STATE OF WISCONSIN | CIRCUIT COURT BRANCH 1 | OUTAGAMIE COUNTY

NEW CHESTER DAIRY, LLC and
MS REAL ESTATE HOLDINGS, LLC,

Petitioners,

WISCONSIN MANUFACTURERS AND
COMMERCE, et al.,

Intervenors-Petitioners,

v. Case No. 14CV001055

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent.

and

CLEAN WISCONSIN INC.,

Intervenor-Respondent.

INTERVENORS WISCONSIN MANUFACTURERS & COMMERCE, DAIRY BUSINESS ASSOCIATION, MIDWEST FOOD PROCESSORS ASSOCIATION, WISCONSIN POTATO & VEGETABLE GROWERS ASSOCIATION REPLY BRIEF ON THE MERITS

Respectfully submitted,

GREAT LAKES LEGAL FOUNDATION
Robert I. Fassbender, SBN 1013985
10 East Doty Street, Suite 504
Madison, WI 53703
Telephone: (608) 310-5315

Attorneys for Intervenors

INTRODUCTION

This case is unique. It appears to be the first opportunity for judicial review of 2011 Wisconsin Act 21 (Act 21) in the context of a Department of Natural Resources' (DNR) permit program. In addition, upon the withdrawal of the Wisconsin Department of Justice from the case, coupled with DNR's decision not to file a response brief, it has fallen upon Clean Wisconsin Inc. ("CWI") to defend DNR's position. Having DNR in effect taking a neutral position, however, suggests it be presumptuous to assume that CWI speaks for the state on this matter.

The Intervenors' position is that Wis. Stat. § 227.10(2m), created by Act 21, prohibits the DNR from issuing permit conditions that are not explicitly allowed by statute or administrative rule. Second, Wis. Stat. §§ 227.11(2)(a)1. and 2., also created by Act 21, precludes statutory preambles – declarations of legislative intent, purpose, findings, or policy, as well as descriptions of an agency's general powers or duties – from being used as a regulatory wildcard by agencies that cannot otherwise find explicit statutory authority. Both these policies are not a shift in the law as much as a reassertion that the legislature is the source of agency authorities, not the courts or the agencies themselves.

For the most part, CWI acknowledges that Wis. Stat. § 227.10(2m) requires that DNR must have explicit authorities to impose the monitoring well conditions at issue. The case turns, then, on whether DNR has been granted explicit authority to impose groundwater monitoring wells as a condition to New Chester Dairy, LLC's ("New Chester Dairy") high capacity well permit. CWI falls far short in its efforts to find any such explicit authority under the state's high capacity well program found at Wis. Stat. § 281.34 and related rules at Wis. Admin. Code NR § 812. CWI's argument, unavoidably, we suppose, reverts to an assertion that "explicit" really must mean "necessarily implied," which would render Wis. Stat. § 227.10(2m) meaningless. (CWI Br. at 13.)

INTEREST OF INTERVENORS

Intervenors Wisconsin Manufacturers & Commerce, Dairy Business Association, Midwest Food Processors Association, and Wisconsin Potato and Vegetable Growers Association are trade associations whose members include dairy producers (small and large), potato and vegetable growers, food processors, and manufacturers. Their members own and operate high capacity wells that are necessary to conduct their businesses. Without such wells they would have to shut down and move out of Wisconsin. Some have already done so.

There is nothing notably unique with New Chester Dairy's high capacity wells that led to DNR's conclusion groundwater monitoring was necessary. Intervenors reasonably anticipate DNR will continue to expand its policies of requiring monitoring wells. This is an expensive proposition for Intervenors' members; sometimes it will be prohibitively costly. Beyond the imposition of these costly requirements not authorized by law, reverting back to the pre-Act 21 policies – that agencies have broad plenary authority arising out of preamble clauses in the statutes – creates regulatory uncertainties that make it impossible for Wisconsin industries to meaningfully assess the cost of doing business in Wisconsin. Rather than providing discernable parameters that limit agency regulatory reach, the statutes would offer the regulatory community vague outlines of unlimited power.

ARGUMENT

I. THE COURT REVIEWS *DE NOVO* WHETHER DNR EXCEEDED ITS AUTHORITY UNDER WIS. STAT. § 227.10(2m).

CWI argues that DNR must be afforded great weight deference in applying its interpretation of Wis. Stat. § 281.34 and its own regulations. (CWI Br. at 7.) The issue before the court, however, is DNR's authority under Wis. Stat. § 227.10(2m). A court's review of legal issues of first impression is *de novo*. *RURAL v. PSC*, 2000 WI 129, ¶ 22, 239 Wis.2d 660, 619

N.W.2d 888. In addition, courts "are not bound by an agency's decision that concerns the scope of its own power." *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 11, 270 Wis. 2d 318, 677 N.W.2d 612.

CWI concurs with Intervenors that DNR is afforded no deference in its interpretation of its own authority. (CWI Br. at 7.) All parties appear to agree, then, that whether there exists explicit authorities in Wis. Stat. § 281.34 or DNR's regulations requires a court to interpret *de novo* the authority limitations set forth in Wis. Stat. § 227.10(2m). There should be no deference to DNR on the meaning of this seminal provision limiting an agency's authority to regulate Wisconsin businesses and citizens that never before has been addressed by DNR or the courts.[1]

II. THE TERMS "EXPLICITLY REQUIRED OR EXPLICITLY PERMITTED" CANNOT BE "HARMONIZED" TO MEAN NOTHING.

A. CWI Asks the Court to "Harmonize" Wis. Stat. § 227.10(2m) into Irrelevancy.

CWI argues that "Wis. Stat. § 227.10(2m) can and must be harmonized with other statutes, case law, and constitutional requirements." (CWI Br. at 12.) CWI's analysis starts with an observation that "it is well-settled principle of administrative law with nearly 100 years of case law establishing the scope of administrative agency authority as having 'only such powers as expressly granted to them or necessarily implied' by an act of the legislature." (CWI Br. at 13.). The following CWI conclusion that the term "explicitly" found at Wis. Stat. § 227.10(2m) is subsumed by these legal tenets is unsupported.

> Given the longstanding common law principle that agencies of the state have both express and necessarily implied authority, the most reasonable interpretation of Wis. Stat. § 227.10(2m) is a codification of the common-law principle, interpreting the phrase "explicitly required or explicitly permitted" to encompass both express authority and authority that is necessarily implied by the terms of the statutes. To read otherwise

[1] As previously briefed, this issue was not addressed by the Wisconsin Supreme Court in *Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res*., 2011 WI 54, ¶ 23, 335 Wis. 2d 47, 799 N.W.2d 73.

> would create a cumbersome, inflexible, and in some cases, impossible system of regulatory authority. (CWI Br. at 14.)

If the court were to agree with CWI on this point – that explicit authority incorporates the terms express and implied authority – it would render Wis. Stat. § 227.10(2m) inert. Such a reading would be "at odds with one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .'." *Corley v. United States,* 556 U.S. 303 (2009), citing *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). Put more eloquently, "these words cannot be meaningless, else they would not have been used." *United States v. Butler*, 297 U.S. 1, 65 (1936).

CWI's attempts to render the term "explicitly required or explicitly permitted" superfluous is also at odds with its own brief in which CWI notes that "[w]hen the legislature chooses to use two different words, we generally consider each separately and presume that different words have different meanings." (CWI Br. at 10, citing *Augsburger v.Homestead Mut. Ins. Co.*, 2014 WI 133, 359 Wis. 2d 385 ¶ 17, 856 N.W.2d 874.) The legislature's use of the term "explicitly" in Wis. Stat. § 227.10(2m) must presume to have a different meaning than the term "express" or "implied." But one need not resort to presumptions given the plain meaning of the terms.

CWI acknowledges that "statutory interpretation begins with the plain language of the statute." (CWI Br. at 10.) But their logic stops there. Their position that the terms "explicitly required or explicitly permitted" are "to encompass both express authority and authority that is necessarily implied" violates the most basic interpretive canons that statutes should be construed in a way that provisions not be rendered inoperative or superfluous and that statutes should be afforded their plain meaning.

B. CWI Erroneously Asserts There is No Legislative Intent to Deviate from Prior Judicial Pronouncements on Agency Authority.

In an attempt to bolster its argument that Wis. Stat. § 227.10(2m) is superfluous, CWI asserts that there is "no evidence . . . that the legislature intended to place this rigid restriction on the longstanding common law principle of implied authority." To the contrary, the intent behind these provisions is clear. Gov. Walker and the legislature aimed Act 21 directly at recent court decisions with the intent to overturn expansive interpretations of agency authority.

In *Wisconsin Builders Ass'n v. Wisconsin Dep't of Commerce*, 2009 WI App 20, 762 N.W.2d 845 (2008), the court of appeals found that Wis. Stat. § 101.14(4m)(b) does not set forth *limits* on the authority of the Department of Commerce, despite clear language that automatic fire sprinkler systems were to be required for only those multifamily dwellings that meet specific statutory criteria, such as exceeding 16,000 square feet or when more than 20 dwelling units. See Wis. Stat. § 101.14(4m)(b). Instead, the court concluded that under the Department's general powers, duties and jurisdiction provisions, specifically, Wis. Stat. § 101.02(15), "the Department has the *general authority* to enforce and administer all laws and lawful orders that require public buildings to be safe and that require "the protection of the life, health, safety and welfare of ... the public or tenants in any such public building." *Id.* ¶ 10. (Emphasis ours.)

In effect, the court rendered meaningless the legislative thresholds on surface area and number of units set forth in enabling legislation specifically addressing fire sprinkler systems. It follows that the entire sprinkler system enabling legislation was unnecessary because the plenary powers under Wis. Stat. § 101.02 allow for any rules that touch upon public building safety. That is, invocation of "general authorities" give the agency *carte blanc* authority over matters relating to building safety, which in turn, made the fire sprinkler system provisions superfluous and insignificant. In addition, use of Wis. Stat. § 101.02's powers and duties clause is inconsistent

with another tenant of statutory construction that "the purpose clause cannot override the operative language" in the statute. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 220 (2012).

In *Lake Beulah Mgmt. Dist. et al. v. Dep't of Natural Resources*, 2010 WI App 85, 787 N.W.2d 926 (2010), a different court of appeals concluded that broad general policy and purpose statutory provisions granted DNR the authority to regulate activities that were not expressly conferred to them in the statutes. The court notes:

> There are four statutes at issue here: two statutes provide a broad, general grant of authority to the DNR—Wis. Stat. §§ 281.11 and 281.12—and two statutes create specific rules for high capacity wells—Wis. Stat. §§ 281.34 and 281.35. *Id.* ¶17.

The court found: "We interpret these *general statutes* [Wis. Stat. §§ 281.11 and .12] as expressly delegating regulatory authority to the DNR necessary to fulfill its mandatory duty "to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private." *Id.* ¶ 19 (Emphasis ours.) Like the *Wisconsin Builders* case, *Lake Beulah* rendered the high capacity well enabling legislation superfluous and insignificant because the plenary powers conferred upon DNR under Wis. Stat. §§ 281.11 and .12 subsumes the more specific and deliberately developed high-capacity well enabling legislation set forth at Wis. Stat. §§ 281.34 and .35.

It was at this juncture that certain Intervenors participated in the *Lake Beulah* case as *amici* before the Wisconsin Supreme Court.[2] In a related development, Gov. Walker unveiled his legislative proposal that would become Act 21.

[2] As previously briefed, a group of *amica*, including Intervenors Wisconsin Manufacturers & Commerce, Dairy Business Association, and Midwest Food Processors Association, attempted to have the Supreme Court consider Wis. Stat. § 227.10(2m) as a supplemental authority in the *Lake Beulah* case. Instead, the Supreme Court merely chose to find the newly enacted law inapplicable to the case before them. *Lake Beulah,* 335 Wis. 2d 47, ¶ 39 n. 31.

Act 21 arose out of a Special Session, which is a "session of the Legislature convened by the Governor to accomplish a special purpose."[3] The legislation was introduced as Assembly Bill 8 by the Committee on Assembly Organization, but by request of Governor Scott Walker.[4] In essence, Gov. Walker was the author of Act 21 and his intentions were always clear.

When introducing his special session legislation that became Act 21, he specifically noted the Wisconsin Builders case.

> The Wisconsin Department of Commerce implemented rules requiring sprinkler systems in all multifamily dwellings except certain townhouse units even though state law *explicitly* stated that the sprinkler systems were required on multifamily dwellings exceeding 16,000 square feet or more than 20 dwelling units.
>
> * * *
>
> Unelected bureaucrats are drafting rules and regulations based on the department's *general duties provisions*, not based on the more specific laws the legislature meant to govern targeted industries or activities. Instead of basing rules on the specific rule of law approved by the legislature, bureaucrats are empowering themselves to use the department's *overall duties provision*.
>
> Laws are created by the elected officials in the legislature who have been empowered by the taxpayers, not employees of the State of Wisconsin. The practice of creating rules *without explicit legislative authority* is a constitutionally questionable practice that grants power to individuals who are not accountable to Wisconsin citizens.[5] (Emphasis ours.)

Act 21 is intended to restore Wisconsin's history of requiring clear delegation of authority in enabling legislation, not preamble pronouncements setting forth general authorities or general duties. To restore these limitations, the legislature had to overturn the recent expansive court interpretations that prefatory, general statutory provisions provide express or necessarily implied

[3] Wisconsin State Legislature Glossary. http://legis.wisconsin.gov/about/glossary/.

[4] 2011 Assembly Bill 8. http://docs.legis.wisconsin.gov/2011/proposals/jr1/ab8.

[5] Walker, Regulatory Reform Informational Paper, (Dec. 21, 2010.). http://walker.wi.gov/newsroom/press-release/regulatory-reform-info-paper.

agency authorities that, in turn, make the more specific and contemplative enabling legislation inoperative, superfluous, or otherwise meaningless.[6]

Through Act 21, the legislature exercised it prerogative to reverse a court's interpretation of statutes by substituting the no longer constraining *express* and *necessarily implied* principles with new limitations that require permit conditions, among other agency orders, to be "explicitly required or explicitly permitted." Wis. Stat. § 227.10(2m). In addition, Wis. Stat. §§ 227.11(2)(a)1. and 2., also created by Act 21, provide that statutory preambles – declarations of legislative intent, purpose, findings, or policy, as well as descriptions of an agency's general powers or duties – are not to be used as a regulatory wildcard by agencies that cannot otherwise find explicit statutory authority.

CWI's assertion that there is no evidence to suggest the legislature intended to make statutory changes to agency authority requirements is both puzzling and inaccurate. Reining in the expansive court interpretations of agencies authority was the precisely articulated purpose of Act 21. Regardless, relying upon legislative intent is not needed for this court to render an opinion on whether DNR can impose the monitoring well conditions to high-capacity well permits. The

[6] The legislative history of high-capacity well legislation is instructive as to why the legislature would prefer agency authorities be defined by enabling legislation rather than by courts using general statutory provisions.

> The statutory framework for high-capacity well permits was a result of collaborative and deliberate legislative debate and choice. Until 1985, the general standard in § 281.34(5)(a), that protected other public utility wells, was the only standard applicable to high-capacity well permits.
>
> In 1985 Act 60, the legislature expanded DNR's permit authority for high-capacity wells over 2 million gallons per day (gpd). In 2003 Act 310, the legislature expanded DNR's permit authority for high-capacity wells once again, explicitly regulating wells with capacities of 100,000 and 2 million gpd.
>
> Act 310 evidences the deliberate legislative approach it desired for the regulation of high-capacity wells through the creation of a Groundwater Advisory Committee for the purpose of reporting back to the legislature in 2007 on any additional recommended changes to DNR's high-capacity well permit authority.
>
> The 2007 report to the legislature evaluated various changes to existing law, one of which was to expand DNR authority to require additional environmental review for wells potentially affecting surface waters. That proposal was rejected by the committee. For a copy of the committee's report, go to: http://www.friendsofthelittleploverriver.org/assets/Reports/2007-GAC-Final-Report.pdf.

law on its face is clear. DNR must have explicit authority in a statute or rule to impose such conditions. They have neither.

III. DNR DOES NOT HAVE EXPLICIT AUTHORITY TO REQUIRE MONITORING WELL CONDITIONS IN HIGH CAPACITY WELL PERMITS.

A. There Is No Explicit Authority in Wisconsin's High Capacity Well Enabling Legislation or Regulations for the Inclusion of Monitoring Well Conditions.

In their search for explicit authority, CWI notes that Wis. Stat. § 281.34(2) requires an individual to obtain approval from DNR before constructing or withdrawing water from a high capacity well. (CWI Br. at 10.) But they appear to acknowledge that no explicit authority exists under these statutory provisions that would allow DNR to require monitoring wells as a condition for a high capacity well permit. So they then turned to Wis. Admin. Code NR § 812, which provides standards for well pump design and installation. (CWI Br. at 10.)

First, CWI extracts and cobbles together otherwise disjointed phrases from Wis. Admin. Code NR § 812.09(4) as evidence of explicit authorities. (CWI Br. at 11.) But read in its entirety, it is clear this provision only pertains to well and heat exchanged drill hole locations and related construction requirements for the high capacity well itself. Absolutely nothing can be found in this provision relating to separate monitoring wells. Second, CWI notes that this provision provides DNR authority to specify high capacity well locations. (CWI Br. at 11.) Again, this provision can only be read as providing authority with respect to the high capacity well itself, not for the installation and location of separate monitoring wells. CWI also concludes that this provision "would be rendered meaningless if DNR were not allowed to verify through use of monitoring wells whether the [well location] condition was effective or not." (CWI Br. at 12.) In other words, CWI asks the court to read into this provision authorities that CWI believes are "necessarily implied." This is precisely the judicial legislating Act 21 intends to preclude. Moreover, such a reading would render Wis. Stat. § 227.10(2m) meaningless.

CWI also raises the prospect that requiring monitoring wells must be read into the statute or rules in order for DNR to verify its decisions related to location and other conditions that may be explicitly allowed. But this path is also blocked by the requirement the permit conditions be explicitly required or explicitly permitted. DNR is not without options, however. As in the past, should it be determined that DNR has insufficient authorities to regulate high capacity wells, it is the legislature's prerogative, and only their prerogative, to enhance DNR's authorities through new legislative enactments. Or, rather than imposing these monitoring and research requirements on industry through permit conditions, DNR can exercise its authority to undertake research and monitoring relating to the interaction of groundwater and surface water. Wis. Stat. § 281.34(10).

B. There Is No Explicit Authority for the Inclusion of Monitoring Well Conditions in Wis. Stat. §§ 281.11 and .12.

CWI cites *Lake Beulah* for the proposition that DNR has the authority to impose the monitoring conditions. (CWI Br. at 8.) As previously briefed, the *Lake Beulah* court refused to take up the invitation to interpret Wis. Stat. § 227.10(2m). The court's discussion relating to DNR's authority under Wis. Stat. §§ 281.11 and 281.12 is not controlling with respect to whether those provisions contain the requisite explicit authorities required under Wis. Stat. § 227.10(2m).

Relevant to the explicit authority requirements set forth in Wis. Stat. § 227.10(2m) are Wis. Stat. §§ 227.11(2)(a)1. and 2., also created by Act 21, that provide that statutory preambles are not a source of DNR rulemaking authority. CWI dismisses these provisions because they reference rulemaking and concludes they "have no bearing on agencies ability to impose conditions on a case-by-case basis in an administrative decision." This is simply untrue. There is no such thing as case-by-case administrative authorities that are not explicitly authorized by statute or rule.

Wis. Stat. § 227.10(2m) clearly states the permit conditions can only arise out of explicit authorities set forth in the statute or rules. As previously discussed, there is no authority in DNR's high capacity well enabling legislation (Wis. Stat. § 281.34) nor in related rules (Wis. Admin. Code NR § 812). Wis. Stat. §§ 227.11 (2)(a)1. and 2. make it clear that DNR cannot address this vacancy in future rulemaking. They must, as has been done in prior years, amend its high capacity well enabling legislation. Moreover, these sections also provide a compelling basis to find that Wis. Stat. §§ 281.11 and 281.12 cannot be the source of any explicit statutory authority. That is, a legislative determination these statements of policy and purpose (§ 281.11) and declarations of general powers and duties (§ 281.12) do not provide rulemaking authority is because of their general, non-explicit nature. Regardless, there is nothing in Wis. Stat. §§ 281.11 and 281.12 that could be construed as explicitly requiring or explicitly permitting monitoring well conditions in high capacity well permits.

IV. DNR MUST RECONCILE ANY PUBLIC TRUST DOCTRINE DUTIES WITH THE LEGISLATIVELY PRESCRIBED LIMITATIONS SET FORTH IN WIS. STAT. § 227.10(2m).

CWI asserts that applying the plain meaning of Wis. Stat. § 227.10(2m) would run afoul of the *Lake Beulah* court's public trust doctrine directive. (CWI Br. At 18.) But as the *Lake Beulah* court recognized, DNR's public trust duties are only those that are specifically granted to them by the legislature. *See Lake Beulah*, 335 Wis. 2d 47, ¶ 34. Similarly, in all other respects, agencies only have those powers delegated to them by the legislature. *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 14, 270 Wis. 2d 318, 677 N.W.2d 612. It necessarily follows that the legislature can limit any delegated powers, public trust or otherwise, as they have in Wis. Stat. § 227.10(2m).

Subsequent to the *Lake Beulah* decision, the state supreme court reiterated key public trust limitations in *Rock-Koshkonong Lake District v. Department of Natural Resources* 2013

WI 74, 350 Wis. 2d 45, 833 N.W.2d 800. Most notably, when invalidating any public trust basis for DNR's efforts to regulate wetlands adjacent to navigable waters, the court affirmed public trust jurisdiction must have a nexus to navigable waters:

> The DNR's position seeks to extend its public trust jurisdiction beyond navigable waters to non-navigable waters and land. Wetlands are often not "navigable in fact." Nonnavigable land is by definition not navigable and may not be marshy or "wet." Eliminating the element of "navigability" from the public trust doctrine would remove one of the prerequisites for the DNR's *constitutional basis* for regulating and controlling water and land. Applying the public trust doctrine to non-navigable land above the OHWM [ordinary high water mark] would eliminate the rationale for the doctrine. The ramifications for private property owners could be very significant. Id. ¶77 Citing *DeGayner & Co. v. DNR*, 70 Wis. 2d 936, 236 N.W.2d 217 (1975), (Emphasis in original.)

In *DeGayner*, the Supreme Court rejected efforts to extend the public trust doctrine to a creek merely because it is a tributary to navigable waters, finding that such a nexus test "can be carried to ridiculous extremes, for it would mean that all tributaries, since they eventually run into some navigable body of water, must be held navigable." *Id.* at 948. When asserting its public trust arguments, CWI made no efforts to reconcile the requirement for groundwater monitoring well conditions to the Supreme Court's directive that public trust authority cannot be applied beyond navigable waters.

CONCLUSION

For the foregoing reasons, and all of those presented in its Opening Brief on the Merits, Intervenors respectfully request an Order of the Court invalidating the monitoring and reporting condition that DNR imposed on New Chester Dairy's high capacity well approvals.

Dated this 25th day of July, 2015.

Respectfully submitted,

GREAT LAKES LEGAL FOUNDATION
Attorneys for Intervenors-Plaintiffs
Wisconsin Manufacturers & Commerce, Dairy Business Association, Midwest Food Processors Association, Wisconsin Potato & Vegetable Growers Association

_____
Robert I. Fassbender, SBN 1013985
10 East Doty Street, Suite 504
Madison, WI 53703
Telephone: (608) 310-5315