

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 11, 2015

Diane M. Fremgen
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. 2014AP2590

Cir. Ct. No. 2014CV273

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

PETER BORMUTH,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-RESPONDENT,

ENBRIDGE ENERGY, LIMITED PARTNERSHIP,

INTERVENOR-RESPONDENT.

APPEAL from an order of the circuit court for Douglas County:
KELLY J. THIMM, Judge. *Affirmed.*

Before Stark, P.J., Hruz, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Peter Bormuth, pro se, appeals an order dismissing his petition for judicial review. Bormuth had requested a contested case hearing concerning an air pollution control permit granted to Enbridge Energy, Limited Partnership. Bormuth argues equitable estoppel precludes dismissal of his petition, and the interests of justice require this court to exercise its discretionary authority to reverse under WIS. STAT. § 752.35.¹ We affirm.

¶2 Enbridge owns and operates a terminal facility in Superior, where crude oil is directed to other parts of Enbridge's system. Enbridge proposed to construct three new breakout tanks and associated piping at the Superior terminal. The Wisconsin Department of Natural Resources issued an air pollution control construction permit. The permit contained a notice of appeal rights, but the permit was not appealed. Bormuth subsequently requested a contested case hearing, which the DNR denied on July 29, 2014. This denial decision provided information on the time limits for seeking judicial review under WIS. STAT. §§ 227.52-53. Bormuth then filed a request under WIS. ADMIN. CODE § NR 2.20 (Mar. 2014), for review of a contested case decision by the DNR Secretary. After the thirty-day period to file and serve a petition for review under WIS. STAT. § 227.53 expired, Bormuth filed a petition for review with the circuit court. The circuit court granted a motion to dismiss the petition for review, concluding it lacked competency to proceed with the case because the petition was untimely filed. Bormuth now appeals.

¹ References to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶3 WISCONSIN STAT. § 227.53(1) establishes the procedural requirements for filing and serving a petition for judicial review of an agency decision. To properly commence a judicial review action, the petitioner must within thirty days of the final decision serve the petition “personally or by certified mail” upon the agency or one of its officials. WIS. STAT. §§ 227.53(1)(a)1., (1)(a)2m. Once the time limitation is triggered, strict compliance is required. *See Currier v. DOR*, 2006 WI App 12, ¶23, 288 Wis. 2d 693, 709 N.W.2d 520. The failure to comply with the mandatory time limitation results in the loss of the circuit court’s competency to proceed and the petition must be dismissed. *Wisconsin Power & Light Co. v. Public Serv. Comm’n*, 2006 WI App 221, ¶11, 296 Wis. 2d 705, 725 N.W.2d 423.

¶4 Here, the DNR issued its final determination denying Bormuth’s request for a contested case hearing on July 29, 2014. Bormuth filed the petition for review on September 8, 2014, clearly outside the confines of the thirty-day period. The circuit court correctly concluded it lacked competency to proceed, and we affirm its order.

¶5 The circuit court also properly held that Bormuth’s equitable estoppel argument lacked merit. Even if we assumed for the sake of argument that estoppel might be available in this case so as to have extended the time by when Bormuth was to have filed his petition for review in the circuit court, there is nothing in the record that would factually support such a claim.

¶6 Bormuth asserts that he made a “pro se mistake” by filing his petition for review of the contested case hearing under WIS. ADMIN. CODE § NR 2.20. He argues the DNR knew he made a mistake in so filing his petition. He further contends the DNR deliberately withheld its decision on his August 3, 2014

petition until after Bormuth's right to judicial review of the DNR's July 29, 2014 decision under WIS. STAT. § 227.53(1)(a)2m. had expired. However, as the circuit court properly observed, Bormuth presented no evidence of any misdirection or malfeasance by the DNR. Bormuth's conclusory speculation is not evidence.

¶7 Moreover, WIS. ADMIN. CODE § NR 2.20(6) specifically put Bormuth on notice that a filing of a request for discretionary review under that provision "does not in any manner affect or extend the time limits for filing actions in circuit court for review under ss. 227.42 and 227.53, Stats." A notice of appeal rights was also included in the DNR's decision denying Bormuth's request for a contested case hearing, which notice specifically advised Bormuth that a petition for judicial review had to be filed and served within the time period prescribed by WIS. STAT. §§ 227.52 and 227.53. Accordingly, it would be unreasonable for Bormuth to wait for a decision on his WIS. ADMIN. CODE § NR 2.20 request before filing a petition for review.

¶8 Bormuth is not entitled to review in the interests of justice, as it does not appear that justice has miscarried. *See* WIS. STAT. § 752.35. Bormuth provides argument on the merits of why no permit should have been issued to Enbridge and why he would have been entitled to a contested case hearing. The merits of Bormuth's views regarding the permit or his right to a contested case hearing if he had timely filed his petition for review to the circuit court are not relevant to this appeal.

By the Court.—Order affirmed

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

