

**STATE OF MICHIGAN  
THIRTIETH JUDICIAL CIRCUIT COURT**

NATIONAL WILDLIFE FEDERATION and  
LONE TREE COUNCIL,

Petitioners / Appellants,

Case No. 07-192-AA

vs.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL  
QUALITY and STEVEN E. CHESTER,

Hon. Joyce Draganchuk

Respondents / Appellees,

and

SAGINAW COUNTY DEPARTMENT OF PUBLIC  
WORKS,

Intervenor-Respondent / Appellee.

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**REPLY OF APPELLANTS  
NATIONAL WILDLIFE FEDERATION AND LONE TREE COUNCIL**

**ORAL ARGUMENT REQUESTED**

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## INTRODUCTION

On March 16, 2005, the Michigan Department of Environmental Quality (“DEQ”) issued a decision with the title “Certification Under Section 401 of the Federal Clean Water Act.” The question presented in this case is whether the substance of that decision makes it a discharge permit, at least in part, its title notwithstanding. The question is not whether a § 401 certification may be modified or converted into a discharge permit, as the DEQ would have the Court believe. In propounding that question, the DEQ has set up a straw man—a weak position never put forward by Petitioners / Appellants (“NWF”)—and refuted that position instead of the one NWF has really taken.

The essence of the DEQ’s primary position is that it may issue a discharge permit, call it a § 401 certification, and so evade review of the permit decision in a contested case proceeding. As Juliet asked Romeo, “What’s in a name?” William Shakespeare, *Romeo and Juliet*, act 2, sc. 1. To paraphrase the response she gave in answer to her own question, less poetically perhaps, a discharge permit by any other word still authorizes a discharge of pollutants from a point source to state surface waters. That is precisely what the DEQ’s “Certification Under Section 401 of the Federal Clean Water Act” does.

Consequently, NWF has a statutory right to a review of the DEQ’s discharge permit in a contested case proceeding. MCL 324.3113(3). NWF therefore seeks a declaration to that effect, and an order reversing the Director of the DEQ, who dismissed NWF’s petition for a contested case proceeding for lack of jurisdiction. NWF also seeks a remand to the Director of the DEQ to address the merits of the discharge permit, which has two deficiencies NWF has identified and sought to correct from the outset of these proceedings. *Petition for Review*, Administrative Record (“AR”) 256 (seeking nullification, invalidation, or revocation of the

discharge permit because (1) the DEQ established “no net addition limitations” for dioxins/furans, mercury, and PCBs, instead of more stringent water quality-based effluent limitations, contrary to 40 CFR 132, Appendix F, Implementation Procedure 5.E.3.a., and (2) the DEQ authorized the discharge for a fixed term of more than five years, contrary to 2003 AC, R 323.2150).

## **ARGUMENT**

### **I. Standard Of Review.**

NWF agrees with the DEQ that questions presented on appeal must be treated as matters of law where the underlying facts are not in dispute. See Appellee Michigan Department of Environmental Quality and Steven E. Chester’s Brief on Appeal (“DEQ’s Br.”) at 4.

In this case, the material facts are not in dispute. Namely, the U.S. Army Corps of Engineers (“the Corps”) plans to discharge toxic chemicals from the Upper Saginaw Dredged Material Disposal Facility (“DMDF”) through an effluent discharge line to the Saginaw River. Michigan Department of Environmental Quality, *Certification Under Section 401 of the Federal Clean Water Act, Appendix A*, AR 191-92. In response to the Corps’ request for a certification that the discharge would comply with water quality standards, the DEQ issued the decision titled “Certification Under Section 401 of the Federal Clean Water Act.” AR 144, 145, 147, 163, 178-92.

The question on appeal concerns the nature of the DEQ’s decision, which bears on whether the Director violated MCL 324.3113(3), exceeded the DEQ’s statutory authority, or committed a substantial and material error of law in dismissing NWF’s petition for a contested case proceeding.

Resolving this question requires the Court to apply statutes and rules to the undisputed facts. Case law establishes that the Court conducts this application *de novo*. *City of Romulus v. Michigan Dep't of Env'tl. Quality*, 260 Mich App 54, 64, 678 NW2d 444 (2003).

This is where NWF parts company with the DEQ. The DEQ first launches into an extended discussion of the standards of review in cases challenging an administrative decision as unsupported by substantial evidence or as arbitrary and capricious. DEQ's Br. at 4-6. Neither standard of review is implicated in this case because NWF has not challenged the Director's decision on either ground.

Then, the DEQ claims that the Court owes great deference to the agency's construction of a statute it is authorized to administer. DEQ's Br. at 6-7. The DEQ never makes clear, however, which statute it means or which construction the Court should give deference to. The only statute DEQ cites is MCL 324.3106, which directs the agency to issue discharge permits, but the construction of that statute is not at issue in this case.

At issue are MCL 324.3113(3), which grants any person a right to a contested case hearing on a discharge permit; 2003 AC, R 323.2133(2), which reiterates that a discharge permit must be appealed pursuant to MCL 324.3113(3); and 33 USC 1311(a) and 1342, as well as MCL 324.3113(1) and 2003 AC, R 323.2106, which together prohibit a person from discharging any pollutant to a state surface water from a point source without a discharge permit. The DEQ has not offered its own construction of these provisions. Even if it had, the Court would not have owed such constructions any deference because the meaning of these provisions is plain on their face. *See Koontz v. Ameritech Services, Inc.*, 466 Mich 304, 324, 645 NW2d 34 (2002).

## **II. The Michigan Department of Environmental Quality's "Certification" Of The Upper Saginaw Dredged Material Disposal Facility Included A Discharge Permit.**

The DEQ makes no effort to rebut explanations NWF gave in its opening brief showing that the so-called "Certification" includes a discharge permit. Like the Director, it relies on the 20-year term of the "Certification" as proof that it cannot be a discharge permit because a discharge permit may only be issued for a 5-year term. DEQ's Br. at 9. Essentially, this is an assertion that the DEQ can do no wrong, which is ridiculous. See the Brief of Appellants National Wildlife Federation and Lone Tree Council ("NWF's Br.") at 13-14. Moreover, were this assertion accepted, the DEQ would have license to avoid the law governing discharge permits merely by granting them with terms longer than five years. See NWF's Br. at 15. The DEQ's failure to answer these points indicates it cannot answer them, and reinforces their validity.

The DEQ also has no answer to NWF's point that no matter how many other terms the "Certification" may have, it includes a discharge permit because it authorizes the discharge of pollutants from a point source to state surface waters. See NWF's Br. at 15-16. The DEQ merely reiterates the Director's faulty reasoning, noting that the "Certification" is not a discharge permit because it contains other provisions that would not be included in a discharge permit. DEQ's Br. at 9. The DEQ can not mask the nature of its action in that way. Were it allowed to, the right to a contested case proceeding guaranteed by MCL 324.3113(3) would be eliminated.

The DEQ argues that the "Certification" merely authorized a "discharge," which on its own cannot mean that the agency issued a discharge permit because the term "discharge" is broader than the term "discharge of a pollutant." Even were the DEQ correct that

“discharge” is broader than “discharge of a pollutant” (it offers no authority for that proposition), the agency misrepresents what the “Certification” authorized.

The “Certification” did not merely authorize a “discharge,” but a “discharge . . . of sediment dewatering water.” AR 179 (Condition 2.3). There is no dispute that the sediment dewatering water will contain toxic pollutants: dioxins, mercury, and polychlorinated biphenyls (“PCBs”). The “Certification’s” only restriction on the discharge of these pollutants from the DMDF to the Saginaw River is that they not be discharged “at concentrations above their respective background Saginaw River concentration.” AR 183-84 (Conditions 3.11.1, 3.11.2). (Allowing such “no net increase” limitations after March 23, 2007, instead of requiring more stringent water quality-based effluent limitations, is one of the flaws in the discharge permit that prompted NWF to petition for a contested case hearing.) The concentration of these pollutants in the Saginaw River exceeds Michigan’s water quality standards. Michigan Department of Environmental Quality, *Responsiveness Summary, Comments Received On The Upper Saginaw River Navigational Dredging Project And Associated Dredged Materials Disposal Facility Draft Section 401 Water Quality Certification*, at 6, available at <http://www.deq.state.mi.us/documents/deq-wb-swas-dmdf-commresponsesummary.pdf> (last visited June 27, 2007). Thus, the “Certification” authorizes the discharge of pollutants, which is the hallmark of a discharge permit.

The DEQ states that it may not “foist a permit on anyone who may require one,” whether or not the agency has received an application for a discharge permit. DEQ’s Br. at 10. This is another straw man. NWF has not argued that the DEQ has to require anyone to apply for a permit—although the DEQ could (and should) sue a person who discharges a pollutant without a discharge permit. *See* MCL 324.3115(1). Nor has NWF argued that the

State Office of Administrative Hearings and Rules has the authority to compel the Corps to apply for, accept, or comply with a discharge permit. Rather, NWF has argued that the DEQ issued a discharge permit, and a flawed one at that. The Corps' failure even to apply for a discharge permit makes the DEQ's decision to issue one all the more objectionable.

**III. The Michigan Department Of Environmental Quality Must Comply With The Federal Clean Water Act, The Michigan Natural Resources And Environmental Protection Act, And The Regulations Implementing Those Laws.**

Congress enacted the Clean Water Act ("CWA") to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 USC 1251(a). To achieve the goal of eliminating the discharge of pollutants into navigable waters, Congress created the National Pollutant Discharge Elimination System ("NPDES"). Section 301, 33 USC 1311(a), prohibits the discharge of any pollutant from a point source into waters of the United States unless that point source receives an NPDES discharge permit from the U.S. Environmental Protection Agency ("EPA"), or from a state agency authorized to issue discharge permits. *See* 33 USC 1342.

The CWA authorized EPA to delegate to the states the authority to administer the NPDES program for discharges into navigable waters within their jurisdiction. 33 USC 1342. To be eligible for delegation, a state NPDES program (1) must have adequate authority to implement, and (2) must be administered in conformance with, the CWA and its implementing regulations. *Id.*; 40 CFR 123.25(a).

Following the enactment of the CWA, Michigan adopted amendments to Part 31 of the Natural Resources and Environmental Protection Act ("NREPA"), including MCL 324.3103, 324.3106, and 324.3112, which authorized the DEQ to promulgate rules and take other actions necessary to comply with the NPDES. In particular, MCL 324.3106 authorizes the DEQ to set permit restrictions that will assure compliance with applicable federal law and

regulations. As a result of these changes, EPA delegated to the State of Michigan the authority to administer the NPDES for discharges into navigable waters within in its jurisdiction.

The DEQ therefore has a responsibility to issue discharge permits in conformance with the NPDES, regardless of any objections that might be raised to the conditions or limitations required by the NPDES. Thus, the DEQ should not have handed the Corps a defective discharge permit if, indeed, the Corps represented that it would not undertake the Upper Saginaw River Navigational Dredging Project if subject to a discharge permit, or the Corps objected to water quality-based effluent limitations or a 5-year permit term. See DEQ's Br. at 3, 11. (The DEQ cites nothing in the record, by the way, to substantiate its bald assertions that the Corps was opposed or opposes to being subject to a discharge permit, or that the Corps objected or objects to water quality-based effluent limitations and a 5-year permit term.)

The DEQ has it backwards. Persons planning to discharge pollutants do not dictate the terms they will accept. Rather, when issuing discharge permits such as the one issued in this case, the DEQ must impose the conditions and limitations the law requires.

The DEQ's final argument is that the Corps has sovereign immunity from regulation by a discharge permit. Whether the Corps has sovereign immunity is irrelevant to the DEQ's responsibility to include applicable effluent limitations in a discharge permit when it actually issues one, or to limit the permit's term to five years.

Furthermore, as the DEQ correctly acknowledges, the sovereign immunity defense is the Corps' to raise, not the DEQ's. Not only has the Corps failed to assert sovereign immunity, it has failed even to intervene in this proceeding.

More importantly, the Corps does not have sovereign immunity. The Corps only has sovereign immunity to the extent compliance with the CWA affects or impairs the Corps' authority to maintain navigation. *North Dakota v. U.S. Army Corps of Engineers*, 418 F3d 915, 918 (8th Cir 2005);<sup>1</sup> 33 USC § 1371(a)(2)(A). No one has shown, or even tried to show, that compliance with a 5-year discharge permit containing water quality-based effluent limitations would in any way affect or impair the Corps' authority to maintain navigation.

Such a discharge permit, like any other, could be re-issued after the initial 5-year term for subsequent 5-year terms, up to the twenty years granted in the "Certification," and beyond. 2003 AC, R 323.2151. Moreover, the Corps' application for a certification pursuant to § 401 of the CWA shows that the Corps had no concern that compliance with applicable effluent limitations would affect or impair its authority to maintain navigation. *See* AR 144 (Paragraph 6.9) (stating that the Corps was seeking a § 401 certification "to ensure the proposed [DMDF] and discharge from the facility weir will comply with the state of Michigan water quality standards"). Meeting effluent limitations included in a discharge permit would affect the Corps' authority to maintain navigation no more than meeting them to obtain a § 401 certification.

### **RELIEF REQUESTED**

For the foregoing reasons, and the reasons given in NWF's opening brief, NWF respectfully requests the Court to declare that the DEQ issued a discharge permit when it issued the "Certification," and that the State Office of Administrative Hearings and Rules has jurisdiction to review the discharge permit.

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<sup>1</sup> In *North Dakota v. U.S. Army Corps of Engineers*, the Eighth Circuit held that the Corps was immunized from compliance with state water quality standards because such compliance would be directly contrary to the imperative of the Flood Control Act of 1944: to maintain navigation in the Missouri River. No conflict exists here between a statutory directive to maintain navigation and state water quality standards.

NWF also respectfully requests the Court to reverse the Director's Final Determination and Order of January 23, 2007, as unlawful because it is in violation of a statute, in excess of statutory authority, or the result of a substantial and material error of law. In addition, NWF respectfully requests the Court to remand this matter to the Director with instructions to enter a final decision on Petitioners' Motion for Summary Disposition, either immediately or following the Tribunal's issuance of a Proposal for Decision, after the parties have had a reasonable opportunity to file and serve exceptions, pursuant to 2006 AC, R 324.72.

Finally, NWF respectfully requests the Court to grant NWF such other relief as may be required under the circumstances, including all other relief that is reasonable, equitable and just.

Respectfully submitted,

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*This brief was prepared with the assistance of Betsy Bridge, University of Oregon Law School (J.D. expected May 2008), and Anthony Smykla, Ave Maria Law School (J.D. expected May 2008).*