STATE OF WISCONSIN | CIRCUIT COURT BRANCH 1 | OUTAGAMIE COUNTY

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

Petitioners,

WISCONSIN MANUFACTURERS &
COMMERCE, ET AL.,

Intervenor-Petitioners,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Case No. 14CV1055

Respondent.

and

CLEAN WISCONSIN,

Intervenor-Respondent.

INTERVENOR CLEAN WISCONSIN, INC.'S RESPONSE BRIEF ON THE MERITS

Respectfully submitted:

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INTRODUCTION

Access to and free use of navigable waters is a fundamental right in Wisconsin, founded in our state's constitution:

> 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.

WI Const., art. IX, § 1. This is the basis for the state's public trust doctrine. The Wisconsin legislature serves as the trustee of this public right, and has delegated "substantial authority" to the Department of Natural Resources ("DNR") for administration of the trust. *Wisconsin Env. Decade, Inc. v. Dep't of Nat. Res*, 85, Wis. 2d 518, 527, 271 N.W.2d 69, 73 (1978). It is for that reason that DNR is granted broad discretion, authority and a duty to protect navigable waters through its regulatory programs. Wis. Stat. § 281.11 makes clear that in its delegation of public trust, the legislature meant for this authority to be liberally construed and applied across water conservation and water quality programs administered by DNR in Wisconsin:

> To the end that these vital purposes may be accomplished, this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed in favor of the policy objectives set forth in this subchapter.

Similarly, Wisconsin Supreme Court rulings throughout the development of public trust doctrine jurisprudence have continually expanded and strengthened the public trust doctrine, showing that it is a broad responsibility intended to be liberally construed. From early on in the Court's application of the public trust doctrine, it has recognized the importance of liberal construction:

> The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be

> interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits. Navigable waters are public waters, and as such they should enure to the benefit of the public.

Diana Shooting Club v. Husting, 156 Wis. 261, 271, 145 N.W. 816 (1914). This concept has been reinforced throughout the development of the public trust doctrine, and has extended the protections of the public trust doctrine beyond navigability to protect waters of the state for fishing, hunting, recreation, and scenic beauty. *See, e.g., Muench v. Public Service Commission,* 261 Wis. 492, 53 N.W.2d 514, 55 N.W.2d 40 (1952); *Just v. Marinette County*, 56 Wis. 2d 7, 18, 201 N.W.2d 761 (1972); *Wisconsin Envt'l Decade v. Dep't. Natural Res.*, 85 Wis. 2d 518, 526, 271 N.W.2d 69, 72-73 (1978), *Hilton ex rel. Pages Homeowners' Ass'n v. Dep't Natural Res.,* 2006 WI 84, Wis. 2d.1, ¶18, 717 N.W.2d 166; *ABKA Ltd. P'ship v. Wis. Dept't Natural Res.,* 2002, WI 106, ¶¶11-12, 255 Wis. 2d 486, 648 N.W.2d 584; *Lake Beulah Management Dist. v. State Dept. of Natural Res.*, 2011 WI 54 ¶8.

New Chester Dairy and MS Holdings ("New Chester Dairy") now ask this Court to undermine over 100 years of public trust doctrine jurisprudence to find that DNR should narrowly construe its authority under Wis. Stat. Ch. 281 and in so doing, ignore the clear dictate of that chapter as well as its constitutional public trust duty.

New Chester Dairy seeks unconditional access to 145 million gallons of groundwater per year, with no accountability to DNR or the public for the effects of its groundwater use on public trust waters. In pursuit of this goal, New Chester Dairy asks this Court to find that DNR cannot as a matter of law administer its constitutionally-delegated, statutorily-defined, and caselaw-reinforced duty to protect waters of the state. It further requests that this Court go beyond its authority and substitute its judgment for that of the trier of fact, which it is expressly prohibited

from doing under Wisconsin Statutes §§ 227.57(6) and 227.57(8). Neither request is legally supportable, and therefore both requests must be denied.

Furthermore, the decision under review makes clear that monitoring is an essential condition, given the administrative law judge's substantial concerns regarding the trustworthiness of the underlying hydrogeological modeling. If this Court does rule in favor of New Chester Dairy, the permit must be remanded for WDNR to consider whether the permit is approvable without the monitoring condition.

BACKGROUND

Groundwater irrigation pumping in Adams County has seen a dramatic increase over the past 30 years, from 1.5 billion gallons per year in 1979 to 17 billion gallons per year in 2005. Report by S.S. Papadopulos & Assoc., Inc., "Evaluation of Groundwater Pumping, New Chester Township, Adams County, Wisconsin." (R. 0423.) Over this time, area waterways have seen a noticeable water level decline due in part to the significant groundwater pumping. *Id.* (R. 0423-0424.) The trend impacts lakefront property owners, area residents and visitors that rely on these waters for navigation, recreation, and scenic beauty, all of which are rights that are protected by Wisconsin's public trust doctrine. Thus, when New Chester Dairy applied for two new high capacity wells to pump an additional 145 million gallons of groundwater per year in Adams County, DNR had a duty and obligation to carefully evaluate whether those wells would have an additional impact on surface waters. *See generally, Lake Beulah Management Dist.*, 2011 WI 54, ¶44 (holding that the DNR has the authority and a general duty to consider potential environmental harm to waters of the state when reviewing a high capacity well permit application).

In support of its high capacity well application, New Chester Dairy used a computer model to estimate the impacts of its pumping on nearby surface waters. ALJ Decision, p. 2, ¶3 (R. 0041). No modeling is perfect, but the model relied upon by New Chester Dairy was particularly questionable, due to the sparse data available to the model developer regarding the region's hydrogeological features. ALJ Decision, p. 5, ¶23 and ¶¶25-29 (R. 0044). Moreover, the model had never been subject to any kind of field verification or post-audit, and the New Chester Dairy approval was the first test of the model's predictive abilities. Testimony of DNR witness Larry Lynch, transcript vol. 1, pp. 215-216 (R. 1432) Despite these uncertainties, the model was the best available predictive tool available to DNR, and DNR staff accepted the modeled impacts as a predictive estimate with significant qualifications. Testimony of DNR Witness Larry Lynch, Transcript Vol. 1, pp. 177-182 (R.1392-1397).

The model showed impacts to nearby surface waters, including Campbell Creek, Risk Creek and Neenah Creek. Environmental Assessment Changes and Response to Comments, p. 11 (R. 0936). DNR accepted these impacts as modeled, but had significant concerns regarding the fitness of the model. ALJ Decision, p. 5, ¶22 (R. 0044). Due to these concerns, DNR conditioned the well approval on field verification (monitoring and reporting) of the model's predicted impacts to groundwater. *Id,* Conditional high capacity well approval, Ex. 5, pp. 7-8 (R. 0955-0956.) (Hereinafter referred to as the "monitoring and reporting condition.") New Chester Dairy requested a contested case hearing on the permit, contesting the monitoring and reporting condition, claiming that the condition was both beyond the Department's authority and unreasonably imposed on the facility. Administrative Law Judge ("ALJ") Boldt presided over the hearing at the Department of Hearings and Appeals, and found that DNR's monitoring condition was reasonable, necessary, and properly imposed pursuant to DNR's authority to administer a

high-capacity well program. ALJ Decision, p. 10, ¶4 (R. 0049). Among other conclusions, the ALJ found that:

> The record supported the scientific basis for the specific monitoring regimen in this permit which will allow a comparison with the predicted groundwater reductions as recommended by the USGS to reevaluate the original model. (Ex. 118) This seems especially appropriate in this case, given that Dr. Andrews agreed that there was a lot of variability in the hydraulic conductivity data, yet the hydraulic conductivity was the primary calibration parameter for the model.

ALJ Decision, Discussion, p. 9 (R. 0048).

INTEREST OF INTERVENOR

Clean Wisconsin is a non-profit 501(c)(3) organization with 14,400 members and supporters statewide. Clean Wisconsin works on behalf of our members to protect clean air and water and to promote clean energy at the state level through advocacy at the legislature and by holding polluters accountable. Our mission is to protect the special places that make Wisconsin such a wonderful place to live, work and play.

Clean Wisconsin intervened in the contested case hearing at the Division of Hearings and Appeals. Clean Wisconsin's members' interests are directly affected by the regulatory programs that are administered by our natural resources agency, including the high capacity well program. Moreover, transparency and accountability are two fundamental factors affecting public rights in navigable waters and the DNR's ability to protect those rights. Therefore, DNR's authority to regulate high capacity wells in a manner that protects public trust waters and DNR's authority to monitor and enforce conditions of its well permitting program fundamentally affect the interests of our members.

ARGUMENT

I. DNR MUST BE AFFORDED GREAT WEIGHT DEFERENCE IN APPLYING ITS INTERPRETATION OF WIS. STAT. 281.34 AND ITS OWN REGULATIONS.

Courts must grant great weight deference to an agency's interpretation of law in situations where (1) the agency is charged by the legislature with the duty of administering the statute at issue; (2) the agency determination is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming its interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. *Hilton v. DNR,* 2006 WI 84, ¶50. *See also, Kitten v. DWD,* 2002 WI 54, ¶27, 252 Wis. 2d 561, 644 N.W.2d 649 ("When analyzing agency decisions, this court has generally applied three levels of deference to an agency's conclusions of law and statutory interpretation…If the agency is charged by the legislature with the interpretation of a statute; the interpretation of the agency is long-standing; and the agency has experience, technical competence, and specialized knowledge that aid the agency in its interpretation and application of the statute, we have afforded the agency determination great weight." (citing *Jicha v. DILHR,* 169 Wis. 2d 284, 290, 485 N.W.2d 256 (1992)).

DNR is charged with administering the high-capacity well program under Wis. Stat. §281.34 and Wis. Admin. Code chs. NR 812 and 820, and has been administering this program in its current form since its enactment in 2003, and before that has been issuing approvals for high capacity wells since its inception over 45 years ago under former Wis. Stat. § 281.17 (1995) (original version at § 144.025(2)(e) (1969) (created by 1967 c. 614, s.37.)).

While New Chester Dairy is correct that DNR is afforded no deference in its interpretation of its own authority (Pet. Br., pp. 5-7), it incorrectly concludes that DNR is

interpreting Wis. Stat. § 227.10(2m). While Clean Wisconsin agrees that statutory interpretation of that provision should be subject to a *de novo* review, DNR's action below is actually an interpretation of the requirements of Wis. Stats. §§ 281.11, 281.12, and 281.34 and Wis. Admin. Code chs. NR 812 and 820. DNR has been charged by the legislature with the interpretation and administration of these statutes, its interpretation and administration of the high-capacity well permitting requirements is long-standing, and the DNR has experience, technical competence, and specialized knowledge that aid the agency in its interpretation of the statute. *See, e.g. Lake Beulah*, 2011 WI 54, ¶¶ 43, 46. ("DNR utilizes its experience and exercises its discretion to make what, by necessity, are fact-specific determinations" based on the "highly fact-specific" information presented by applicants for high capacity well approvals.) Thus, with regard to its interpretation of whether the monitoring and reporting condition was explicitly permitted pursuant to the terms of those authorities, the DNR's interpretation should be afforded great weight deference.

II. DNR HAS A CLEAR STATUTORY AUTHORITY AND A PUBLIC TRUST DUTY TO IMPOSE THE MONITORING AND REPORTING CONDITION.

A. DNR has a clear authority to impose the monitoring and reporting condition.

In 2011, the Wisconsin Supreme Court examined Wisconsin's high capacity well regulatory scheme and unanimously held that, "for all proposed high capacity wells, the legislature has *expressly granted* the DNR the authority and a general duty to review all [high-capacity well] permit applications and to decide whether to issue the permit, to issue the permit with conditions, or to deny the application." (Emphasis added.) *Lake Beulah*, 2011 WI 54, ¶39, *citing* Wis. Stat. §§ 281.34(2), (4)-(5), 281.35(4)(b), (5) (hereinafter referred to as *Beulah*). "The high capacity well permitting framework along with the DNR's authority and general duty to

preserve waters of the state provides the DNR with the discretion to undertake the review it deems necessary for all proposed high capacity wells…" *Id.* Moreover, the Court held, "there is nothing in either Wis. Stat. § 281.34 or §281.35 that limits the DNR's authority to consider the environmental impacts of a proposed high capacity well, nor is there any language in Subchapter II of Wis. Stat. ch. 281 that requires the DNR to issue a permit for a well if the statutory requirements are met and no formal review or findings are required." *Id* at ¶ 41.

Since 2011, the language of Subchapter II of Wis. Stat. §281.34 and 281.35 has not changed, and the Wisconsin Supreme Court has not reversed or modified the *Beulah* decision. Yet, New Chester Dairy argues that DNR lacks the authority to administer its constitutionally-mandated public trust duty because of the limitation imposed on the agency under Wis. Stat. § 227.10(2m). That section provides, in pertinent part, that:

> No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter…

New Chester Dairy interprets this section to preclude DNR's authority to impose certain conditions on a high capacity well permit, even though that administrative task is *explicitly permitted* by statute as found by the *Beulah* court in 2011. New Chester Dairy views the provision in Wis. Stat. §227.10(2m) as a sweeping reform that obliterates DNR's administrative discretion. However, as discussed more fully below, that interpretation of Wis. Stat. § 227.10(2m) is inconsistent with the plain language of that section and the basic tenets of statutory interpretation, produces an absurd result and, in this case, produces an unconstitutional result. Therefore, New Chester Dairy's interpretation of Wis. Stat. §227.10(2m) should be rejected.

1. The monitoring and reporting condition is "expressly permitted" under applicable statutes and regulations as required by Wis. Stat. § 227.10(2m).

Statutory interpretation begins with the plain language of the statute. *Augsburger v. Homestead Mut. Ins. Co.*, 2014 WI 133, 359 Wis. 2d 385 ¶17,856 N.W.2d 874. The plain language of §227.10(2m) states that no condition may be imposed on a permit unless it is "explicitly required or explicitly permitted." New Chester Dairy conflates these requirements, glossing over the distinction between what is "required" and what is "permitted." Throughout its brief, New Chester Dairy describes the requirement as what is "expressly authorized" by statute and rule. While the distinction may seem nuanced, it is significant. "'When the legislature chooses to use two different words, we generally consider each separately and presume that different words have different meanings.'" *Id, citing Pawlowski*, 2009 WI 105, 322 Wis. 2d 21, ¶22, 777 N.W.2d 67. By condensing the language of the statute, New Chester Dairy overlooks the plain meaning of what is "explicitly required" or "explicitly permitted" by statute or rule.

Wis. Stat. § 281.34(2) *explicitly requires* any individual to obtain an approval from DNR before constructing or withdrawing groundwater from a high capacity well. ("An owner shall apply to the department for approval before construction of a high capacity well begins. No person may construct or withdraw water from a high capacity well without the approval of the department.") Aside from that requirement, there is very little direction found in the statute for DNR regarding approval standards or conditions for most high-capacity well approvals. Wis. Admin. Code NR 812 provides the applicable standards for well pump design and installation, and the only approval standards applicable to high capacity wells other than those described in

Wis. Stat. § 281.34(5)(a)-(c).[1] Within NR 812, department approvals are governed by Wis. Admin. Code NR 812.09. However, NR 812.09(4) provides that:

> Prior department approval is required for the activities described in this subsection. When deemed necessary and appropriate for the **protection of** public safety, safe drinking water and **the groundwater resource**, the department may specify **more stringent well** and heat exchange drillhole **locations, well** and heat exchange drillhole **construction or pump installation specifications** for existing and proposed high capacity, school or wastewater treatment plant water systems requiring approval by this subsection or water systems approved by variance. (Emphasis added.)

While Intervenor-Petitioners cite this provision of administrative code, concluding "[t]here is nothing in this code section that provides explicit authority to require monitoring well installation and data collection for high capacity wells," (Int.-Pet. Br., p. 8), the emphasized language above directly contravenes their conclusion. The monitoring and reporting condition is nothing more than a "more stringent well... specification," "deemed necessary and appropriate for the protection of… the groundwater resource." NR 812.09(4). New Chester Dairy also overlooks this explicit authority for DNR to impose a more stringent well specification, discussing only the limited denial standard found immediately following it. Pet. Br., p. 16. This provision provides the requisite explicit authority for DNR to impose the condition under §227.10(2m), and this Court's analysis could accordingly stop there.

Even if the monitoring and reporting condition were found to be outside the bounds of the more stringent well specifications that are explicitly permitted pursuant to Wis. Admin. Code NR 812.09(4), that section still provides sufficient authority for DNR's monitoring and reporting condition. DNR's explicit authority to impose a "more stringent well location" to protect the groundwater resource (and, by extension pursuant to *Beulah*, the public trust resource) under NR

[1]It is well-established that special consideration is to be given to high capacity wells that affect public water supply, are located in a groundwater protection areas, will result in high water loss, or will impact a spring as described in Wis. Stat. § 281.34(5)(a)-(c). It is also well established that New Chester Dairy's wells do not fall under any of these categories, and therefore the heightened environmental review and approval standards that apply to those categories of wells do not apply here.

812.09(4) would be rendered meaningless if DNR were not allowed to verify whether the condition was effective or not. This is one of several absurd scenarios that would result from New Chester Dairy's suggested application of § 227.10(2m) here, and is exactly the type of strict interpretation that has previously been rejected by Wisconsin courts in interpreting agency authority.

In 2012, for example, the Wisconsin Supreme Court examined the language of the Livestock Facility Siting Law in *Adams v. State Livestock Facilities Siting Review Bd.* Even though that law stated that the agency "'shall,' if it determines that a challenge is justified, 'reverse the decision of the political subdivision,'" the Court upheld the agency's decision to modify, rather than reverse, the decision of the political subdivision. 2012 WI 85, ¶61, *citing* Wis. Stat. § 93.90(5)(d). The provisions of Wis. Stat. §93.90 did not leave room for the reviewing agency (in that case, the Livestock Facility Siting Review Board) to modify, rather than reverse, the approval, yet the Court held, "[s]uch an outcome would render many other carefully designed components of the statute meaningless." *Id* at ¶ 64, *citing State ex. Rel. Kalal v. Circuit Court for Dane County (In re Criminal Complaint),* 2004 WI 58, 271 Wis. 2d 633, ¶46. Similarly here, finding that DNR could impose conditions on high capacity well approvals (including conditions as to the location, well design, and pumping rates) to protect the groundwater resource but could not require monitoring and reporting on whether those conditions are meeting their anticipated goals renders other carefully designed components of the high-capacity well regulations meaningless.

2. Wis. Stat. §227.10(2m) can and must be harmonized with other statutes, case law, and constitutional requirements.

The concept that an administrative agency's authority is limited to that which has been explicitly conferred upon it by the legislature is not new. To the contrary, it is a 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 are expressly granted to them or necessarily implied" by an act of the legislature. *See, e.g., American Brass Co. v. State Board of Health, 245 Wis. 440, 448, 15 N.W.2d 27 (1944), citing Monroe v. Railroad Comm.* (1919) 170 Wis. 180, 174 N.W. 450. ("No proposition of law is better established than that administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds")*; Racine Fire & Police comm. v. Stanfield,* 70 Wis. 2d 395, 234 N.W.2d 308 (1975). ("The effect of this rule has generally been that such statutes are strictly construed to preclude the exercise of a[n agency] power which is not expressly granted."); *see also Oneida County v. Converse,* 180 Wis. 2d 120, 125, 508 N.W.2d 416 (1993); *Maple Leaf Farms, Inc. v. State Dep't Natural Res.,* 2001 WI App 170, ¶13, 247 Wis. 2d 96; *Wisconsin Citizens Concerned for Cranes and Doves v. DNR,* 2004 WI 40, ¶14, 270 Wis. 2d 318, 677 N.W.2d 612, *Adams v. State Livestock Facilities Siting Review Bd.,* 2012 WI 85, ¶62. Yet, courts have also consistently found that limiting agency powers to those "expressly granted" is too restrictive, as on a case-by-case basis, fact-specific scenarios raise unresolvable problems with this approach. The most efficient and most reasonable solution to this problem has been to conclude that agencies also possess powers which are "necessarily implied" by the terms of a statute. *See Adams*, 2012 WI 85, ¶62.

In interpreting §227.10(2m), the court must consider that "a statute does not abrogate any rule of common law unless the abrogation is so clearly expressed as to leave no doubt of the

legislature's intent. A statute in derogation of the common law must be strictly construed so as to have minimal effect on the common law rule." *NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 836, 520 N.W.2d 93, 96 (Wis. Ct. App. 1994) (internal citations omitted). "To accomplish a change in the common law, the language of the statute must be clear, unambiguous, and peremptory." Fuchsgruber v. Custom Accessories, Inc., 2001 WI 81, ¶25, 244 Wis. 2d 758, 773, 628 N.W.2d 833, 841.

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 would create a cumbersome, inflexible, and in some cases, impossible system of regulatory authority.

Furthermore, there is no evidence in either the words of the statute or the drafting file for 2011 Act 21 that the legislature intended to place this rigid restriction on the longstanding common law principle of implied authority. While New Chester Dairy cites extensively to secondary materials that indicate that the rulemaking provisions of Act 21 represent a "sweeping change" to agency *rulemaking* authority, it is unable to point to similar materials which speak directly to the interpretation or intent behind § 227.10(2m). It is difficult to imagine that the State Legislature would act so recklessly as to abandon a 100-year old common law doctrine of agency authority without simultaneously giving agencies the tools necessary to implement the change. Absent a clear, unambiguous and peremptory dictate to the contrary, the provision should be harmonized with the common law rather than read to overturn it.

3. **Wis. Stat. § 227.10(2m) must be read to avoid an absurd result.**

A sweeping interpretation of §227.10(2m) creates a regulatory scenario in which the Legislature must anticipate every potential permit condition and include it in each statute the Legislature has charged an administrative agency with the responsibility to administer, or else leave the agency without adequate tools or discretion to implement the statutes as they are written. Either scenario is completely untenable and produces an absurd result. Indeed, the Wisconsin Court of Appeals has considered and rejected the notion that all permit language must (or even could) be written into statute or rule:

> This would make the issuance of permits an untimely, cumbersome and inflexible exercise that would not benefit permit holders at all. It makes more sense that the legislature would allow the DNR flexibility in drafting conditions in permits. This allows the DNR to work individually with permit holders to fashion permits that more closely balance the specific needs of the permit holder with public environmental concerns.

Maple Leaf Farms, Inc. v. State Dep't of Natural Res., 2001 WI App 170, ¶31. Similarly here, while DNR has a clear statutory authority and constitutional responsibility to regulate *all* high-capacity wells in a manner that protects the groundwater as well as surface water resources of the state, the statutory scheme provided for such regulation is sorely lacking in specifics for how exactly DNR is supposed to accomplish that task. Moreover, with over 18,000 individual high capacity wells in the state,[2] it would be virtually impossible for the legislature to anticipate fact-specific scenarios and appropriate conditions for each individual high capacity well approval that DNR reviews.

Disallowing the monitoring and reporting condition produces a second absurd result: DNR is required to make a regulatory determination whether to approve, deny, or conditionally

[2] Number of records retrieved upon query of DNR's online high-capacity well database, found at: http://dnr.wi.gov/topic/wells/highcapacity.html. Accessed May 27, 2015.

approve a high capacity well application, but is prohibited from collecting information from the permittee to determine whether that permit is in compliance with its very terms. This regulatory "Catch-22" is likely the precise outcome that New Chester Dairy and Intervenor-Petitioners hope to see in this case. However, it is exactly this untenable and absurd situation that serves as the linchpin in the argument against interpreting the statute this way, as courts are required to interpret statutes as to avoid absurd results:

> In examining the statutory text, however, we do more than focus on a dictionary definition of each word. Words are given meaning to avoid absurd, unreasonable, or implausible results and results that are clearly at odds with the legislature's purpose.

Force v. Am. Family Mut. Ins. Co. 2014 WI 82, ¶30. As interpreted by the *Beulah* Court, the statutory and constitutional authority granted to DNR under Wis. Stats. §§ 281.11, 281.12, and 281.34 provides a clear framework for DNR to exercise its discretion to impose reasonable conditions on high-capacity wells in order to protect groundwater and surface water resources. It follows that DNR is also expressly permitted to require monitoring and reporting on regulated activities to ensure that permitees are meeting the terms of their permits.

4. **Wis. Stat. §227.10(2m) must be read to avoid an unconstitutional result.**

In addition to producing an absurd result, New Chester Dairy's reading of Wis. Stat. § 227.10(2m) produces an unconstitutional result, because it would be a derogation of the state's public trust duty, discussed above. "It is a fundamental rule of statutory construction that a court is required to avoid construing a statute in such a way as would render that statute unconstitutional." *United States Fire Ins. Co. v. E. D. Wesley Co.,* 105 Wis. 2d 305, 319, 313 N.W.2d 833, 840 (1982). The validity of Wis. Stat. § 227.10(2m) thus turns on the question of whether that provision can be reconciled with the constitutional requirements of the public trust

doctrine. Clean Wisconsin believes that it can, and that New Chester Dairy's offered reading of that statutory provision accordingly should be denied.

In determining the constitutionality of a statute, there is a strong presumption in favor of constitutionality. *Ferdon v. Wis. Patients Comp. Fund*, 2005 WI 125**,** ¶68. If the words of the statute can be reconciled with the constitutional requirement, the court should adopt that interpretation of the statute. *Beulah,* ¶42*, citing Beard v. Lee Enters., Inc.* 225 Wis. 2d 1, 15, 591 N.W.2d 156 (1999) ("Apparently conflicting provisions of law should be construed so as to harmonize them and thus give effect to the leading idea behind the law.")

In this case, such an interpretation is possible, because the Supreme Court of Wisconsin has already stated that the provisions of the statutes governing the high-capacity well program "expressly grant[] the DNR the authority and a general duty to review all permit applications and decide whether to issue the permit, to issue the permit with conditions, or to deny the application." *Beulah,* at ¶ 39. This interpretation is consistent with the plain language of Wis. Stat. § 227.10(2m), which does not require every condition to be explicitly and exhaustively listed by statute or rule, but which merely requires that the conditions be "explicitly permitted" by statute or rule in order to be imposed by the agency. Not only has the Supreme Court already determined that DNR's authority is "expressly granted" by the legislature to "undertake the review *it deems necessary for all* proposed high capacity wells," *Beulah,* ¶ 39 (emphasis added), but DNR also has explicit authority found in Wis. Admin. Code § NR 812.09(4) to impose necessary conditions on well approvals to protect the groundwater resource, as discussed above.

Absent any direct limitation on its delegation of public trust, DNR retains its authority to act within the statutory framework to "utilize[] its expertise and exercise[] its discretion to make what, by necessity, are fact-specific determinations." *Beulah*, ¶43. "The fact that these are broad

standards does not make them non-existent ones." *Id.* Moreover, the *Beulah* Court found that DNR's authority and duty in administering the high capacity well program is grounded in its constitutionally-based, delegated public trust duty. *Beulah*,¶39. DNR's action in this case was firmly rooted in the same statutory and constitutional authorities as contemplated by *Beulah.* The monitoring and reporting condition was a direct response to concerns that New Chester Dairy's wells had the potential to produce significant deleterious impacts to public trust waters:

> Q: Would you say that you would be comfortable going forward with making this regulatory decision based on the model without monitoring conditions?
>
> A: No.
>
> Q: That's primarily based on the potential for impacts to Risk Creek and other creeks in the area?
>
> A: Yes.

Testimony of DNR Witness Mr. Lynch, Tr., vol. 1, p. 215, lines 5-12 (R. 1431). Without the monitoring and reporting condition, the modeled impacts were, as far as DNR was concerned, too close to "significant" for comfort. *Id.* Therefore, to grant the permit without such a condition would have been a derogation of the State's public trust duty.

Given the clear language in *Beulah* that directly speaks to DNR's authority and public trust duty under the high capacity well permitting program, combined with the findings of fact and record of decision from the administrative proceeding, it is evident that the condition at issue here is not only *permitted* by statute or rule, it is *required* by DNR's constitutionally-based public trust duty to protect waters of the state. The narrow construction and application of Wis. Stat. § 227.10(2m) suggested by New Chester Dairy runs afoul of this constitutional directive and should be rejected.

B. Limitations on the DNR's rulemaking authority stemming from 2011 Act 21 are irrelevant to the monitoring and reporting condition.

In support of its argument, New Chester Dairy discusses at length the impact that 2011 Act 21 had on DNR's *rulemaking* authority. Pet. Br., pp. 10-14, citing changes to Wis. Stat. § 227.11. However, changes that 2011 Act 21 made to Wis. Stat. § 227.11 only affect agency *rulemaking authority*, and have no bearing on an agency's ability to impose conditions on a case-by-case basis in an administrative decision. DNR's action here is not a rulemaking action, and no weight should be given to New Chester Dairy's argument that the limitations found in Wis. Stat. § 227.11 apply to DNR's regulatory authority to impose conditions on high capacity well permits under Wis. Stat. § 281.34.

III. THE MONITORING AND REPORTING CONDITION WAS A REASONABLE EXERCISE OF DNR'S AUTHORITY UNDER ITS HIGH CAPACITY WELL PERMITTING PROGRAM.

A. A Reviewing Court May Not Substitute Its Judgment for that of the Agency on a Disputed Finding of Fact or Discretionary Issue

A reviewing court "shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact," nor shall a reviewing court "substitute its judgment for that of the agency on an issue of discretion." Wis. Stat. §§ 227.57(6) and 227.57(8). Wisconsin courts have emphatically reiterated the "primacy of the agency's role as fact finder" in decision after decision. *See, e.g. Sierra Club v. Wis. Dep't of Natural Res.*, 2010 WI App 89, ¶25, 327 Wis. 2d 706, 787 N.W.2d 855, 2010 Wisc. App. LEXIS 482 ("We may not substitute our judgment for the agency's judgment regarding the weight of the evidence."); *Hedlund v. Wis. Dep't of Health Servs.*, 2011 WI App 153, ¶21, 337 Wis. 2d 634, 807 N.W.2d

672 ("The ALJ, as the finder of fact, is entitled to make reasonable inferences from the evidence…If the factual findings of the administrative body are reasonable, they will be upheld" (internal citations omitted)); *Kitten v. DWD,* 2002 WI 54, ¶5, 252 Wis. 2d 561, 644 N.W.2d 649 ("The findings of an administrative agency do not even need to reflect a preponderance of the evidence as long as the agency's conclusions are reasonable" (internal citations omitted)).

New Chester Dairy disputes the efficacy of having three years of groundwater monitoring data, the care with which the Condition was crafted, as well as the significance of confounding effects on the analysis the monitoring and reporting condition can provide, and asks this Court to substitute its judgment for that of the DNR and Administrative Law Judge Boldt. Pet. Br., pp. 29-32. New Chester Dairy's request is clearly barred by statute and extensive case law, as the trier of fact has already evaluated the credibility and weight of the evidence presented by all three of the DNR's expert witnesses and by New Chester Dairy's expert witness, and found the DNR's testimony to be more compelling and credible at hearing.

This careful and measured evaluation is evident throughout the Findings of Fact, Conclusions of Law, and Order issued in the administrative proceeding below. In summarizing the various experts' experience, the Findings of Fact describe that New Chester Dairy's expert witness, Dr. Charles Andrews, "does not have experience as a regulator in determining whether groundwater monitoring is necessary to verify whether a groundwater model has accurately predicted groundwater drawdown from high capacity wells," which is the main purpose of the Monitoring and Reporting Condition. (ALJ Decision, p. 4-5, ¶21 (R. 0043-0044).) Additionally, DNR expert witnesses' testimony provides substantial evidence for upholding the condition, and all three DNR witnesses were found to "have extensive experience reviewing groundwater models, issuing high capacity well approvals, or both, in the regulatory context." ALJ Decision,

p. 4, ¶17 (R. 0043). "All three…found that…groundwater monitoring was necessary in order to verify the SSPA model's predictions regarding groundwater drawdown…" ALJ Decision, p. 5, ¶22 (R. 0044). Regarding the DNR's need for three years of groundwater monitoring data, DNR expert witness Mr. Lynch "explained that a minimum of three years of monitoring was required because the SSPA report included a five-year projection of groundwater drawdown, and DNR may be able to reasonably determine after three years whether or not groundwater drawdown was occurring as predicted in the SSPA model." ALJ Decision, p. 6, ¶34 (R. 0045). DNR expert witness, Mr. Johnson, further stated that the "DNR should see three feet of groundwater drawdown after the initial three years if the model is accurate." ALJ Decision, p. 6, ¶34 (R. 0045).

New Chester Dairy further argues that the DNR expert witnesses "did not scientifically evaluate the usefulness of the data they would be requiring New Chester Dairy to collect" in arguing that the DNR did not carefully craft the requirement (New Chester Brief, p. 30). Once again, there is substantial evidence in the record to support the ALJ's conclusion. Contrary to New Chester Dairy's conclusion that there is no evidence in the record to support the condition, DNR expert witnesses' testimony regarding the usefulness of three years of groundwater monitoring data demonstrate that the DNR had several scientifically-based reasons to require the Monitoring and Reporting Condition.

Although New Chester Dairy would have this Court believe that the ALJ "ignored" evidence offered by its witness, the Findings of Fact paint a different picture. ALJ Boldt dedicates several Findings of Fact to the DNR expert witnesses' concerns, as well as Dr. Andrews' admissions about the lack of reliable data input into the SSPA model, the data relied upon to predict groundwater drawdowns. (ALJ Decision, p. 5, ¶23 ("Mr. Johnson had concerns

with the sparseness of input parameters for the model."); ¶25 ("Mr. Freihoefer had concerns with the model inputs and the wide range of hydraulic conductivity values."); ¶27 ("Dr. Andrews admitted that the model calculated stream flow and groundwater level changes are only as good as the model inputs, and these inputs are not precisely known.")) It seems that New Chester Dairy has also "ignored" these statements in the ALJ's decision that show that the decision was indeed based on substantial evidence found in the record.

Finally, New Chester Dairy argues that the DNR expert witnesses did not consider "significant confounding effects" such as "irrigation wells" in crafting the Monitoring and Reporting Condition. Pet. Br., p. 32. However, DNR witness Mr. Lynch explained DNR's reasoning, stating the "more frequent monitoring during the period in which irrigation wells in the area are also operating" was required to "separate out the impacts of the dairy's wells from the irrigation wells." ALJ Decision, p. 6, ¶36 (R. 0045). Again, New Chester Dairy has ignored the clear and detailed Findings of Fact, and asks this Court to substitute its view of the evidence for the judgment of the trier of fact, who has already considered and decided on the various issues the Dairy disputes.

With regard to the substantial evidence test referenced in Wis. Stat. § 227.57(6), the Supreme Court has explained that "[t]he test is whether, taking into account all of the evidence in the record, 'reasonable minds could arrive at the same conclusion as the agency.'" *Kitten v. DWD,* 2002 WI 54, ¶5, 252 Wis. 2d 561, 644 N.W.2d 649 (citations omitted). When substantial evidence supports two conflicting views, "'it is for the agency to determine which view of the evidence it wishes to accept.'" *Bucyrus-Erie Co. v. State, Dep't of Industry, Labor & Human Relations,* 90 Wis. 2d 408, 418, 280 N.W.2d 142, 147 (1979), *citing Robertson transport Co. v. Public Serv. Comm.,* 39 Wis. 2d 643, 658, 159 N.W.2d 636 (1968). Moreover, the Court of

Appeals emphasized that "a reviewing court may not "evaluate…credibility," as New Chester Dairy asks this Court to do. *Id*.

The Wisconsin Supreme Court recently reiterated this long-standing principle in its *Xcel Energy Servs., Inc. v. Labor & Indus. Review Com'n* decision, holding that, "where LIRC's order or award depends on a finding by LIRC, "the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact."" 2013 WI 64, ¶48, 349 Wis. 2d 234, 833 N.W.2d 665. In *Xcel*, the Supreme Court clearly explained that reviewing courts have no authority to reevaluate an agency's findings of fact:

> It is not LIRC's role to evaluate every individual premise upon which an expert's opinion is based, nor it is the role of the courts to verify that LIRC's decision gave the proper weight to experts' intermediate conclusions. Rather, LIRC's role is to make findings supported by credible and substantial evidence in the record. Similarly, our role is to examine the record to ensure that evidence of record supports the findings LIRC actually reached, not to reevaluate the weight and credibility of every piece of evidence upon which LIRC relied.

Id., ¶52,. *See also, Milwaukee Symphony Orchestra, Inc. v. DOR*, 2010 WI 33, ¶31, 324 Wis. 2d 68, 781 N.W.2d 674 ("[T]he weight and credibility of the evidence are for the agency, not the reviewing court, to determine." (quoting *Hilton v. DNR*, 2006 WI 84, ¶25, 293 Wis. 2d 1, 717 N.W.2d 166)).

Emphasizing the high level of deference accorded to agency decisions when applying the substantial evidence test, the *Hilton* Court held that, "The "substantial evidence" rule affords significant deference to the agency's factual findings", such that "[t]he agency's decision may be set aside by a reviewing court only when, upon examination of the entire record, the evidence, including the inferences therefrom, is such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences." *Hilton v. DNR*, 2006 WI 84,

¶52, 293 Wis. 2d 1, 717 N.W.2d 166, 2006 Wisc. LEXIS 380 (quoting *Sterlingworth Condo. Ass'n v. DNR*, 205 Wis. 2d 710, 727, 556 N.W.2d 791 (Ct. App. 1996) (citing *Hamilton v. Department of Industry, Labor & Human Relations*, 94 Wis. 2d 611, 618, 288 N.W.2d 857 (1980)). New Chester Dairy fails to show that the ALJ's decision should be reversed under the substantial evidence standard, as the decision is well-founded in credible evidence in the record, and a reasonable person, acting reasonably, could reach the same conclusion from the evidence and its inferences.

B. The Wisconsin DNR's Inclusion of a Monitoring and Reporting Condition on New Chester Dairy's High Capacity Well Permit is Reasonable.

New Chester Dairy argues that it is unreasonable for the Wisconsin DNR to require sufficient data to verify the groundwater impacts of high capacity wells it is charged with regulating, to ensure such wells do not cause significant adverse impacts to the waters of the state. Pet. Br. pp. 29-40. Upon review of the record in this case, it is clear that the DNR's action in including a Monitoring and Reporting Condition on New Chester Dairy's High Capacity Well Permit is both reasonable and necessary for the DNR to exercise its duty of ensuring that the waters of the state do not experience significant adverse impacts.

High capacity wells have the potential to significantly and adversely impact the waters of the state; accordingly, the DNR must review all high capacity well applications to ensure that the operation of such wells will not cause significant adverse environmental impacts to nearby waters of the state. ALJ Decision, p. 4, ¶16 (R. 0043). Given the significant uncertainties with the groundwater modeling performed in this case, monitoring requirements were developed to verify that the actual impacts resembled the anticipated impacts of the wells. (ALJ Decision, p. 6, ¶31 (R. 0045).) DNR expert witness, Mr. Lynch, "explained the basis for the Condition, which

was to verify that the groundwater drawdowns predicted by the SSPA model were correct." (ALJ Decision, p. 6, ¶32 (R. 0045).) DNR experts Mr. Johnson and Mr. Lynch further explained that, "the monitoring data would be compared with the modeled predictions of groundwater drawdown and would be used with other data collected over the same time period….to determine whether the actual reductions in groundwater levels were consistent with what was predicted in the model." ALJ Decision, p. 6, ¶33 (R. 0045). Mr. Lynch further clarified the necessary time period of the monitoring, as well as its frequency. He explained that, as the SSPA model included a five-year projection of groundwater drawdown, the DNR could "reasonably determine after three years whether or not the groundwater drawdown was occurring as predicted in the SSPA model." ALJ Decision, p. 6, ¶34 (R. 0045).

The need for more frequent monitoring was required "during the period in which irrigation wells in the area are also operating…to be able to separate out the impacts of the dairy's wells from the irrigation wells." (ALJ Decision, p. 6, ¶36 (R. 0045).) DNR experts Mr. Johnson and Mr. Lynch both stated that they were "confident that DNR was capable of separating out the impacts of the Dairy's wells, since accounting for well interference is learned in a beginning level hydrogeology course" and the DNR has been doing similar calculations for more than six decades. ALJ Decision, p. 6, ¶37 (R. 0045). DNR's monitoring and reporting condition was reasonable and necessary to verify its determination that the wells as proposed would meet the statutory standards as well as its public trust duty to protect waters of the state.

CONCLUSION

For the reasons discussed herein, DNR has a clear authority to impose the monitoring and reporting condition on New Chester Dairy's high capacity well permit, and DNR reasonably

exercised its authority to impose the condition in this case. Accordingly, the high capacity well permit should be approved in its entirety.

Dated this 28th day of May, 2015.

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