IN THE IOWA DISTRICT COURT FOR POLK COUNTY

KIMBERLY JUNKER, CANDICE BRANDAU LARSON, and KATHY CARTER, Petitioners, vs. IOWA DEPARTMENT OF NATURAL RESOURCES, Respondent.	)	No. CVCV066246 RESISTANCE TO MOTION TO DISMISS AND REQUEST FOR ORAL ARGUMENT

Come now the Petitioners and in support of this Resistance to Motion to Dismiss, state to the Court as follows:

LEGAL STANDARD FOR MOTION TO DISMISS

As the Iowa Supreme Court explained in *Young v. Healthport Techs., Inc.*, 877 N.W.2d 124 (Iowa 2016):

> A court should grant a motion to dismiss "only if the petition on its face shows no right of recovery under any state of facts." *Tate v. Derifield*, 510 N.W.2d 885, 887 (Iowa 1994). Thus, a motion to dismiss may be properly granted "only when there exists no conceivable set of facts entitling the non-moving party to relief." Rees, 682 N.W.2d at 79 (quoting *Barkema v. Williams Pipeline Co*., 666 N.W.2d 612, 614 (Iowa 2003)). When a moving party attacks a claim by filing a motion to dismiss, that party "admits well-pleaded facts and waives ambiguity or uncertainty in the petition." *Schaffer v. Frank Moyer Const., Inc*., 563 N.W.2d 605, 607 (Iowa 1997). A court must decide the merits of a motion to dismiss based on the facts alleged in the petition, not the facts alleged by the moving party or facts that may be developed in an evidentiary hearing. *Berger v. Gen. United Grp., Inc*., 268 N.W.2d 630, 634 (Iowa 1978); *Riediger v. Marrland Dev. Corp.*, 253 N.W.2d 915, 916–17 (Iowa 1977).
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> Under our notice-pleading standards, nearly every case will survive a motion to dismiss for failure to state a claim upon which any relief may be granted. *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994). To survive a motion to dismiss, the petition need not allege the ultimate facts to support each element of a cause of action. *Id*. However, it must contain factual allegations sufficient to give the

> defendant fair notice of each claim asserted so the defendant can adequately respond. *Schmidt v. Wilkinson*, 340 N.W.2d 282, 283 (Iowa 1983). The allegations in a petition comply with this fair-notice requirement if the petition informs the defendant of the general nature of the claim and the incident giving rise to it. *Soike v. Evan Matthews & Co*., 302 N.W.2d 841, 842 (Iowa 1981). In ruling on a motion to dismiss, a court construes the petition in the light most favorable to the plaintiff and resolves any doubts in the plaintiff's favor. *Turner v. Iowa State Bank & Trust Co*., 743 N.W.2d 1, 3 (Iowa 2007).

Also, the Court must view Petitioners' Petition in the light most favorable to the Petitioners' and resolve any doubts in the Petitioners' favor. *White v. Harkrider*, 990 N.W.2d 647 (Iowa 2023).

PETITIONERS HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES

The requirement for exhaustion of administrative remedies applies if two conditions are met: an administrative remedy for the alleged wrong exists and exhausting this remedy is statutorily required. *UE Local 893/IUP v. State*, 928 N.W.2d 51 (Iowa 2019). In this case neither condition is present.

A. An Adequate Administrative Remedy Does Not Exist

Iowa Code § 455B.278(1) states that:

> The [Environmental Protection Commission] shall adopt, modify, or repeal rules establishing procedures by which permits required under this part shall be issued, suspended, revoked, modified, or denied. The rules shall include provisions for application, public notice and opportunity for public hearing, and contested cases. **Public notice of a decision by the director to issue a permit shall be given in a manner designed to inform persons who may be adversely affected by the permitted project or activity.** (emphasis added).

In other words, IDNR rules must ensure that any person, such as the Petitioners herein, be given notice that they will see or hear of the IDNR's decision to issue a permit. In this case, in order to comply with the above statute, anyone affected by a withdrawal of

millions of gallons of water from the Devonian Limestone aquifer should have been given reasonable notice pursuant to IDNR rules.

Instead of providing for such reasonable notice, 567 I.A.C. § 50.7(3)(a) states:

> Prior to the issuance of a permit to withdraw, divert or inject water, the department shall publish a notice of recommendation to grant a permit. The notice shall summarize the application and the recommendations in the summary report. The notice shall allow 20 days to request a copy of the summary report and submit comments on the report. The department may extend the comment period upon request for good cause. **The notice may be published in a newspaper circulated in the locality of the proposed water source, or the department may use other methods of publishing the notice to ensure adequate notice to the affected public.** The notice shall be sent to any person who has requested a copy of the notice concerning the particular water use under consideration. (emphasis added).

So the notice of the recommendation to issue a permit, the only way an affected person would know about the proposed permit, is published in a local newspaper in the locality of the proposed water source. In this case, as shown by the exhibit to IDNR's Motion to Dismiss, the notice was published in the New Hampton Tribune, a local paper in Chickasaw County. As shown by the affidavits of the Petitioners, attached hereto, they do not reside in Chickasaw County and would not be expected to read the New Hampton Tribune. And IDNR would surely know that the Devonian aquifer extends outside of Chickasaw County and the notice as required by § 50.7(3) should be published in a broader area than that served by the New Hampton Tribune. A map of the Devonian aquifer is hereto attached. Publishing notice in a broader area, in larger newspapers of more general circulation, was required to satisfy the requirement of § 455B.278, to "use other methods of publishing the notice to ensure adequate notice to the affected public."

Thus, because the notice as limited by the regulation violates the requirement of § 455B.278(1) to give notice "designed to inform persons who may be adversely affected,"

the Petitioners did not have an **adequate** administrative remedy, as required by § 17A.19(1). If they cannot be expected to even know about the proposed permit, they cannot be in a position to request an appeal to the EPC, pursuant to 457 I.A.C. § 50.9. If a remedy is illusory, it is not adequate. So Petitioners have shown that they had no adequate administrative remedy to exhaust.

B. Exhausting the Administrative Remedy Is Not Statutorily Required

Judicial review, pursuant to Iowa Code § 17A.19(1), is available to anyone "aggrieved **or** adversely affected" by agency action. (emphasis added). The word "or" is important and is disjunctive. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 12, at 116 (2002) ("Under the conjunctive/disjunctive canon, "and" combines items while "or" creates alternatives…"). Thus, an aggrieved person, or in the alternative, a person adversely affected may seek judicial review. As an example of terms used in the alternative, the Iowa Supreme Court, in *State v. Nelson*, 178 N.W.2d 434 (Iowa 1970), considered a criminal statute that prohibited ""an open and indecent or obscene exposure of his or her person." Regarding the use of the word "or" between indecent and obscene, the court concluded:

> This would indicate to us that the open exposure of a person is indecent per se, but not necessarily obscene; such it appears to us is the obvious intent of the statute. While it is true that the two words "indecent" and "obscene" have been used as synonyms for each other, we find that the eminent linguistic scholars and semanticists do not agree they are so interchangeable.

Id. at 437. That describes exactly the situation here with the terms "aggrieved" and "adversely affected."

It is clear, therefore, that a person aggrieved is distinct from a person adversely affected. Otherwise, the statute would not have used both terms with the connector, "or," between them. If the two terms mean the same thing, the statute would just use one of the terms, but not both, with the disjunctive connector "or." Petitioners have clearly stated in Paragraph 3 of their Petition that they are persons adversely affected.

567 I.A.C. § 50.9, which governs the requirement to appeal an administrative decision regarding a water withdrawal permit, states that only an aggrieved person may file a notice of appeal. Therefore, a person adversely affected is not required to appeal to the EPC. The requirement only applies to aggrieved persons. Although § 455B.278 provides for appeal to the EPC by the permit applicant or any affected person, it is § 50.9 of the IDNR rules that establishes the administrative remedies available, as admitted by IDNR at page 3 of its Motion to Dismiss ("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 person affected by IDNR action on the permit application"). Based on the clear language of the rule, only an aggrieved person is required to appeal to the EPC. Therefore, these Petitioners, as adversely affected persons, are not required to appeal to the EPC.

A person is aggrieved by suffering a denial of a legal right. *Merriam-Webster's Collegiate Dictionary* (10th Ed.) (definition of aggrieved). These Petitioners, however, have no legal right to a water withdrawal permit, so they cannot be aggrieved persons. And it is the right to a permit that is the subject of the agency action. But the Petitioners

are adversely affected, as set out in their Petition. As explained above, § 50.9 provides for appeal to the EPC only by aggrieved persons, not persons adversely affected.

The different terminology in § 455B.278 and § 50.9 creates some confusion. But the critical issue is whether the Petitioners have a right to seek judicial review pursuant to § 17A.19. There is a presumption of reviewability of agency action. *Richards v. Iowa Dept. Of Revenue and Finance*, 454 N.W.2d 573 (Iowa 1990). Although the issue in *Richards* was not exhaustion of administrative remedies, the court did make clear that lack of statutory clarity is to be resolved in favor of the presumption. So the lack of clarity between the language of § 455B.278 and § 50.9 must be resolved in favor of allowing the Petitioners to seek judicial review.

Thus, Petitioners have established that exhaustion of administrative remedies is not required, based on the facts in this case.

CONCLUSION

Requiring exhaustion of remedies should not be applied so strictly that it unfairly deprives a party from seeking judicial review. The facts of this case, perhaps a matter of first impression, together with well-known legal concepts, show that the Petitioners' right to seek judicial review should not be denied.

REQUEST FOR ORAL ARGUMENT

The facts and issues in this case do not avail themselves of a quick and easy answer. Oral argument will be helpful to the Court in resolving those facts and issues. Petitioners therefore request oral argument on the Respondent's Motion to Dismiss.

/s/ *Wallace L. Taylor*

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