

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>KIMBERLY JUNKER, CANDICE BRANDAU LARSON, and KATHY CARTER,</p> <p>Petitioners,</p> <p>vs.</p> <p>IOWA DEPARTMENT OF NATURAL RESOURCES,</p> <p>Respondent.</p>	<p>NO. CVCV066246</p> <p>MOTION TO DISMISS</p>
--	---

Respondent Iowa Department of Natural Resources (“IDNR”), pursuant to Iowa Rule of Civil Procedure 1.421(1), hereby submits this Motion to Dismiss for failure to state a claim upon which any relief may be granted. In support, IDNR states as follows:

INTRODUCTION

Summit Carbon Solutions LLC proposes to construct a carbon dioxide pipeline in Iowa to transport carbon dioxide captured from ethanol plants in Iowa to North Dakota. (Petition ¶7). Lawler SCS Capture LLC, an affiliated company, proposes to construct carbon dioxide capture facilities in Iowa, and submitted a permit application to the IDNR to withdraw water pursuant to 567 IAC 50. (Petition ¶¶7, 10).¹ A permit to withdraw up to 55.9 million gallons of water per year from the groundwater (Devonian Limestone) in Chickasaw County, Iowa, was issued to Lawler SCS Capture LLC, on May 29, 2023. (Petition ¶2). Petitioners seek judicial review pursuant to Iowa Code section 17A.19 of the water use permit issued to Lawler SCS, and request the Court reverse the IDNR’s action. (Petition ¶¶1, 16). This Court, however, is without authority

¹ Paragraph 10 of Petitioner’s Petition erroneously cites to chapter 199 of the Iowa Admin. Code. The correct chapter is 567.

to consider Petitioners' claims because Petitioners failed to exhaust their administrative remedies before invoking district court jurisdiction. Accordingly, Petitioner's claims must be dismissed.

PETITIONERS' PETITION MUST BE DISMISSED BECAUSE THEY FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

The Iowa Administrative Procedure Act ("IAPA") permits any "person or party who has *exhausted all adequate administrative remedies* and who is aggrieved or adversely affected by any final agency action" to seek judicial review of the agency action. Iowa Code § 17A.19(1) (emphasis added). A district court, however, is deprived of jurisdiction of the case if a party fails to exhaust any available administrative remedies before seeking relief. *Keokuk v. H.B.*, 593 N.W.2d 118, 122-23 (Iowa 1999) (citing *Shors v. Johnson*, 581 N.W.2d 648, 650 (Iowa 1998)). Although a district court is not deprived of subject matter jurisdiction over the matter, this authority must be withheld unless or until any available administrative remedies are exhausted. *Id.* Thus, this Court lacks authority to exercise its subject matter jurisdiction over Petitioner's Petition if they failed to exhaust any administrative remedy available to them. *Id.*

I. PETITIONERS WERE REQUIRED TO INITIATE A CONTESTED CASE PROCEEDING OF THE WATER USE PERMIT BEFORE BRINGING A PETITION FOR JUDICIAL REVIEW.

In order to require Petitioners exhaust any administrative remedies before bringing this action in district court, the following two conditions must exist:

- (1) an administrative remedy must exist for the claimed wrong, and
- (2) a statute must expressly or implicitly require that remedy to be exhausted before resort to the courts.

Id. at 123.

Lawler SCS' permit application was subject to the provisions of Iowa Code section 455B.278 (Permit application procedures). This statute requires the Iowa Environmental Commission ("EPC") to adopt rules for permit application procedures, including provisions for

“application, public notice and opportunity for public hearing, and contested cases.” Iowa Code § 455B.278(1). Furthermore, any person affected by IDNR action on a permit application is required to exhaust their administrative remedies as follows:

Action by the department upon an application for a permit required under this part may be appealed to the commission by the applicant or any affected person within thirty days of the department’s action. A hearing before the commission or its designee is a contested case. The hearings and judicial review of decisions of the commission shall be carried out in accordance with chapter 17A. Notwithstanding chapter 17A, petitions for judicial review may be filed in the district court of Polk county or of any county in which the property affected is located. If the commission, the district court, or the supreme court determines that the action of the commission shall be stayed, the petitioner shall file an appropriate bond approved by the court.

Id. at 455B.278(2).

In accordance with the above statutory mandate, the EPC adopted rules governing water use permit applications at 567 IAC 50, including the administrative remedies available to any persons affected by IDNR action on the permit application. The rule reads as follows:

Appeal of initial decision. Any person aggrieved by an initial decision issued under 567—50.8(17A,455B) may file a notice of appeal with the director. The notice of appeal must be filed within 30 days following the certified date of mailing of the decision unless the appellant shows good cause for failure to receive actual notice and file within the allowed time. The form of the notice of appeal and appeal procedures are governed by 567—Chapter 7. The department shall mail a copy of the notice of appeal to each person who commented on the application. If the appeal is from denial of a permit and a notice of recommendation to grant a permit was not published, the department shall publish the notice of commencement of a contested case and provide an opportunity for interested people to seek intervention in the contested case.

567 IAC 50.9. Accordingly, Petitioners were expressly required by statute to exhaust their administrative remedies before seeking judicial review, and the EPC specifically provided Petitioners with an administrative remedy for any alleged wrongs.

II. PETITIONERS FAILED TO EXHAUST THE ADMINISTRATIVE REMEDIES AVAILABLE TO THEM.

As Petitioners allege, the permit they challenge in this action was issued on May 29, 2023. (Petition ¶2). Although Petitioners vaguely and generically allege to have “exhausted all adequate administrative remedies” before seeking judicial review, they do not actually identify any administrative remedy they claim to have exhausted. (*See* Petition ¶5). Indeed, rather than administratively appeal the water use permit within 30 days as required by both statute and rule, Petitioners bypassed the administrative remedies available and brought this petition for judicial review as a direct action “from a decision by the Iowa Department of Natural Resources (IDNR) for a water withdrawal permit pursuant to Iowa Code § 455B. 265.” (Petition ¶1).

The water use permit being challenged by Petitioners is on the IDNR public database as Permit # 10476 (<https://programs.iowadnr.gov/wacop/Home/PermitSearch>). (Exhibit 1). As this public document demonstrates, the IDNR received Lawler SCS’ permit application on April 17, 2023. Public Notice was made in the Thursday, May 4, 2023 edition of the New Hampton Tribune of the IDNR’s intent to grant the permit and request for public comments on the permit. (Exhibit 2). The water use permit was issued on May 29, 2023, and published on the IDNR public database on May 30, 2023. (Exhibit 1).

Petitioners had until Wednesday, June 28, 2023, to administratively challenge the Lawler SCS water use permit by initiating a contested case proceeding before the EPC. *See* Iowa Code § 455B.278(2), 567 IAC 50.9. Petitioners failed to do so, and thereby failed to exhaust the administrative remedies available to them. This Court, therefore, is without authority to exercise jurisdiction over this petition for judicial review, and it must be dismissed.

WHEREFORE, Respondent Iowa Department of Natural Resources respectfully requests the Court dismiss Petitioners’ Petition and tax the costs of this action against the Petitioners.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa

/s/ David S. Steward
DAVID S. STEWARD
Assistant Attorney General

/s/ Jacob J. Larson
JACOB J. LARSON
Assistant Attorney General

/s/ Eric M. Dirth
ERIC M. DIRTH
Assistant Attorney General
Environmental Law Division
Hoover State Office Building
1305 E. Walnut St., 2nd Floor
Des Moines, Iowa 50319
Phone: (515) 281-5164
E-mail: david.steward@ag.iowa.gov
jacob.larson@ag.iowa.gov
eric.dirth@ag.iowa.gov

ATTORNEYS FOR RESPONDENT IOWA
DEPARTMENT OF NATURAL RESOURCES