

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 15, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2007AP41

Cir. Ct. No. 2006CV726

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS,
CHRISTINE FOSSEN RADES, THOMAS SYDOW AND CLEAN WATER
ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,**

PETITIONERS-APPELLANTS,

NATIONAL WILDLIFE FEDERATION,

PETITIONER,

v.

DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT.

FT. JAMES OPERATING COMPANY,

PETITIONER-RESPONDENT,

v.

DEPARTMENT OF NATURAL RESOURCES,

DEFENDANT,

**CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS,
CHRISTINE FOSSEN RADES, THOMAS SYDOW AND CLEAN WATER
ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,**

INTERVENORS-APPELLANTS.

APPEAL from an order of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Reversed and cause remanded for further
proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. This appeal concerns petitions for judicial review of an administrative decision by the DNR, which were consolidated into one case by the circuit court. The appellants include a number of individuals and Clean Water Action Council of Northeastern Wisconsin (collectively “the Council”). The respondent is Fort James Operating Company, which operates a paper mill in Green Bay, Wisconsin.

¶2 The Council petitioned the DNR for review of a Wisconsin Pollutant Discharge Elimination System permit granted to Fort James. Fort James claimed the petition was not properly verified pursuant to WIS. STAT. § 283.63. When the DNR disagreed, Fort James petitioned the circuit court for review.

¶3 The Council asserts the circuit court did not have jurisdiction to hear Fort James’ petition for judicial review because the administrative decision appealed by Fort James was not a final agency decision. Alternatively, if the court did have jurisdiction over Fort James’ petition, the Council claims the court erred

when concluding that the Council's petition for DNR review of the permit was not properly verified.¹ Because we agree that Fort James' petition seeks review of a non-final agency decision, we reverse the circuit court's order and remand for further proceedings on the merits of the Council's petition.

BACKGROUND

¶4 On August 30, 2005, the DNR issued a Wisconsin Pollutant Discharge Elimination System permit to Fort James. The Council filed a petition seeking DNR review of the permit pursuant to WIS. STAT. § 283.63, challenging aspects of the permit relating to mercury and phosphorus.² Fort James challenged the Council's petition, contending it was not properly verified. After rejecting Fort James' verification argument, the DNR partially granted and partially denied the Council's petition, allowing a hearing as to the phosphorus issue, while denying a hearing on the mercury issue.

¶5 The Council petitioned for judicial review of the DNR's denial of a hearing on the mercury issue. Fort James did not respond to the Council's petition for judicial review, but instead filed its own petition for judicial review,

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² The Council's petitions for DNR review and judicial review actually contain numerous issues. For the purpose of distinguishing between Fort James' and the Council's claims, we only refer to the "mercury" and "phosphorus" issues.

challenging the DNR's jurisdiction to grant a hearing on the permit, arguing that the Council's petition was not properly verified.³

¶6 The Council and the DNR both moved to dismiss Fort James' petition for judicial review for lack of subject matter jurisdiction. One basis for challenging the court's jurisdiction was that the DNR's decision was not a final order adversely affecting Fort James' substantial interests. Fort James moved to consolidate both cases or, alternatively, to intervene as a party to the case involving the Council's petition.

¶7 On July 28, the circuit court denied the motions to dismiss Fort James' petition and granted Fort James' motion to consolidate the cases. On November 16, the court granted Fort James' petition for judicial review, concluding that the Council's petition for DNR review of the permit was not properly verified pursuant to WIS. STAT. § 283.63. Accordingly, the court dismissed the Council's petition for judicial review.

DISCUSSION

¶8 Before an administrative decision can be subject to judicial review, it must adversely affect a person's substantial interests. WIS. STAT. § 227.52. Case law has further established that an administrative decision must be "final" to be reviewable. *Sierra Club v. DNR*, 2007 WI App 181, ¶13, 736 N.W.2d 918.

³ WISCONSIN STAT. § 283.63(1)(a) requires a party seeking administrative review of a permit to file a "verified" petition. Fort James argued that the verification signatures in the Council's petition only verified the authenticity of the signatures, not the factual allegations within the petition. Because we conclude the circuit court did not have jurisdiction to hear Fort James' petition, we do not address the merits of this verification issue.

Whether an administrative decision is final for the purposes of judicial review is a question of law we review de novo. *Id.*

¶9 An administrative order is final and subject to judicial review when it “directly affects the legal rights, duties, or privileges of a person.” *Pasch v. DOR*, 58 Wis. 2d 346, 356, 206 N.W.2d 157 (1973). An aspect of this standard is whether the aggrieved party would have another opportunity for judicial review. *See id.* at 357. The fact that an early judicial review might avoid the expense and inconvenience of further administrative proceedings is not a basis for concluding that an order is subject to review. *Sierra Club*, 736 N.W.2d 918, ¶16. It is more important to avoid the delay and disruption of the administrative process that would accompany piecemeal review of non-final agency decisions. *Id.*

¶10 An agency decision denying a jurisdictional challenge and requiring a hearing on the merits is not a final agency decision subject to review because, at that point, the party seeking review does not have a substantial interest that has been adversely affected. *Kimberly Area Sch. Dist. v. LIRC*, 2005 WI App 262, ¶11, 288 Wis. 2d 542, 707 N.W.2d 872. Until the administrative hearing is concluded, the effect of the hearing on the parties remains undetermined. *Id.*, ¶13. The party opposing the hearing may ultimately prevail on the merits, rendering the question of whether the agency had jurisdiction to hold the hearing moot. *See id.* Alternatively, if the party opposing the hearing does not prevail on the merits, it may contest the agency’s jurisdiction upon judicial review of the agency’s final decision. *Id.*

¶11 Therefore, here, the DNR’s decision rejecting Fort James’ verification challenge and ordering a hearing on the merits was not a final agency decision subject to judicial review. If Fort James prevails in the DNR’s final

decision after a hearing, it will not need to seek judicial review at all. *See id.*, ¶¶11, 13. If Fort James does not prevail, it can then seek judicial review, including review of the verification issue. *Id.*

¶12 Fort James nonetheless argues that the verification issue is a separate reviewable issue from the phosphorus issue on which the DNR ordered a hearing. Fort James quotes *Friends of the Earth v. PSC*, 78 Wis. 2d 388, 407, 254 N.W.2d 299 (1977), for the proposition that “[i]f [an] order finally disposes of matters having an immediate impact upon the rights of a party, the order may well be reviewable as to such matters despite the fact that further action by the agency is expected on other aspects of the case.” Fort James argues that the DNR’s decision rejecting its verification challenge and ordering a hearing on the merits immediately impacted its “right to know that any process which is undertaken that may result in changes to the permit terms—and therefore what constitutes compliance with mandatory permit requirements—has a lawful basis and is proceeding in accordance with statutory authority and statutory requirements.” Fort James characterizes this impacted right as a “due process injury.”

¶13 It is unclear why Fort James’ “right to know” how reviewing courts will rule on the verification issue amounts to a “due process injury.” Fort James does not dispute that it can obtain judicial review of the verification issue after the agency’s final decision. If its “due process injury” is merely the delay between now and then, we have already rejected that as a justification for judicial review. *See Sierra Club*, 736 N.W.2d 918, ¶16. If Fort James is claiming a violation of its constitutional due process rights, its argument is inadequately developed, and we need not address it. *See State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

¶14 As an alternative argument, Fort James argues that, even if the DNR decision is a non-final order, judicial review should be permitted in the interest of judicial economy. Fort James contends that judicial economy is the sole basis for prohibiting judicial review of non-final agency decisions, and because the Council's petition for review already disrupted the administrative process, judicial economy favors deciding both parties' claims now.

¶15 However, dismissing Fort James' petition for judicial review is consistent with the law prohibiting judicial review of non-final decisions, along with the underlying purpose of judicial economy. Once a final decision is rendered on the phosphorus issue, and possibly the mercury issue if the Council prevails in its petition for judicial review, Fort James will be able to obtain judicial review if necessary. If Fort James prevails in the final decision, it will not need to seek judicial review at all. Because judicial review of Fort James' claims may prove unnecessary, it would not be in the interest of judicial economy to undertake that review now.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

