary hearing before one can receive a contested case hearing. MCL 24.203(3) defines a contested case as "... a proceeding ... in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing."<sup>19</sup> The Michigan Court of Appeals has previously held that the provisions of the Administrative Procedures Act (APA) governing contested cases apply in licensing situations only when the licensing is *required* to be preceded by notice and an opportunity for hearing.<sup>20</sup> Contested case hearings are afforded under Part 31 relative to existing permits or the issuance of initial permits:

A person who is aggrieved by an order of abatement of the department or by the reissuance, modification, suspension, or revocation of an existing permit of the department executed pursuant to this section may file a sworn petition . . . setting forth the grounds and reasons for the complaint and asking for a contested case hearing on the matter pursuant to the administrative procedures act of 1969 . . . . MCL 324.3112(3).

If the permit or denial of a new or increased use is not acceptable to the permittee, the applicant, or any other person, the permittee, the applicant, or any other person may file a sworn petition with the department setting forth the grounds and reasons for the complaint and asking for a contested case hearing on the matter pursuant to the administrative procedures act of 1969 . . . . MCL 324.3113(3).

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<sup>17</sup> *Michigan Dep't of Civil Rights ex rel Parks v General Motors Corp, Fisher Body Div*, 412 Mich 610, 633 (1982); *Lake Isabella Dev, Inc v Vill of Lake Isabella*, 259 Mich App 393, 401 (2003).

<sup>18</sup> MCL 324.101 *et seq.*

<sup>19</sup> MCL 24.203(3).

<sup>20</sup> *Kelly Downs, Inc v Racing Comm*, 60 Mich App 539, 547; 231 NW2d 443 (1975). See also *TDN Enterprises, Inc v Liquor Control Comm*, 90 Mich App 437, 439; 280 NW2d 622 (1979).

The federal statute pertaining to the 401 Certification certainly has not, nor could it, expand the powers of a state administrative tribunal by authorizing that it provide a contested case hearing under the provisions of the APA.

In short, the relief requested by NWF—nullify, modify, or now convert to a state permit the 401 Certification through a contested case hearing—cannot be granted by the Administrative Tribunal. Thus, this Court should affirm the DEQ's Final Determination and Order that the Administrative Tribunal lacks jurisdiction to conduct a contested case hearing on a certification required under 33 USC § 1341.

**B. The 401 Certification cannot be considered a *de facto* NPDES Permit.**

NWF argues that the 401 Certification is in actuality an NPDES Permit because it contains "the defining characteristic of a discharge permit: an authorization to discharge pollutants" and thus should meet all the permitting requirements under state law. (NWF brief, p 13.) Accordingly, the 401 Certification is subject to review by the Administrative Tribunal and subject to modification to comport with what NWF believes to be necessary terms and conditions in a Permit. The only substantive objection to the Certification noted by NWF in its brief is the provision authorizing a discharge for a period longer than five years. (NWF brief, p 13.) Pursuant to 2003 AACS, R 323.2150, an NPDES permit is to have a fixed term which shall not be more than five years. The 401 Certification has a term of 20 years, thus, if it were an NPDES Permit, it would exceed the time limitation and be in violation of state rule.

A close examination of the 401 Certification reveals that it is not and never was intended to be a permit. As noted, the 20-year life provision of the 401 Certification sets it apart from a permit. Further, NWF must acknowledge that there are a number of provisions in the 401 Certification that would not be included in a NPDES permit. In the issued 401 Certification

(Appendix A, AR 191), the ACOE accepted conditions placed upon the actual dredging of the River. Operational requirements for dredging are not required in an NPDES permit. In addition, the ACOE was required to comply with a management plan not found in permits to discharge into navigable water: (1) to preserve long-term integrity of the DMDF facility, (2) to provide closure requirements to meet solid waste regulations, (3) to prevent waterfowl botulism, (4) to preserve bald eagle nesting sites, (5) to minimize wildlife exposure to contaminants, and (6) to otherwise complement the adjacent wetland mitigation area and state game area. Finally, the 401 Certification requires that there be a corrective action plan should return water not meet the discharge requirements of the 401 Certification. Regardless, NWF can point to no authority for the Administrative Tribunal to modify a 401 Certification in order to fabricate a permit, a result never intended by DEQ or the ACOE.

In fact, the ACOE never requested or applied for a state permit. NWF apparently takes the position that it is incumbent upon the DEQ to foist a permit on anyone who may require one, regardless of whether a complete application has been submitted pursuant to MCL 324.3113(1). It is the practice of the DEQ, however, to follow the law and not issue a permit until a complete application has been received, and then only if it is otherwise appropriate. As the DEQ has repeatedly emphasized, the ACOE requested a 401 Certification, which was issued. The Certification is not and never was intended to be a permit. Furthermore, the ACOE never applied for a permit, and none was issued.

Merely because the 401 Certification contains "authorization to discharge" language, that does not somehow transform the document into a permit and thereby circumvent certain terms and conditions that are incumbent in the permitting process. Furthermore, NWF fails to recognize that Section 401's use of the term "any discharge" may be different and in fact broader

than "discharge of any pollutant" as used in Section 402 (NPDES provision) of the Federal Clean Water Act.<sup>21</sup> The point is that terminology used in the 401 Certification should not be considered interchangeable in an effort to call it something that it is not. Here, DEQ's mere use of the term "authorized to discharge" does not and cannot mean that the Corps has been given an NPDES permit.

**C. Proclaiming the 401 Certification to be a permit would be unavailing.**

The fact that the ACOE has not given its approval for modification to include the provisions requested by NWF, and has given every indication that it opposes the requested modifications, appears to be of no concern to NWF. This is perplexing since the ACOE has only affirmatively agreed to comply with the 401 Certification terms and conditions, not a permit it never requested.

Assuming the Administrative Tribunal proceeded with a CCH and modified the 401 Certification as requested by NWF, it is difficult to imagine the legal force the "permit" would carry. The ACOE could reject the proffered permit, and NWF is unable to point to any authority for the Administrative Tribunal to compel an entity to apply for, accept or otherwise comply with a permit. Certainly, this Court with its equitable powers could compel compliance with a permit, but this matter is on appeal of an administrative action concerning the jurisdiction of the Administrative Tribunal.

There is yet another reason an attempt to impose a Permit upon the ACOE would be of little value. Unless Congress has unequivocally waived the federal government's sovereign immunity from suit, a local governmental unit cannot enforce its local law against the ACOE, a federal agency.<sup>22</sup> Section 1323(a) of the Clean Water Act,<sup>23</sup> which contains a limited waiver of

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<sup>21</sup> See *Oregon Natural Desert Ass'n v Dombeck*, 172 F 3d 1092, 1098 (9<sup>th</sup> Cir 1998).

<sup>22</sup> *US Dept of Energy v Ohio*, 503 US 607 (1992).

sovereign immunity, generally allows a state to compel the ACOE's compliance with a state's pollution abatement requirements. In a Ninth Circuit opinion decided August 16, 2005 however,<sup>24</sup> the court held that the waiver of 33 USC § 1323(a) was limited by § 1371(a). That section states: "[The CWA] shall not be construed as . . . affecting or impairing the authority of the Secretary of the Army . . . to maintain navigation." The court held that because the Corps was involved in maintaining navigation, sovereign immunity was preserved by Section 1371(a). The case provides a good discussion regarding the federal government's (ACOE) immunity and accompanying principles of preemption. [Any state-local law is pre-empted where it conflicts with or frustrates federal law.<sup>25</sup> Because the 401 Certification is expressly issued to cover navigational dredging operations, the ACOE's immunity appears to be preserved. This theory of immunity, however, is better left to the ACOE to address in the event it is challenged in another forum for its dredging operations.

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<sup>23</sup> 33 USC § 1323(a).

<sup>24</sup> *North Dakota v US Army Corps of Eng'rs*, 418 F3d 915 (8<sup>th</sup> Cir 2005).

<sup>25</sup> *CSX Transp., Inc, v Easterwood*, 507 US 658, 663 (1993).

**Relief Requested**

DEQ requests that the Director's Order be affirmed because the Administrative Tribunal is without jurisdiction to nullify or modify a 401 Certification Order or convert it into an NPDES permit.

Respectfully submitted,

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