COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 25, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3162

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

WAUGAMIE FARMCO COOPERATIVE, D/B/A WAUGAMIE FS COOPERATIVE,

Petitioner-Appellant,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent.

APPEAL from a judgment of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Waugamie Farmco Cooperative appeals a judgment affirming the decision of an administrative law judge in a contested case. The ALJ ruled in favor of the Department of Natural Resources and

ordered additional testing of soil and ground water contaminated by pesticides and fertilizer. Waugamie argues that an earlier DNR order was based on an erroneous legal standard, that the ALJ exceeded his authority by modifying the original DNR order, that the ALJ's order subjects Waugamie to arbitrary and limitless requirements without proof of necessity and that Waugamie did not have reasonable notice that the hearing before the ALJ could result in a more burdensome order being issued. We reject these arguments and affirm the judgment.

In 1989, the DNR issued an order requiring testing and remediation of chemical spills attributable to Waugamie. The DNR order required Waugamie to "take the actions necessary to restore the environment to the extent possible ...." Waugamie requested a contested case hearing at which it contended that soil and water samples showed the pollution had been abated. The ALJ modified the initial DNR order to require additional test wells and Waugamie contests the ALJ's order.

Issues relating to the initial DNR order are moot. Waugamie argues that the DNR order is invalid because it required Waugamie to restore the environment to the extent "possible" when § 144.76(3), STATS., only requires restoration to the extent "practicable." This error in the initial DNR order was corrected when the ALJ used the correct standard at the contested case hearing. The original DNR order is no longer in effect and any correction of the errors underlying that order will have no practical effect on this controversy. Therefore, the issue is moot. *See* ***Racine v. J-T Enters.***, 64 Wis.2d 691, 700, 221 N.W.2d 869, 874 (1974).

A contested case "hearing" is not a certiorari-type review of an existing record limited to affirming or remanding the agency's decision.[1] Rather, it is a de novo consideration of the subject matter addressed in the notice. The ALJ is not limited to reviewing the initial DNR order and affirming or reversing it. After a contested case hearing, whether conducted by an ALJ or the secretary of the DNR, the decisionmaker is authorized to enter any order permitted by law. *See* § 227.46(1)(h) and (i), STATS. That is, an ALJ conducting a

[1] The DNR has adopted the ALJ's decision. WIS. ADM. CODE § NR 2.155(1) (1996). It is not clear how a remand to the DNR would benefit Waugamie except by further delay.

contested case for the DNR may enter any order that the DNR is authorized to enter as long as it is supported by substantial and credible evidence and the parties have had notice and an opportunity to be heard. *See* §§ 227.20(6) and 227.44, STATS. The ALJ's decision is consistent with his authority under § 227.46(1)(h) and (i), the DNR's powers under § 144.76(3) and (7)(c), STATS., and the DNR's rules.

The ALJ's decision was not appealed by the DNR and became the decision of the DNR. *See* WIS. ADM. CODE § NR 2.155(1) (1996). This court must give "due weight" to the experience, competence and knowledge of the DNR as the agency with the statutory authority under § 144.76, STATS., to require an owner to restore contaminated property. *See* ***Barnes v. DNR***, 184 Wis.2d 645, 662, 516 N.W.2d 730, 738 (1985). The scope of this court's review for a discretionary DNR decision is limited. We may look no further than to determine whether the decisionmaker examined relevant facts, applied a proper standard of law, and reached a reasoned conclusion. ***Kwaterski v. LIRC***, 158 Wis.2d 112, 120, 462 N.W.2d 534, 537 (Ct. App. 1990).

The ALJ's order is supported by substantial and credible evidence establishing that additional testing is necessary and practicable. Waugamie argues that additional testing serves no purpose except to appease the DNR's curiosity. Waugamie submitted soil samples from only four of thirty-three locations that it had previously agreed to sample and contends that these tests establish that further remediation will not be necessary. The most recent ground water sampling, done in 1991, showed ground water contamination levels that exceed the standards set in WIS. ADM. CODE § NR 140.10. The record does not establish, as Waugamie argues, that natural attenuation will restore the ground water. A DNR water supply specialist testified that it is difficult to determine how ground water flows. He opined that sampling from the original wells plus the addition of some new wells would be necessary to determine the extent, both vertically and horizontally, of the plume and whether any contaminated soil remains on the site. An expert witness testified that chemical breakdown of the compounds involved here occurs very slowly in cool, dark and anaerobic conditions of ground water. He concluded that additional geoprobe samples are needed.

Waugamie's argument that it is subjected to boundless, limitless or senseless requirements substantially exaggerates its position. The ALJ's

decision is not dramatically different from the initial DNR decision. The order to do additional testing following the incomplete testing Waugamie performed is a reasonable exercise of discretion.

Waugamie had adequate notice of the scope of the contested case hearing. Waugamie contends that it had no indication that the hearing could result in an order imposing more stringent requirements than those initially ordered by the DNR. The notice, entitled "In the Matter of Ground Water Contamination Caused by Pesticides Spills and Fertilizer Spills on Property Owned by Waugamie FS Cooperative in the City of Bear Creek, Wisconsin" referred to the DNR order as it concerns "ground water contamination caused by pesticides spills and fertilizer spills and the failure to take the actions necessary to identify the contamination and restore the environment." The notice further provided that a public hearing would be held "regarding the Department's Order ...." Finally, the notice stated that this is a Class 2 contested case. From this notice, Waugamie should have known that it was participating in a full hearing of the contamination problem, not a limited review of the initial DNR order. Even the application for the contested case hearing submitted by Waugamie noted the possibility of modification of the DNR order. Waugamie fully participated in the hearing and called witnesses to present its position. Waugamie has not identified any additional evidence that it could have presented had it been given more specific notice that the hearing could result in a more onerous order. We perceive no violation of Waugamie's due process rights.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.