COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP551 **Cir. Ct. No. 2011CV843**

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

C. M. BYE,

PETITIONER-RESPONDENT,

V.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Reversed and cause remanded with directions*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 HRUZ, J. C.M. Bye placed unauthorized fill on wetlands on his property, and then he applied for an after-the-fact water quality certification from the Wisconsin Department of Natural Resources (DNR). Every tribunal to have considered that initial application—including the DNR, the Wisconsin Division of

Hearings and Appeals, and the circuit court—agreed that Bye was not entitled to certification under the law as it existed at the time of his application. However, while Bye's petition for judicial review of the DNR's denial of his application was pending, the Wisconsin legislature changed the law governing wetland permits. The circuit court concluded Bye was entitled to water quality certification under the new law, and it reversed the DNR's decision on that basis.

¶2 We reverse the circuit court's order. Although Bye submitted an application under the new law, that application is not a component of the present judicial review proceeding. It is not in the certified administrative record, and the DNR has not ruled on it. Further, contrary to the circuit court's conclusion, the facts established during the agency proceedings on Bye's initial application did not automatically qualify Bye for a certification permit under the new law. Accordingly, the circuit court erred by ordering water quality certification under the new law at this time. On remand, the circuit court shall enter an order affirming the DNR's decision and dismissing Bye's petition.

BACKGROUND

¶3 In 2005, Bye became the owner of real property located in Lincoln County. Bye graded out a hill and placed unauthorized fill at four points on the property, all in wetland areas. At the direction of the United States Army Corps of Engineers, Bye has since restored all but one of the locations to their natural wetland state. The remaining location, which is known as Site 2, is the subject of this case.

¶4 On November 16, 2009, Bye applied to the DNR for an after-the-fact water quality certification authorizing the fill at Site 2.[1] On May 17, 2010, the DNR denied the permit, finding Bye's proposal would not comply with the standards for water quality certification set forth in the then-applicable versions of WIS. ADMIN. CODE ch. NR 103 and WIS. ADMIN. CODE § NR 299.04. Bye requested a contested case hearing, which was held on June 27, 2011, before an administrative law judge (ALJ) from the Wisconsin Division of Hearings and Appeals.

¶5 In a July 27, 2011 written order, the ALJ upheld the DNR's decision to deny water quality certification for Site 2. He noted "the proposed project would affect 0.0848 acres of wetlands for the purpose of providing tractor and mower access by way of 'a crossing to 55 acres' of property for 'mowing and recreational use,' primarily grouse hunting." The ALJ determined there were "numerous practicable alternatives to the proposed wetland fill," and the fill would have "a significant detrimental direct impact upon preserving the wetland functional value …." In sum, he concluded the DNR properly denied certification because the fill did not comply with various aspects of the applicable administrative regulations.

¶6 Bye filed a petition for judicial review of the ALJ's decision on August 18, 2011. He asserted the DNR improperly denied water quality

[1] A former DNR employee testified before the Division of Hearings and Appeals that an after-the-fact permit is required "when the work has been started or completed prior to application for the permit." According to this witness, an after-the-fact permit application is reviewed in the same manner as a predevelopment application; that is, the DNR approaches its review as if the project had not been started.

certification.[2] He also alleged the denial amounted to a regulatory taking, a claim he has since abandoned.[3] Pursuant to a scheduling order, Bye's first brief in the case was due on June 29, 2012.

¶7 Before Bye's first brief became due, legislation known as the Wetlands Reform Bill was enacted. *See* 2011 Wis. Act 118. Federal law requires states to certify that any discharges into navigable waters within their jurisdiction comply with state water quality standards enacted under Title 33 of the United States Code. *See* 33 U.S.C. § 1341(a). Discharges into nonnavigable waters, however, were not subject to federal oversight and were regulated only by the DNR under WIS. STAT. § 281.36 (2009-10). It was this type of certification Bye sought in his 2009 application to the DNR. The Wetlands Reform Bill was, in part, designed to establish uniform standards governing discharges into both federal and nonfederal wetlands.

¶8 Accordingly, the Wetlands Reform Bill repealed much of the previous WIS. STAT. § 281.36 and re-created the section to establish two classes of state wetland permits sufficing as federal certification: "general" permits and "individual" permits. *See* 2011 Wis. Act 118, §§ 71-86. General permits are summarily issued for certain categories of discharges that are temporary or affect only a small amount of wetland area. *See* WIS. STAT. § 281.36(3g)(a). As

[2] By rule, the ALJ's decision becomes the final decision of the DNR. *See* WIS. STAT. § 227.46(3); WIS. ADMIN. CODE § NR 2.155(1) (Mar. 2014).

Unless otherwise noted, all references to the Wisconsin Statutes are to the 2011-12 version.

[3] A regulatory takings claim is not cognizable under WIS. STAT. § 227.57 and was not properly included in Bye's petition for judicial review. *See* WIS. STAT. § 227.53(1)(b).

pertinent to this case, WIS. STAT. § 281.36(3g)(a)9. authorizes the DNR to issue general permits for discharges that are "part of a development for recreational purposes, if the discharge does not affect more than 10,000 square feet of wetland."[4] The legislation also required the DNR to establish "requirements, conditions, and exceptions to ensure that the discharges [authorized by a general permit] will cause only minimal adverse environmental effects …." WIS. STAT. § 281.36(3g)(d). If a discharge is not authorized under a general wetland permit, or if the DNR is concerned about adverse wetland impacts associated with an application for a general permit, a more rigorous individual permit process is required. *See* WIS. STAT. § 281.36(3m).

¶9 On June 28, 2012, three days before the effective date of the Wetlands Reform Bill, Bye filed his legal brief setting forth his argument for reversal. Bye did not argue he was entitled to water quality certification under the general permit provisions of the new law. Indeed, he conceded the "Wetlands Reform Bill was not in effect for this case at the time of the subject permit application on November 17, 2009." Instead, Bye cited the new law as evidence that his "de minimis" filling would not have a significant adverse wetland impact. The DNR filed a response brief in late September, in part calling on Bye to submit a second application under the new standards established by the Wetlands Reform Bill.

¶10 Bye filed a second application for water quality certification for Site 2 on October 10, 2012. In it, he again acknowledged that the Wetlands

[4] 10,000 square feet is equal to approximately .23 acres. It is undisputed that the area of the Site 2 fill is less than one-tenth of an acre.

Reform Bill was not in effect at the time of his initial permit application. However, he claimed that, under the new law, the issuance of water quality certification was mandatory because "[i]t is undisputed that the Site 2 project … would only affect … less than 10,000 square feet [and] … is a development purely for recreational purposes."

¶11 On October 31, 2012, the parties agreed to stay the judicial review proceeding while the DNR considered Bye's second application under the Wetlands Reform Bill's provisions. The parties stipulated that if the DNR approved the application, the action for judicial review would be moot. However, the DNR had not yet acted on Bye's second application by June of 2013, apparently because it had not finished developing the "requirements, conditions, and exceptions" attendant to general permits under WIS. STAT. § 281.36(3g)(d). Judicial review proceedings therefore resumed without conclusive DNR action on Bye's second application.

¶12 Bye filed a reply brief in the circuit court on July 12, 2013. He raised several arguments for the first time, among them that the circuit court could independently grant water quality certification under the new Wetlands Reform Bill. Bye also filed an affidavit to which he attached his second application, which was still pending before the DNR. Consistent with his second application, Bye argued the issuance of a discharge permit was mandatory because his fill had a recreational purpose and affected less than 10,000 square feet of wetland.

¶13 The circuit court reversed the DNR's decision and granted Bye water quality certification for the Site 2 wetland fill project. The court addressed, and rejected, each of Bye's challenges to the sufficiency of the evidence supporting the DNR's decision on Bye's initial application. It agreed with the

ALJ that the fill violated then-applicable WIS. ADMIN. CODE ch. 103. Nonetheless, the court concluded Bye was entitled to certification under the new law, with the "understanding" that Bye would add culverts to the project to "minimize the impact on the surrounding wildlife."

DISCUSSION

¶14 Appeals from administrative decisions are governed by the standards set forth in WIS. STAT. ch. 227. *See* ***Columbus Milk Producers' Co-op v. Department of Agric.***, 48 Wis. 2d 451, 458, 180 N.W.2d 617 (1970). We must affirm the agency decision unless the petitioner establishes one of the grounds set forth in WIS. STAT. § 227.57(4)-(8). *See* WIS. STAT. § 227.57(2). There is no dispute in this case that the DNR's interpretation and application of water quality standards is entitled to great weight deference. *See* ***Andersen v. DNR***, 2011 WI 19, ¶27, 332 Wis. 2d 41, 796 N.W.2d 1.

¶15 The scope of judicial review in an administrative appeal is the same regardless of whether the case is before the circuit court, the court of appeals, or the supreme court. *See* ***Andersen***, 332 Wis. 2d 41, ¶24; ***Cuna Mut. Ins. Soc. v. DOR***, 120 Wis. 2d 445, 448, 355 N.W.2d 541 (Ct. App. 1984). At each level, courts are to apply the standards set forth in WIS. STAT. § 227.57. *See* ***Andersen***, 332 Wis. 2d 41, ¶24. The agency decision—not the decisions of lower courts—is the focus of the review. *See* ***Richland Sch. Dist. v. DILHR***, 166 Wis. 2d 262, 273, 479 N.W.2d 579 (Ct. App. 1991), *aff'd*, 174 Wis. 2d 878, 498 N.W.2d 826 (1993).

¶16 Setting aside for a moment the issue of whether the circuit court properly granted water quality certification based on the Wetlands Reform Bill, we note that every previous tribunal has concluded that Bye is not entitled to a permit

based on the law in effect at the time of his initial application. Consistent with these determinations, we conclude there is no reason whatsoever to overturn the DNR's findings of fact or conclusions of law.

¶17 This is so because Bye's arguments to this court do not contend that the DNR erred by denying his initial application under then-existing law. Although he did present such arguments before the circuit court, the court specifically rejected Bye's assertion that various facets of the DNR's decision were not supported by substantial evidence. Meanwhile, the court did not address Bye's arguments, first raised in his reply brief in support of his petition for judicial review, that the DNR's decision was arbitrary and capricious, inequitable, and plagued with procedural flaws. Bye has abandoned all such arguments on appeal, thereby conceding the DNR acted appropriately when it denied his application. *See* ***Herder Hallmark Consultants, Inc. v. Regnier Consulting Grp., Inc.***, 2004 WI App 134, ¶16, 275 Wis. 2d 349, 685 N.W.2d 564 (court of appeals will not address undeveloped arguments).

¶18 Instead, Bye asserts he is entitled to water quality certification based on the statutory changes brought about by the Wetlands Reform Bill. He argues the circuit court properly granted him a permit under that legislation, even though it also determined the DNR correctly denied certification. We disagree, because issuing such a certification in this case requires the consideration of matters outside of the administrative record, skirts the exhaustion of administrative remedies and prior resort doctrines, and fails to give due deference to the DNR's authority.

¶19 Judicial review of an agency decision is generally confined to the administrative record. *See* WIS. STAT. § 227.57(1); ***Wisconsin's Envtl. Decade,***

Inc. v. Public Serv. Comm'n, 79 Wis. 2d 409, 422 n.12, 256 N.W.2d 149 (1977). The phrase "record on review" is a term of art within the context of WIS. STAT. ch. 227 and means "that record actually compiled and certified by the agency, which it sends to the circuit court." ***Lake Beulah Mgmt. Dist. v. DNR***, 2011 WI 54, ¶52, 335 Wis. 2d 47, 799 N.W.2d 73.

¶20 Bye's second application is not a part of the record on review. Indeed, it could not have been, as neither the second application, nor the Wetlands Reform Bill, existed at the time the DNR denied Bye's initial application for water quality certification. Only the agency's decision regarding Bye's initial application was before the circuit court and is before this court. We cannot expand the scope of the judicial review proceedings to rule on an application that is not part of the administrative record and on which the DNR had not yet acted.

¶21 Bye asserts, as he did before the circuit court, that his second application is properly within the scope of judicial review, though not as part of the administrative record under review.[5] Bye contends that the parties' stipulation—which brought about the stay in the circuit court proceedings while Bye pursued his second application—also effectively made that application part of the administrative record. We reject this argument because, although the stipulation established the fact that a second application had been submitted, it did not add anything to the administrative record on review.

[5] Typically, a party wishing to present additional evidence would seek permission from the circuit court under WIS. STAT. § 227.56(1). It does not appear Bye did so here. In any event, even if Bye sought to bring his second application before the court under that subsection, the court "could not receive such evidence and decide the petition[] for review on the basis of such evidence but could only order that the additional evidence be taken before [the] DNR upon such terms as the circuit court deemed proper." *See* ***State Public Intervenor v. DNR***, 171 Wis. 2d 243, 245, 490 N.W.2d 770 (Ct. App. 1992).

¶22 Bye also argues his affidavit and the second application attached to it do properly warrant consideration because they relate to an alleged procedural irregularity under WIS. STAT. § 227.57(1). Subsection 227.57(1) states that if a petitioner alleges "irregularities in procedure before the agency, testimony thereon may be taken in the court and, if leave is granted to take such testimony, depositions and written interrogatories may be taken … if proper cause is shown therefor."

¶23 Bye's attempt to expand the administrative record under the guise of procedural irregularity fails for several reasons. First, the "irregularity" he invokes is entirely contrived. Bye characterizes the DNR's argument to be that he never submitted a second application, which Bye argues contravenes the parties' stipulation. To the contrary, it is clear the DNR does not dispute Bye submitted a second application. The DNR merely notes that application is not in the administrative record and cannot be considered by courts tasked with reviewing the DNR's denial of Bye's earlier application. Second, Bye does not allege any "irregularities in procedure *before the agency*," which is solely what the statute addresses. *See* WIS. STAT. § 227.57(1) (emphasis added). Third, even assuming the second application arguably related to some procedural irregularity, it is not the type of evidence that may be added to the record. Subsection 227.57(1) permits the circuit court to take testimony on such alleged irregularities, which was not done here.

¶24 More fundamentally, reviewing courts are not competent to grant water quality certification under the Wetlands Reform Bill in the present case. The DNR, not the circuit court, is vested with authority to issue wetlands discharge permits. *See* WIS. STAT. § 281.36(3g)(a), (3g)(h)1. The DNR's decision is then reviewable within the confines of WIS. STAT. ch. 227. The parties

must complete all administrative processes established by the legislature before they come to court. ***Nodell Inv. Corp. v. City of Glendale***, 78 Wis. 2d 416, 424, 254 N.W.2d 310 (1977).

¶25 Known as the exhaustion of administrative remedies doctrine, this rule generally presumes that any procedures established for review of an administrative decision constitute the exclusive remedies available and must be employed before other remedies are used. ***Id.*** Here, Bye did not complete the administrative process attendant to his second application. Instead, judicial review proceedings resumed without official DNR action on Bye's second application.[6] Bye is not entitled to circumvent the administrative process and seek his desired permit directly from reviewing courts.

¶26 Closely related to the exhaustion doctrine is the doctrine of prior resort. It applies "where there has been a total absence of any formal administrative proceedings." ***Helnore v. DNR***, 2005 WI App 46, ¶22, 280 Wis. 2d 211, 694 N.W.2d 730. Here, although the judicial review proceedings were stayed to allow the DNR to consider Bye's second application, it is undisputed the DNR never did so, apparently because it had not yet established the required permit eligibility criteria under the Wetlands Reform Bill. *See* 2011 Wis. Act 118, § 75 (DNR "shall establish requirements, conditions, and exceptions to ensure that the discharges will cause only minimal adverse environmental

[6] As we later explain, the stay in this case did not provide the DNR with an adequate opportunity to address Bye's new application. *See infra*, ¶¶28-30. Bye suggests the DNR acted unreasonably by not addressing his second application immediately, but he does not develop a cognizable legal argument or cite any authority on this point. We shall therefore not consider the issue further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped arguments and arguments unaccompanied by citation to legal authorities will not be considered).

effects"); WIS. STAT. § 281.36(3g)(d) (same). Accordingly, reviewing courts cannot intervene, because there remains the possibility—indeed, in this case, the necessity—of further administrative action. *See* ***Helnore***, 280 Wis. 2d 211, ¶22.

¶27 Taken collectively, the exhaustion and prior resort doctrines' "'net result is in effect that the administrative agency is entitled to the first and the next-to-the-last word.'" ***Nodell Inv. Corp.***, 78 Wis. 2d at 427 n.13 (quoted source omitted). The DNR received neither in this case as to Bye's second application and the new wetlands law and regulations. A change in the law while judicial review proceedings are pending is not a reason for cutting the DNR out of the process; to the contrary, the DNR must be given the initial opportunity to apply that law in this context of a permit to fill wetlands. The circuit court and this court must confine their review to "conditions as they were" when the DNR issued its denial order. *See* ***Wisconsin's Envtl. Decade***, 79 Wis. 2d at 436, 438 (declining to address the validity of new regulations promulgated after initial administrative decision).[7]

¶28 Bye asserts the DNR need not be given an opportunity to review his second application. He contends a remand to the DNR would be "needless or futile" when the DNR had "already … assembled a substantial administrative record resulting in fact[ual] findings that happen to support Bye's right to a permit

[7] Citing ***Tift v. Forage King Industries, Inc.***, 108 Wis. 2d 72, 103, 322 N.W.2d 14 (1982) (Callow, J., dissenting), Bye asserts that a "court generally must apply the law as it exists at the time of the court's ruling." In so doing, Bye grossly mischaracterizes the cited decision. ***Tift*** was a product liability action—not a WIS. STAT. ch. 227 petition for judicial review. Further, Bye fails to acknowledge that he cites to the opinion of a dissenting justice. Finally, the dissenting justice's point was that the legislature is best suited to enact limitations on product liability actions—not that the courts and litigants are entitled to avoid the procedure outlined in ch. 227 based on an intervening change in the law.

under the new law." Bye believes he is entitled to water quality certification under the Wetlands Reform Bill as a matter of law because the administrative record established that Site 2 occupies less than 10,000 square feet, and he uses the site for a recreational purpose—namely, hunting.

¶29 It is true that WIS. STAT. § 281.36(3g)(a)9. requires the DNR to issue a wetland general permit for discharges that are "part of a development for recreational purposes, if the discharge does not affect more than 10,000 square feet of wetland." However, that is not all WIS. STAT. § 281.36 says. In issuing wetland general permits, the DNR is also required to "establish requirements, conditions, and exceptions to ensure that the discharges will cause only minimal adverse environmental effects …." WIS. STAT. § 281.36(3g)(d). Further, there are certain areas—including interdunal wetlands, coastal plain marshes, and boreal rich fens—into which the DNR may prohibit discharges altogether. *See* WIS. STAT. § 281.36(3g)(d)1.-7.

¶30 Thus, it is not true that Bye is entitled to a wetland general permit as a matter of right based on the facts as found by the ALJ. Bye's discharge permit may have been denied altogether, or subject to significant conditions, depending on what "requirements, conditions, and exceptions" the DNR ultimately adopted.[8] Further, Bye does not cite any evidence indicating the DNR determined Site 2 was a suitable location for discharge based on the requirements of WIS. STAT. § 281.36(d)1.-7.

[8] We note that shortly after termination of the stay in this case, the DNR issued a wetland general permit for recreational development that included eligibility criteria and project conditions. *See* WISCONSIN DEPARTMENT OF NATURAL RESOURCES, WETLAND GENERAL PERMIT FOR RECREATIONAL DEVELOPMENT (issued July 19, 2013), *available at* http://dnr.wi.gov/topic/waterways/documents/permitDocs/GPs/GP4.pdf.

¶31 In a final effort to salvage the rationale of the circuit court's ruling, Bye claims its action was justified by several rules within WIS. STAT. ch. 227. None of these rules contravene the principles we have set forth. WISCONSIN STAT. § 227.57(9) gives a reviewing court authority to "provide whatever relief is appropriate irrespective of the original form of the petition." As we have established, the relief awarded by the circuit court in this case was not appropriate. Bye also asserts the DNR's decision was legally incorrect under WIS. STAT. § 227.57(5). However, Bye does not challenge—even as an alternative basis for affirming the circuit court's decision—that the DNR properly denied Bye a permit under then-existing law. Moreover, § 227.57(5) only applies when an agency "has erroneously interpreted a provision of law." Bye overlooks that the DNR never had occasion to interpret the Wetlands Reform Bill, much less erroneously interpret it, because the law did not exist at the time of the DNR's decision. Bye's allusion to WIS. STAT. § 227.57(8), which sets forth the criteria under which a court may reverse an agency's exercise of discretion, is similarly unavailing and inapt, for this same reason.

¶32 Bye is not "left out in the cold," *see* ***Helnore***, 280 Wis. 2d 211, ¶21, with respect to obtaining a permit under the Wetlands Reform Bill. As far as we can discern, based on the record, Bye's second application has never been the subject of formal DNR action and remains pending. If he wishes to pursue that application further, he must follow the proper protocol and obtain a DNR decision, which would then be subject to review as set forth in WIS. STAT. ch. 227.

¶33 Based on the foregoing, we conclude the DNR properly denied Bye's application and its decision should have been affirmed. Accordingly, we reverse the circuit court's order and remand with directions that it enter an order affirming the DNR's decision and dismissing Bye's petition.

By the Court.—Order reversed and cause remanded with directions.

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