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COURT OF APPEALS OF WISCONSIN
DISTRICT III

KOHLER CO.,

Petitioner-Appellant,

v.

Appeal No. 2021AP001187

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent-Respondent,

CLAUDIA BRICKS AND FRIENDS OF
THE BLACK RIVER FOREST,

Intervenors-Respondents.

**APPEAL FROM THE FINAL ORDER OF THE SHEBOYGAN COUNTY
CIRCUIT COURT, THE HONORABLE L. EDWARD STENGEL,
PRESIDING, SHEBOYGAN COUNTY CASE NO. 19-CV-199**

REPLY BRIEF OF KOHLER CO.

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TABLE OF CONTENTS

INTRODUCTION 4

I. The Department and Friends wrongly interpret Chapter 227..... 4

II. The ALJ should have imposed the conditions that his decision
indicates were warranted..... 6

III. Unregulated impacts cannot form the basis for denial of the permit..... 8

IV. The ALJ required Kohler to meet an unmeetable standard. 10

CONCLUSION..... 12

CERTIFICATION OF FORM AND LENGTH 14

TABLE OF AUTHORITIES

Cases

<i>Bucyrus-Erie Co. v. State Dep't of Indus., Lab. & Hum. Relations</i> , 90 Wis. 2d 408 (1979).....	11
<i>Clean Wisconsin, Inc. v. Wisconsin Department of Natural Resources</i> , 2021 WI 72, 961 N.W.2d 611.....	7, 9
<i>Froebel v. Wisconsin Department of Natural Resources</i> , 217 Wis. 2d 652, 579 N.W.2d 774 (Ct. App. 1998).....	7, 8
<i>Meteor Timber, LLC v. Wis. Div. of Hearings & Appeals</i> , No. 2020AP1869, 2021 WL 6012813 (Wis. Ct. App. Dec. 16, 2021).....	5, 11
<i>State v. Williams</i> , 2014 WI 64, 355 Wis. 2d 581, 852 N.W.2d 467.....	9
<i>Tetra Tech EC., Inc. v. DOR</i> , 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21.....	11

Statutes

Wis. Stat. §227.44(3).....	5
Wis. Stat. §227.45(1)-(2).....	5
Wis. Stat. §227.46(1)(c).....	5
Wis. Stat. §281.36.....	11, 12
Wis. Stat. §281.36(3b)(3).....	7
Wis. Stat. §281.36(3n)(b).....	9
Wis. Stat. §281.36(3q)(b).....	8
Wis. Stat. §281.36(3q)(b)2.....	7
Wis. Stat. §281.65(2)(a).....	12

Other Authorities

Wis. Admin. Code NR §203.136(1)(d).....	7
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INTRODUCTION

In reversing the Department of Natural Resources' ("Department") decision to grant Kohler Co. ("Kohler") a wetland fill permit, the ALJ made multiple errors that require reversal. The evidence at the contested case hearing demonstrated the Department had sufficient evidence to issue a statutorily-compliant permit. The ALJ's contrary conclusion required that he disregard certain of Kohler's evidence while crediting testimony introduced by the Friends of the Black River Forest and Claudia Bricks (collectively "the Friends"), even where unsupported by substantial evidence; consider impacts unrelated to water or wetlands caused by activities over which the Department lacks regulatory authority; and impose a burden on Kohler it could not possibly meet. The Decision is legally and factually flawed, and it must be reversed.

I. The Department and Friends wrongly interpret Chapter 227.

Kohler explained in its opening brief how the Department had sufficient information to make the required findings and issue the wetland fill permit. Kohler Br. 24-33; 42-48. In defending the ALJ's contrary conclusion, the Department and Friends rely heavily on information that the Friends submitted at the contested case hearing. At the same time, the Department and Friends argue that the ALJ properly *ignored*¹ evidence that *Kohler* presented at the hearing (for example, its updated Integrated Golf Course Management Plan ("IGCMP") and its pesticide risk assessment, (*see* Kohler Br. 25-30) solely because that evidence was not available at the time of permitting. This disparate treatment cannot be sustained.

If the ALJ's review at the contested case hearing was to be limited to evidence before the Department at the time of permitting, then the ALJ should

¹ Kohler's challenge relates to the ALJ's refusal to even *consider* certain uncontroverted evidence it presented. The ALJ did consider and reject some of Kohler's evidence (*see, e.g.*, R.184-11), which is not the decision Kohler challenges here.

have disregarded *both* Kohler's *and* the Friends' new evidence.² Instead, however, the bulk of the Decision is based on evidence offered by the Friends that was *not* before the Department during permitting. *See* R.183-31, ¶15; R.183-31, ¶¶32, 34; R.184-1, ¶¶ 35, 38; R.184-3, ¶48, R.184-5, ¶¶53-54. That new evidence was the Friends' witnesses' (post-permit) testimony asserting that the golf course project would cause significant adverse impacts. *Id.*

Unsurprisingly, neither the Department nor the Friends identify any authority to support this one-sided treatment. The ALJ should consider *all* evidence presented during a contested case proceeding. Kohler Br. 29. Doing so gives meaning to the statutes' provisions that, during such a hearing, all parties have the opportunity to present evidence, and that testimony may be admitted and evidence received. *See, e.g.,* Wis. Stat. §227.44(3); Wis. Stat. §227.45(1)-(2); Wis. Stat. §227.46(1)(c); Kohler Br. 29. It would make little sense to present evidence to the ALJ, including testimony, if the record were limited to materials already before the Department. It was therefore inappropriate for the ALJ to ignore Kohler's evidence *supporting* the Department's analysis. For example: the Department concluded during permitting that nutrients and pesticides would not cause significant adverse impacts.³ R.39-9-39-19 (permit as issued); R.153-32:24-33:21 (Biersach testimony). In challenging that determination before the ALJ, the

² Department subject-matter experts testified that no additional information was needed from Kohler when the permit was issued. *See, e.g.* R.136, 412-414, 430, 432-33 (Radermacher testimony indicating that Kohler "provide[d] a response" to Department's information requests); R.138, 520, 521, 525, 527-28, 533-35, 537-38 (Biersach testimony that Department had sufficient information to evaluate direct, secondary, and cumulative impacts to wetland functional values and to evaluate mitigation).

³ This case contrasts starkly with *Meteor Timber*, discussed in a January 4 letter submitted by the Friends. *Meteor Timber's* "permit *itself* stated that the Department did not have the information necessary to determine the net positive or negative environmental impact of the proposed project." *Meteor Timber, LLC v. Wis. Div. of Hearings & Appeals*, No. 2020AP1869, 2021 WL 6012813, ¶¶ 45, 54, 55 (Wis. Ct. App. Dec. 16, 2021) (emphasis supplied). In contrast, here, while the EIS issued in 2015 identified potential environmental impacts, those impacts were mitigated during the permitting process, and the *permit* issued two years later identified no insufficiencies. There was *no* EIS completed in *Meteor Timber*.

Friends introduced new testimony (not before the Department during permitting) based on after-the-fact critiques. *See e.g.*, R.15-80-15-158. Kohler, in turn, introduced evidence *supporting* the Department's analysis and ultimate permitting decision. *See e.g.*, R.15-24-15-78. Indeed, Kohler's uncontroverted evidence at the contested case hearing showed that the IGCMP and risk assessment, if followed, would ensure no significant adverse impacts on ground or surface water. R.127-83-91; R.155-19-20; R.155-32:1-13. The ALJ referenced Dr. Cohen's post-permit pesticide evaluation, which Dr. Cohen concluded would prevent significant adverse impacts, but rejected the evaluation itself simply because the evaluation postdated the permit. *See* R.184-12 ("[T]his is another example of the Department issuing the permit with incomplete information and reliance on a restriction that is not actually a condition of the permit.").

This inconsistency is insupportable. Either new evidence was *not* probative of whether the Department properly issued the permit, or it *was*. But the ALJ's approach, allowing the Friends' new evidence to undermine the Department's analysis but dismissing Kohler's new evidence because it was not before the Department at the time of permitting, requires reversal.

II. The ALJ should have imposed the conditions that his decision indicates were warranted.

Based on the ALJ's assessment of the evidence presented at the contested case hearing, he should have imposed conditions modifying the permit. Kohler Br. 24-33. The Friends and the Department argue that the ALJ did not have the authority to "rewrite Kohler's permit," and was correct not to do so because Kohler did not explicitly request modification. Department Br. 36; Friends Br. 28. These arguments are wrong.

First, if additional conditions were warranted, the ALJ plainly had the authority to modify the permit—as the ALJ himself expressly recognized. R.144-10:19-21. In issuing the Decision, the ALJ stood in the shoes of the Department and was vested with the same authority. The statutory scheme at issue here clearly

contemplates that conditions may be appended to a wetland permit. *See, e.g.*, Wis. Stat. §281.36(3b)(3) ("No person may violate *any condition* contained in a wetland...individual permit." (Emphasis supplied)). And the statute authorizing administrative review of wetland permits authorizes review of "[t]he *imposition* of, or *failure to impose*, a condition on any wetland individual permit." Wis. Stat. §281.36(3q)(b)2. (emphasis supplied). To say that an ALJ cannot impose conditions at the conclusion of a contested case hearing would emasculate this statute. Further, as Kohler's opening brief explains (at 29), the trial-like nature of proceedings before the ALJ would be senseless if the ALJ could not issue a permit with all necessary conditions.

Clean Wisconsin, Inc. v. Wisconsin Department of Natural Resources, 2021 WI 72, 961 N.W.2d 611, confirms this. Kohler Br. 26. The Friends argue (at 30) that *Clean Wisconsin* is inapposite because it involves the WPDES permit framework, which specifically authorizes imposition of conditions by the ALJ. *See* Wis. Admin. Code NR §203.136(1)(d). This argument ignores that the wetland permit framework specifically contemplates the review of the imposition or failure to impose permit conditions. If an ALJ can review the failure to impose a condition, then he must be able to rule on – and remedy – that failure by imposing the condition. Any other result is contrary to the plain language of §281.36(3q)(b)2. Thus, the rationale of *Clean Wisconsin* applies. Here, as in *Clean Wisconsin*, faced with a challenge to the issuance of a permit, the ALJ should have imposed the conditions he found necessary for the permit's issuance.⁴

Moreover, the Department's reliance (at 38) on *Froebel v. Wisconsin Department of Natural Resources*, 217 Wis. 2d 652, 656, 579 N.W.2d 774 (Ct. App. 1998) is misplaced. There, the court considered whether an ALJ had authority "to issue a mandatory injunction against the DNR" to take affirmative

⁴ Notably, the permit issued by the Department here had 38 comprehensive conditions, which mitigated any adverse impacts that could have otherwise arisen. R. 39:10-39:13.

action relating to the enforcement of public rights to navigable waters. *Id.* There was no permit at issue in *Froebel*, and the court did not consider whether an ALJ may impose or modify permit conditions.

As to the claim that Kohler forfeited its challenge to the ALJ's failure to impose conditions (Department Br. 40; Friends Br. 28-29), that ignores the procedural posture of this case. Kohler was not the petitioner before the ALJ; the *Friends* challenged the permit's issuance. Wis. Stat. §281.36(3q)(b) states that the *petitioner* may challenge the imposition of, or failure to impose, permit conditions. When the Friends petitioned to overturn the permit, the Department and Kohler were aligned in *preserving* the permit as issued. In defending its permit, Kohler was not obligated to request additional conditions undermining that permit. In any event, given the ALJ's express recognition of additional conditions that would be "sufficient to protect the wetlands" (R.184-12), the ALJ should have exercised his statutory authority to impose such conditions whether or not Kohler requested them.

III. Unregulated impacts cannot form the basis for denial of the permit.

The Department *concedes* that activities such as tree-clearing and grading can be undertaken without a wetland permit. Department Br. 29. Yet the Friends (at 22-28) and Department (at 33-36) claim that, once the wetland-permitting process begins, those activities (and presumably many more) become subject to Departmental regulation. In their view, a statute granting regulatory authority over wetlands, contained in a chapter granting regulatory authority over water, gives the Department unlimited power over activities unrelated to wetlands *or* water—activities over which the Department concedes it otherwise has no regulatory authority.

As Kohler's opening brief explains, this argument violates basic canons of statutory construction. The fundamental purpose of the wetlands statute is to regulate and protect *wetlands*. See Kohler Br. 11-12. The Department's argument ignores that "[i]n determining a statute's plain meaning, the scope, context,

structure, and purpose are important." *State v. Williams*, 2014 WI 64, ¶ 17, 355 Wis. 2d 581, 852 N.W.2d 467. It disregards the fact that "a plain-meaning interpretation cannot contravene a textually or contextually manifest statutory purpose." *Id.* (citation omitted). And, in light of the statute's clear purpose of regulating *wetlands*, it runs directly contrary to the longstanding principle that agencies may exercise only those powers "explicit[ly]" granted by the Legislature. *Clean Wis.*, 2021 WI 72, ¶54.

Rather than improperly elevating purpose over the text as the Friends claim (at 25), Kohler's reading of the statute harmonizes text with purpose. The Department's authority to regulate wetlands cannot be construed as boundless authorization to regulate all conduct, however far removed from wetland protection. Kohler's interpretation honors the principle that the Department's authority is limited to that which the Legislature delegated to it. *See Kohler Br. 17.*

The Friends and Department mischaracterize Kohler as arguing that the Department can consider only direct impacts caused by wetland fill. Department Br. 34; Friends Br. 25. The Department must, of course, consider potential secondary and cumulative impacts "*to wetland functional values*" stemming from a project. Wis. Stat. §281.36(3n)(b) (emphasis added); *see generally Kohler Br. 17-24.* Kohler does not "read out" secondary and cumulative impacts from the statute, as the Friends claim (at 25); Kohler recognizes that the Department's authority to consider such impacts is expressly limited to impacts that bear on "wetland functional values."

The ALJ erred as a matter of law. And, if the Decision stands, it will incentivize applicants to undertake unregulated activities *before* permit application. An applicant who clear-cuts and grades its property before applying for a permit may do so with impunity—and secure a wetland permit *more easily* than an applicant like Kohler that seeks to minimize *all* adverse environmental consequences. The Department responds that Kohler's "environmentally

responsible conduct throughout the permitting process" demonstrates that applicants will not take such actions. Department Br. 35. But future applicants will not behave like Kohler if the Department prevails, and Kohler's responsible conduct *harms* its ability to obtain a permit. The statute should not be interpreted to discourage environmental stewardship.

IV. The ALJ required Kohler to meet an unmeetable standard.

The Decision effectively required *Kohler* to prove, with absolute certainty, that the project would *not* result in significant adverse impacts. That is an impossible and legally erroneous standard. And, under the proper standard, the Decision cannot stand.

Kohler's opening brief demonstrates that the ALJ made various insupportable findings about cumulative impacts, pesticides, and fertilizers. Kohler Br. 33-48. The Friends and the Department respond that the ALJ's Decision did not actually "depend" on those findings. Friends Br. 43; Department Br. 41-42. It would be surprising if the ALJ made factual findings that had no purpose, and indeed the Decision belies this claim. The ALJ's overarching holding was that the Department "did not have sufficient information to determine the proposed project will not result in significant adverse impact[s]." R.184-17. It depended explicitly on the Friends' introduction of evidence that such impacts *would* result. In particular, the Decision devoted several paragraphs to the potential effect of pesticides and fertilizers and expressly adopted the Department's finding on cumulative impacts. R.184-10-13. If, as Kohler contends, those findings were in error, then little of the Decision would remain. And while the Department asserts (at 44) that the lack of a completed pesticide-management plan independently supports the ALJ's holding, that is irrelevant if there was never enough information to support the ALJ's finding about pesticides and fertilizers in the first place.

The Friends, meanwhile, suggest that the Decision may be sustained even if findings as to cumulative impacts, pesticides, and nutrients are unsupported by

substantial evidence, because the impacts from construction serve as an alternative basis for affirmance. Friends Br. 43. But unregulated activities cannot form the basis for denying a wetland fill permit. Kohler Br. 17-24; Section III, *supra*. Additionally, affirming the Decision on this basis would make it impossible to satisfy §281.36. The Decision expressly recognizes that the Friends identified *no* conditions that could reduce construction-related impacts, and that such impacts could "only be avoided by not developing the site." R.184-16. Effectively, the Friends argue that *any* impact to the wetlands is necessarily significant. This cannot be the proper analysis under §281.36, or no permit could *ever* be issued – effectively a regulatory taking.

As to the findings themselves, Kohler has explained in detail why neither the cumulative-impacts finding nor the pesticides/nutrients finding is supported by substantial evidence. Kohler Br. 33-48. It bears repeating that substantial evidence requires more than "an isolated piece of testimony which is explained or discredited by other testimony." *Bucyrus-Erie Co. v. State Dep't of Indus., Lab. & Hum. Relations*, 90 Wis. 2d 408, 418 (1979), *abrogated on other grounds by Tetra Tech EC., Inc. v. DOR*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21. The Friends' evidence amounts to a bare invocation of "professional judgment" (Kohler Br. 34-35), and baseless assumptions, with no grounding in science or empirical analysis, that pesticides and nutrients will "inevitabl[y]" reach the wetlands. *Id.* at 36-48.⁵

Finally, the ALJ *did* in fact require quantitative findings—and that, too, mattered.⁶ In issuing the permit, the Department originally concluded that adverse

⁵ In *Meteor Timber*, this Court struck down a wetland permit both because the permit itself stated that the Department did not have necessary information (which is not the case here), *and* for failure of the developed mitigation plan. Here, in contrast, the ALJ specifically found that Kohler "satisfies the [statutory] requirements" regarding mitigation. R.184-17.

⁶ The Department argues that the reference to "quantitative findings" arose in the context of a discussion of "the general lack of accurate, up-to-date information." Department Br. 50. But the supposed "missing information" is important *because* it is needed to quantify nutrient and

impacts from the project would not be significant, relying on information like Kohler's pesticide management plan and the Best Management Practices imposed by the permit, which will indisputably reduce (if not eliminate) adverse impacts. Yet to the ALJ, that was not enough—*because* "[t]he Department did not make any quantitative findings as to at what point the secondary adverse impacts would become significant or explain how the conditions would reduce the adverse impacts below the level of significance." R.184-12. Analyzing secondary impacts of a future project necessarily involves some level of uncertainty, and certain impacts cannot be quantified at all. R.151-35:15-35:24. There will *always* be a degree of uncertainty in the Department's assessment of impacts under §281.36.⁷ Requiring a level of certainty that cannot be met is an error of law.

CONCLUSION

The ALJ improperly ignored Kohler's new evidence while accepting the Friends'; failed to exercise his authority to impose the conditions that he found necessary to protect the wetlands; erroneously based a permit denial on activities over which the Department concededly has no regulatory authority; and effectively required Kohler to meet an unmeetable standard, on the basis of findings unsupported by substantial evidence. Any one of these errors requires reversing the Decision.

pesticide levels—and thus make "quantitative findings" as to impacts' significance. *See, e.g.*, R.184-10 (discussing nitrogen *levels*), R.184-11 (discussing *amount* of chemicals and *levels* of nutrients), R.184-12 (concluding that Department did not make quantitative findings as to significance and that it should have made "determinations based on completed plans").

⁷ In fact, the conditions under which wetland fills should be authorized (established by Wis. Stat. §281.36) demonstrate the need for flexibility to adjust for uncertainty. Permit conditions, like those imposed here (*see, e.g.*, R.39-12 (Permit Condition 22); R.39-17 (Finding 20)), often refer to "Best Management Practices," i.e., "practices, techniques or measures...which are determined to be effective means of preventing or reducing pollutants..." Wis. Stat. §281.65(2)(a). By definition, "best" practices may – and indeed should – evolve with changed conditions and technology. The Department and Friends' insistence on immovable plans with precise quantitative values would preclude adapting the *best* practices for improved irrigation, nutrient and pesticide technologies.

Accordingly, as discussed herein and in Kohler's opening brief, Kohler respectfully requests that the Court reverse the circuit court's decision upholding the Decision of the ALJ.

Dated this 6th day of January, 2022.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,989 words.

Dated this 6th day of January, 2022.

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