STATE OF WISCONSIN

COURT OF APPEALS, DISTRICT III

PETER BORMUTH,

Appeal No: 2014-AP-2590

Petitioner - Appellant,

v.

WISCONSIN DEPT. NATURAL RESOURCES

Respondent - Respondent

& ENBRIDGE ENERGY, LIMITED PARTNERSHIP

Intervenor - Respondent

On Appeal from Circuit Court in the County of Douglas

Case No. 2014-CV-000273

Hon. Kelly J. Thimm, Presiding

REPLY BRIEF OF PETITIONER/APPELLANT TO INTERVENOR/RESPONDENT

ENBRIDGE ENERGY, LIMITED PARTNERSHIP

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CONSTITUTIONAL PROVISIONS

United States Constitution, Article VI, Clause 2 in pertinent part provides:

> *This Constitution, and the Laws of the United States, which shall be made in pursuance thereof . . . shall be the supreme Law of the Land.*

Wisconsin Constitution, Article 1, Section 9 in pertinent part provides:

> *Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.*

Wisconsin Constitution, Article 7, Section 5 (3) in pertinent part provides:

> *(3) The appeals court shall have such appellate jurisdiction in the district, including jurisdiction to review administrative proceedings, as the legislature may provide by law, but shall have no original jurisdiction other than by prerogative writ. The appeals court may issue all writs necessary in aid of its jurisdiction and shall have supervisory authority over all actions and proceedings in the courts in the district.*

Wisconsin Constitution, Article 7, Section 8 in pertinent part provides:

> *Except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state and such appellate jurisdiction in the circuit as the legislature may prescribe by law. The circuit court may issue all writs necessary in aid of its jurisdiction.*

Wisconsin Constitution, Article 9, Section 1 in pertinent part provides:

> *The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.*

STATUATORY PROVISIONS

Wis. Stats. Section 227.42(1)

Wis. Stats. Section 227.53(1)(a)(2)

Wis. Stat. Section 227.57(5)

Wis. Stat. Section 227.57(7)

Wis. Stat. Section 227.57(8)

Wis. Stats. Section 281.11

Wis. Stats. Section 281.13

Wis. Stats. Section 752.35

Wis. Stats. Section 30.03(4)(a)

Wis. Stats. Section 30.294

Wis. Stats. Section 806.07(1)(h)

42 USC 4331 Sec 101(a)

42 U.S.C § 4331 Sec. 101(b)(1)(2)(3)(4)

42 U.S.C. § 4331 sec 102(2)

LEGAL ARGUMENT

I. APPELLANT CLAIMS THE DOCTRINE OF EQUITABLE ESTOPPEL SUSPENDS THE TIME LIMITATION AND THUS THE CIRCUIT COURT HAD COMPETENCY TO PROCEED AND ENBRIDGE ENERGY HAS NOT YET ACCRUED ANY CONSTITUTIONAL RIGHT TO THIS PERMIT.

The Appellant argues that the doctrine of Equitable estoppel suspends the running of the statute of limitations during any period in which the defendant took active steps to prevent the plaintiff from suing. *Barry Aviation Inc. v. Land O'Lakes Mun. Airport Comm.*, 377 F.3d (7th Cir. 2004) at 689; see also *Singletary v. Cont'l Illinois Nat. Bank & Trust Co. of Chicago,* 9 F.3d 1236, 1241 (7th Cir. 1993). And the Appellant notes that he met the four part standard for determining estoppel established by *Milas v. Labor Ass'n of Wis., Inc*., 214 Wis. 2d 1, 571 N.W.2d 656, 660 (Wis. 1997). "Under Wisconsin law the doctrine of equitable estoppel has four elements: (1) action or non-action; (2) on the part of one against whom estoppel is asserted; (3) which induces reasonable reliance thereon by the other, either in action or non-action; and (4) which is to his or her detriment." *Milas v. Labor Ass'n of Wis., Inc*., 214 Wis. 2d 1, 571 N.W.2d 656, 660 (Wis. 1997). In the context of a claim of equitable estoppel, "detriment" has been equated with "prejudice," and commonly understood to mean "injury or damage." The facts of this case show deliberate non-action by the WDNR to the detriment of the appellant when the appellant was reasonably reliant on the WDNR. The WDNR knew by August 13,

2014 that the Appellant made a pro se mistake in filing his August 3, 2014 Petition for Review of the Contested Case Decision under Wis. Admin. Code s. NR 2.20 but deliberately withheld their decision until August 29, 2014 when the Appellant's right to judicial review under Wis. Stats. s. 227.53(1)(a)(2m) had expired. That is non-action creating detriment and amounts to an injury to the Appellant. "Equitable estoppel is a rule of justice which, in its proper field, prevails over all other rules." *City of Chetopa v. Board of County Com'rs*., 156 Kan. 290, 133 P.2d 174, 177 (1943) and thus Enbridge Energy has not yet accrued any Constitutional right to this permit.

II. APPELLANT DID NOT WAIVE HIS ARGUMENT THAT THE WDNR ERRED IN REJECTING HIS PETITION FOR A CONTESTED CASE HEARING.

A. The Appellant fully developed this issue in his Petition for Review filed with the Circuit Court on September 8, 2014

If the Honorable Court will refer to the Appellant's Appendix, Part 1, page 58 to p.68 the Court will find the Appellant raised his entire argument in Circuit Court. When an appeal is taken from a circuit court order on administrative review, the appellate court reviews the decision of the agency, not the circuit court. *Zip Sort, Inc. v. DOR*, 2001 WI App 185, ¶11, 247 Wis. 2d 295, 634 N.W.2d 99. The WDNR July 29, 2014 decision denying the Appellant a contested case hearing under Wis. Stats. s. 227.42 is reviewable by this Court and the Appellant has not waived this argument. And since the contested case hearing was improperly denied by the

WDNR, the Intervenor-Respondent has not accrued any constitutionally protected right to this erroneously issued permit.

B. Even if the Appellant waived this argument, the Court may consider it.

This court has the power and may consider the entire record and dispose of questions of law although presented for the first time on appeal. *Herro v. Heating & Plumbing Finance Corp.* 206 Wis. 256, 239 N. W. 413 (1931); *Cappon v. O'Day* 165 Wis. 486, 162 N. W. 655 (1917); *Braasch v. Bonde*, 191 Wis. 414, 211 N. W. 281 (1926); and *Dupont v. Janet*, 165 Wis. 554, 162 N. W. 664 (1917). As the Court stated many years ago in *Cappon*, 165 Wis. at 491:

> *…Whether this court should review a question raised here for the first time depends upon the facts and circumstances disclosed by the particular record. It undoubtedly has the power, but ordinarily will not exercise it. The question is one of administration, not of power.*

Likewise in *State v. Dyess*, 124 Wis. 2d 525, 536, 370 N.W.2d 222 (1985), the court explained that:

> *This court, even prior to the broad discretionary grant of power to consider issues specifically conferred by the 1977 constitutional revision, had the option of considering issues if it appeared to the court to be in the interests of good judicial administration to do so.*

This Court has the inherent power to invoke Wisconsin Stats s. sec. 752.35. In *State v. Wyss,* 124 Wis. 2d 681, 370 N.W.2d 745 (1985) the Court explained that there were two grounds for reversing a judgment under s. 752.35: (1) whenever

the real controversy has not been fully tried or (2) whenever it is probable that justice has for any reason miscarried. *State v. Wyss,* 124 Wis. 2d at 735. The Court stated that, under the first category, when the real controversy has not been fully tried, an appellate court may exercise its power of discretionary reversal without finding the probability of a different result on retrial. The Appellant asks this Court to exercise its discretionary power to examine the Appellant's claim that the WDNR wrongly denied his petition for a contested case hearing because the real controversy was never fully tried.

III. THE INTERVENOR FAILED TO RESPOND TO APPEELANT'S ARGUMENT THAT THE PUBLIC TRUST DOCTRINE MUST BE APPLIED TO THIS PERMIT BECAUSE IT AFFECTS NAVIGABLE WATERS.

The appellant made the argument that the public trust doctrine applies to this permit since it impacts navigable waters. A "Navigable waterway" has been defined by DNR to mean "any body of water with a defined bed and bank that is navigable under Wisconsin law. In Wisconsin a body of water is navigable if it is capable of floating on a regularly recurring basis the lightest boat or skiff used for recreation or any other purpose." Wis. Admin. Code § NR 310.03(5). Clearly the waters of the Nemadji River and Lake Superior are navigable waters under Wisconsin law. In *Rock-Koshkonong Lake District v. DNR*, 2013 WI 74 (2013) the Court repeatedly emphasized that the Public Trust doctrine is restricted to, and applies to, all navigable waters. The Appellant argues that WDNR determination

involved a question of law and is reviewable by this court under Wis. Stat. § 227.57(5).

The Appellant also argues that the interests of justice require this Court to exercise its discretionary power under Wis. Stat. § 752.35 to reverse the ruling of the Circuit Court and the WDNR. As the Appellant noted, in *State v. Wyss,* 124 Wis. 2d 681, 370 N.W.2d 745 (1985) the Court explained that there were two grounds for reversing a judgment under s. 752.35: (1) whenever the real controversy has not been fully tried or (2) whenever it is probable that justice has for any reason miscarried. *State v. Wyss,* 124 Wis. 2d at 735. The Appellant claims that this Court may exercise its discretionary power under either or both grounds with regard to this issue. The real controversy has not been fully tried since the WDNR never considered the Appellant's argument that the Public Trust Doctrine applies to this permit which affects navigable waters and justice has miscarried allowing the Court to exercise its discretionary power because a consideration of the Public Trust doctrine as applied to this permit would clearly result in a different outcome.

IV. THE INTERVENOR'S CLAIM OF A CONSTITUTIONALLY PROTECTED RIGHT OF HIGH DIGNITY VIOLATES THE SEPARATION OF POWERS DOCTRINE.

In Wisconsin law the doctrine of separation of powers is well established. The Intervenor/Respondent cites *Maryland Cas. Co. v. Beleznay*, 245 Wis. 390, 14 N.W.2d 177 (1944) for the proposition that the limitation created by the 30 day

time limit of Wis. Stat. s. 227.53(1) has granted them a constitutionally protected right of high dignity to this permit. This argument is completely without merit and violates the separation of powers doctrine. The Intervenor/Respondent is in possession of a permit erroneously issued by a department of the Executive. This executive action is subject to judicial review by the Wisconsin Courts under the following five legal doctrines or statutes.

A. The Courts may review this permit under the doctrine of equitable estoppel and thus no constitutional right is established.

The WDNR knew by August 13, 2014 that the Appellant made a pro se mistake in filing his August 3, 2014 Petition for Review of the Contested Case Decision under Wis. Admin. Code s. NR 2.20 but deliberately withheld their decision until August 29, 2014 when the Appellant's right to judicial review under Wis. Stats. s. 227.53(1)(a)(2m) had expired. This non-action created detriment and amounts to an injury to the Appellant. "Equitable estoppel is a rule of justice which, in its proper field, prevails over all other rules." *City of Chetopa v. Board of County Com'rs*., 156 Kan. 290, 133 P.2d 174, 177 (1943) and thus this Court may review the Circuit Court decision and Enbridge Energy has not yet accrued any Constitutional right to this permit.

B. The Courts may review this permit under Wis. Stats. s. 227.42 using inherent authority under Wisconsin Stats s. 752.35.

When an appeal is taken from a circuit court order on administrative review, the appellate court reviews the decision of the agency, not the circuit court. *Zip Sort, Inc. v. DOR*, 2001 WI App 185, ¶11, 247 Wis. 2d 295, 634 N.W.2d 99. The Appellant claims that the WDNR July 29, 2014 decision denying the Appellant a contested case hearing under Wis. Stats. s. 227.42 is reviewable by this Court under their inherent authority granted by Wisconsin Stats s. 752.35.

C. The Courts may review this permit for a violation of the Public Trust Doctrine under their inherent authority granted by Wisconsin Stats s. 752.35.

The permit issued by the WDNR adversely affects navigable waters and violates the Wisconsin Constitution, Article 9, Section 1, which this Court has a constitutional duty to uphold. This Court has the inherent authority to revoke this permit under Wisconsin Stats s. 752.35. Anything less would in effect abdicate control of title and control to bottomlands and waters in question to Enbridge. The duty under public trust law is continuing; it is not a passive trust; the rights of a licensee, permittee, or grantee are subject to the public trust and the Courts have a continuing duty to protect it. (see *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927); *Lake Beulah Mgmt. Dist. v. Dep't of Natural Res*. 799 N.W.2d 73, 84 (Wis. 2011); *R.W. Dock & Slips v. DNR,* 628 N.W.2d 781 (Wis. 2001)).

D. The Courts have the inherent power to revoke this permit under Wisconsin Stats. s. 806.07(1)(h).

The Appellant notes that if the Court accepted the position of the Intervenor – Respondent, they would lose the judicial power to utilize Wisconsin Stats. s. 806.07(1)(h). A motion pursuant to Wis. Stat. § 806.07(1)(h) must be made "within a reasonable time." Wis. Stat. § 806.07(2). Relief under subsection (h) requires "extraordinary circumstances;" the provision "should be used only when the circumstances are such that the sanctity of the final judgment is outweighed by `the incessant command of the court's conscience that justice be done in light of all the facts.'" *Bankers Mtg. Co. v. United States*, 423 F.2d 73, 77 (5th Cir.), cert. denied, 399 U.S. 927 (1970). As a general principle, Wis. Stat. § 806.07 "attempts to achieve a balance between fairness in the resolution of disputes and the policy favoring the finality of judgments." *Edland v. Wis. Physicians Serv. Ins. Co*., 210 Wis. 2d 638, 644, 563 N.W.2d 519 (1997) (citing *M.L.B.,* 122 Wis. 2d at 542). Thus, a court considering a motion for relief from judgment under subsection (h) "should not interpret extraordinary circumstances so broadly as to erode the concept of finality, nor should it interpret extraordinary circumstances so narrowly that subsection (h) does not provide a means for relief for truly deserving claimants." Id. at 552. *Village of Trempealeau v. Mikrut*, 2004 WI 79, 681 NW2d 190 (2004). The remedy the Appellant seeks is one that is expressly protected by a constitutional provision and should this Court deny the relief requested in the

instant action, the Appellant will file a separate action under Wis. Stats. s. 806.07(1)(h) since justice will not have been done in light of all the facts the protection of Lake Superior justifies the use of the 'extraordinary circumstances' standard.

E. The Courts have inherent power to review this permit under Wis. Stats. s. 30.03(4)(a) and Wis. Stats s. 30.294

Wis. Stats. s. 30.03(4)(a) contemplates that the WDNR must respond to any possible infringement of the public rights relating to navigable waters. The Appellant assert that Wis. Stat. § 30.294 would give any member of the public (including the Appellant) standing to bring an separate action against the intervenor, even though the intervenor already has possession of a permit. Section 30.294 provides that "every violation of this chapter [30] is declared to be a public nuisance and may be prohibited by injunction and may be abated by legal action brought by any person." Thus § 30.294 expressly contemplates citizen suits irrespective of the DNR'S actions or enforcement decisions. A citizen may bring suit under this section, pursuant to the public trust doctrine, directly against a private party for abatement of a public nuisance when the citizen believes that the department of natural resources has inadequately regulated the private party. *Gillen v. City of Neenah*, 219 Wis. 2d 806, 580 N.W.2d 628 (1998).

V. THE INTERVENOR CANNOT CLAIM A CONSTITUTIONALLY PROTECTED RIGHT BECAUSE FEDERAL LAW AND FEDERAL STATUTE SUPERSEEDS STATE LAW AND STATUTE AND ENBRIDGE IS NOT IN POSSESSION OF THE REQUIRED STATE DEPARTMENT PERMIT NECESSARY TO PROCEED WITH THIS PROJECT

The United States Constitution, Article VI, Clause 2, provides that "this Constitution, and the Laws of the United States, which shall be made in pursuance thereof . . . shall be the supreme Law of the Land." Article VI, Clause 2 of the Constitution is generally referred to as the Supremacy Clause. "Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." *Perez v. Campbell*, 402 U.S. 637, 29 L. Ed. 2d 233, 91 S. Ct. 1704 (1971). If either the purpose or the effect of a state statute interferes with the effectiveness of a federal statute, the state statute is rendered invalid by the Supremacy Clause. Id. at 652.

Under the National Environmental Policy Act, 42 USC 4331 Sec 101(a), the Congress recognized the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the effects of resource exploitation, and further recognized the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man. 42 USC 4331 Sec 101 (b)(1)(3) determined that it is the continuing responsibility of

the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations:… (3) attain the widest range of beneficial uses of the environment without degradation, risk to health of safety, or other undesirable and unintended consequences;…"

While no federal statute can preclude the State of Wisconsin from exercising its public trust authority, because the pipeline feeding these oil storage tanks crosses the international border with Canada, Enbridge Energy is required to obtain a new Presidential Permit from the State Department before it may implement this WDNR permit. The State Department held a public comment period and the Appellant made public comment # 1jy-8efg-bidq on September 18, 2014.[1] The Department of State has not yet acted on this permit request by Enbridge Energy. But clearly, if the State Department follows federal law and refuses to issue a new

[1] The Appellant requested that: "the Department of State deny a new Presidential Permit for Enbridge Energy to operate Line 67 to full design capacity because the Enbridge application violates 42 U.S.C § 4331 Sec. 101(b)(1)(2)(3)(4). I further request that the Department of State, under 42 U.S.C. § 4331 sec 102(2), use a systematic, interdisciplinary approach to consider the adverse environmental impacts of the project, long term consequences, and the irretrievable resources which the project may destroy under 42 U.S.C. § 4331 sec 102(2). The State Department must also consider the alternatives this commenter has raised and provide detailed analysis and recommendations regarding these alternatives in comparison to the new Enbridge Energy Line 67 application for a presidential permit."

Presidential Permit to Enbridge Energy, Permit # 13-DCF -129 issued by the WDNR on July 29, 2014 is a worthless piece of paper to which no constitutional right applies. Federal statute and Federal agency decisions have a preemptive effect on conflicting state regulatory agencies and their powers. (see *Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988); *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 108 S. Ct. 2428, 101 L. Ed. 2d 322 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986). State environmental regulations are allowed to be stronger than federal law if State Constitutions and State Legislators have so chosen but state law is pre-empted when it actually conflicts with federal law. Clearly the Intervenor – Respondent's claim of a constitutional right of high dignity to this permit is vacuous and without merit.

CONCLUSION

On July 25, 2010 a ruptured Enbridge pipeline poured 1,100,000 gallons of tar sands crude oil into Michigan's Talmadge Creek and Kalamazoo River. Despite multiple alarms and reports, Enbridge allowed an astounding seventeen hours to elapse before shutting down the line. The U.S. National Transportation Safety Board found "pervasive organizational failures" and determined that the company overlooked multiple warning signs of corrosion, cracks, and thinning metals that

were evident as early as 2004. More than four years after the spill clean-up costs have exceeded a billion dollars. Now, with the political acquiescence of Wisconsin Governor Scott Walker, Enbridge wants to endanger the Nemedji River and Lake Superior. The Appellant claims it is the responsibility of this Court to protect the public trust in navigable waters and to review the WDNR actions and factual oversights in issuing this permit.

Respectfully Submitted,

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March 5, 2015

CERTIFICATE OF MAILING

I certify that this Reply Brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on March 5, 2015. I further certify that the brief was correctly addressed and the postage was pre-paid.

Date: March 5, 2015

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CERTIFICATE OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font (Calibri Body).

The length of this brief is 13 pages according to the Microsoft Word program used to compose it.

Date: March 5, 2015

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CERTIFICATE OF SERVICE

I, Peter Bormuth, do hereby certify that on March 5, 2015 I did mail 3 copies of second Appellant's Reply Brief to Thomas M. Pyper, Enbridge Energy, P.O. Box 1379, Madison, WI 53701-1379 and to Charlotte Gibson, Assistant Attorney General, P.O. Box 7857, Madison, WI. 53707-7857 by first class mail.

Date: March 5, 2015

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