Status of Suit to Compel DNR Compliance with Jobs Creation Act

Dane County Court Punts Rather than Resolves Critical Legal Issues

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On April 28, 2008, a coalition of nine business groups filed a petition for writ of mandamus in Dane County Circuit Court seeking to compel DNR to follow statutory rulemaking procedures in connection with its utility mercury rule. On June 23, Dane County Circuit Judge Ebert denied the petition and granted the DNR's motion to dismiss. This decision, while disappointing, was not unexpected as DNR's argument that prevailed rested on the timing and not the merits of the suit.

Procedural defects relating to DNR's draft mercury rule include the failure to prepare a scope statement that, in turn, triggers an obligation to prepare an economic impact report. These defects clearly deviate from the letter and intent of the Jobs Creation Act (2003 Wis. Act 118). More importantly, however, this information is vital for interested parties to provide meaningful comments. The Legislature also has the right to this report as part of the record it reviews under the legislative review process.

The law is clear that an agency cannot work on a rule until it publishes a scope statement that includes a description of the rule's objective, among other specifics. In its 2005 scope statement, DNR stated that the mercury rule would mirror federal mercury standards. The rule in question was drafted in 2007 and is an entirely different rule than the one contemplated in 2005.

This rule establishes a 90 percent mercury reduction level that has no nexus to any federal program; and, most notably, includes state-wide emission limits to address ozone, particulate matter and regional haze. DNR never *scoped* such objectives, which contravenes their obligations to accurately and fully state its purpose. Relying on the inaccurate scope statement, industry had no reason to request an economic impact report. Once the true objectives were published, industry's request for the required report was denied as untimely.

In the mandamus action, DNR argued and the Court agreed that the "proper" remedy lies with a legal challenge after the rule runs it full course, including legislative review, where the rule now lies. Unfortunately, this process is hollow without the required economic assessment of this expensive mandate that may cost ratepayers hundreds of millions of dollars. The businesses and homeowners that will see these substantial rate increases, and legislators that must now review the rule, are only being given those pieces of information that support DNR's position rather than what is required by law.

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The rule suffers other fatal defects, mostly relating to the stealth attempt to impose state-wide ozone and particulate matter controls under cover of a mercury rule. These mandates would be imposed despite the fact the Governor and DNR have repeatedly acknowledged that Wisconsin will meet those standards in all 72 counties through existing programs.

Given our compliance with the underlying standards, there exists no health or legal basis for establishing these ***statewide*** mandates. If those emission limits are allowed to stand, this will be the first time since the Clean Air Act Amendments of 1990 that Wisconsin has implemented ozone controls on a statewide basis, outside the ozone nonattainment area, and not otherwise required by the Act.

DNR in essence merely won a temporary reprieve. The law is clear that any rules that do not follow statutory rulemaking procedures are invalid. Given the plain violations of these procedures, we believe this rule should be dead on arrival before any fair judicial tribunal. In addition to providing fair notice and needed economic analysis, the Petitioners thought it best for all parties to reset the rule before the end of the lengthy process, while DNR argued that we should wait and sue later. So be it.