STATE OF WISCONSIN | CIRCUIT COURT BRANCH 3 | DANE COUNTY

CLEAN WISCONSIN, INC.

and

PLEASANT LAKE MANAGEMENT DISTRICT

Petitioners,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

WISCONSIN MANUFACTURERS & COMMERCE, et al.,

Intervenors.

Case Nos. 16-CV-2817
16-CV-2818
16-CV-2819
16-CV-2820
16-CV-2821
16-CV-2822
16-CV-2823
16-CV-2824

RESPONSE BRIEF OF INTERVENORS WISCONSIN MANUFACTURERS & COMMERCE, DAIRY BUSINESS ASSOCIATION, MIDWEST FOOD PRODUCTS ASSOCIATION, WISCONSIN POTATO & VEGETABLE GROWERS ASSOCIATION, WISCONSIN CHEESE MAKERS ASSOCIATION, WISCONSIN FARM BUREAU FEDERATION, WISCONSIN PAPER COUNCIL, AND WISCONSIN CORN GROWERS ASSOCIATION

Respectfully submitted:

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INTRODUCTION

Through these consolidated cases, Petitioners take direct aim at 2011 Wis. Act 21 regulatory reforms. Act 21 created Wis. Stat. § 227.10 (2m) that prohibits administrative agencies from imposing regulatory mandates that are not explicitly allowed by statute or administrative rule. With respect to the Department of Natural Resources (DNR), this prohibition precludes public trust authorities that are not explicitly delegated to DNR. 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. Because these provisions are descriptive and not substantive requirements, no explicit public trust delegation resides therein.

This case turns on the Petitioners' ability to convince the Court that high capacity well permits complying with the letter of explicit legislative enactments need to be voided. They assert DNR breached expansive duties Petitioners believe arise from Wisconsin's Public Trust Doctrine despite the Wisconsin Supreme Court's recent holding that public trust authority only applies to lands below a navigable waters ordinary high water mark. If successful, Petitioners' efforts here could shut down or otherwise curtail hundreds of operations requiring water from these wells. This case, therefore, will affect much more than the eight well applications before this Court.

Petitioners urge the Court to void the high capacity well permits targeted by this litigation. These permits are essential to operating eight Wisconsin agricultural operations. If Petitioners prevail, hundreds of other Wisconsin businesses holding high capacity well permits may be shut down or otherwise curtailed because their well applications were granted under DNR policies Petitioners seek to invalidate here. That is, if the Court invalidates DNR policies underpinning

approval of the permit applications in this case, so too goes all wells, past and future, and business operations depending on those wells, that have or would have been approved under the voided policies. The Petitioners desire, and likely anticipate, this domino effect when requesting, upon invalidating the eight permits in these consolidated cases, the Court impose the underlying findings to *all* high capacity well applications.

It is our position that:

1. The statutory preambles provided at §§ 281.11 and 281.12 do not provide DNR Public Trust or any other authorities to provide Petitioners' requested relief.
2. DNR correctly, and consistent with the Attorney General Opinion, applied the explicit requirements at Wis. Stat. § 281.34 when approving the eight high capacity well permits being challenged here.
3. Moreover, public trust authority does not apply to high capacity wells located on lands not below the relevant high-water mark of navigable water bodies.
4. Consistent with the requirement for explicit authority, applicants should be able to rely upon those explicit standards found at Wis. Stats. § 281.34, rather than be subject to regulatory uncertainty arising out of judicial directions causing DNR to impose conditions or (denials) on a permit by permit basis.

INTEREST OF INTERVENORS

The Intervenors are eight trade associations whose members interact with DNR and other state agencies on a regular basis. Intervenors' members own and operate businesses in nearly every category of agricultural, business, and industrial activity. Many of the Intervenors' members own and operate high capacity wells that are regulated by DNR, and many others are contemplating the construction of high capacity wells to support planned business development and expansion activities.

Water is essential both for the agricultural and manufacturing sectors. Groundwater is often the only source of water for these operations. For example, it would be virtually impossible to grow adequate quality potatoes and vegetables in the central sands area without high capacity well irrigation. Wisconsin law requires a permit from DNR to operate a high capacity well. Without such permit, there will be no well, no well water, and no agricultural and manufacturing operations dependent upon such well water. Loss of high capacity well permits will, therefore, result in great economic harm to numerous Intervenors' member companies, many of whom are small, family-run businesses.

The relief sought by Petitioners is to do just that; that is, to have the court reverse, set aside, or vacate eight DNR permit approvals of the high capacity well applications that are the subject of the consolidated cases. Under Wis. Stat. §281.34 (7), once a high capacity well permit has been approved, DNR must either modify or rescind the permit if the approval is not in conformance with the applicable law. Thus, granting the relief sought could trigger existing permits to be modified or rescinded. Such a ruling may impact many or all existing high capacity well permits. Particularly at risk are those permits that are targeted in this litigation and the hundreds of other permits approved by DNR under the same protocols Petitioners seek to invalidate in these consolidated cases.

Petitioners are also seeking the Court direct DNR to consider the cumulative impacts of a high capacity well prior to approval of the permit application. If the Court grants Petitioners' request to consider cumulative impacts or other factors or permit conditions not evaluated by DNR when issuing high capacity well permits, hundreds of permits held by Intervenors' members could be modified, rescinded or otherwise affected.

There is also a potential that a court decision granting the relief sought would adversely impact permits issued prior to the Attorney General opinion.[1] There are thousands of such permits in existence that are essential for all sorts of agricultural and manufacturing processes requiring water from high capacity wells. Intervenors have identified over 450 members with high capacity well permits issued prior to the Attorney General opinion. At a minimum, establishing new high capacity well permitting protocols by judicial directive resulting from this case will create significant regulatory uncertainty for anyone holding such a permit.

Agricultural and manufacturing companies that require new high capacity well permits would also be injured if the Court grants the relief requested. Their high capacity well permit applications would have an increased likelihood of being denied, approved with infeasible conditions, or not acted upon in a timely manner. Denial or granting the permit with infeasible conditions would have similar impacts to having an existing permit being rescinded. Instead of curtailing existing operations, those agricultural and manufacturing processes needing water from a high capacity well would never be launched. The company would have little choice but to invest outside of Wisconsin.

More common and problematic is the scenario in which DNR puts its high capacity well permit program on hold in response to the court granting Petitioners the relief sought. This situation faced permit applicants prior to the Attorney General opinion. For example, the February 2016 request by the Assembly Committee on Organization for the Attorney General opinion was to "address confusion surrounding the authority of the DNR" that resulted in a high capacity well permit application backlog. Id.

[1] OAG-16-1

ARGUMENTS

I. Standard of Review – Case Law Supports the Persuasive Value of Attorney General Opinions as Guidance in Statutory Interpretation.

The standard of review articulated in *Racine Harley-Davidson, Inc. v. State*, 2006 WI 86, ¶11, 292 Wis. 2d 549, 717 N.W.2d 184 that statutory interpretation "is ordinarily a question of law determined independently by a court..." is a reasonable starting point for this review. While there is extensive case law regarding the three levels of deference that courts may apply to agency decisions – great weight, due weight, and no deference – under current law, per *Racine Harley-Davidson, Inc*. and a long line of Wisconsin Supreme Court precedent supporting it, this case calls for a more nuanced consideration of the appropriate standard of review.[2]

While in the abstract we might agree with Petitioners' first assertion for *de novo* review, regarding the breadth of application of Wis. Stats. §§227.10(2m) and 227.11(2)(a)1-2 to most Wisconsin executive branch agencies, there are significant mitigating factors to their argument. For instance, the standard of review here should reflect the gravity and importance of a correct interpretation of the relevant statutes, as well as the underlying constitutional questions, in order to guide all executive branch agencies in the proper course in implementing Act 21, as the Office of the Attorney General has done for the DNR.

The attorney general first concluded that "[t]hrough the plain language of Act 21, the Legislature sought to regain and maintain control of the breadth of agency authority in two ways. First, an agency must have explicit authority to impose license and permit conditions and second, by requiring explicit authority for rulemaking. Wis. Stats. §§227.10(2m) and 227.11(2)(a). Act 21

[2] The Great Lakes Legal Foundation (Foundation), on behalf of 11 associations as *amici*, is on record in *Tetra Tech EC, Inc., and Lower Fox River Remediation LLC, v. Wisconsin Department of Revenue*, Appeal No. 2015AP2019 before the Wisconsin Supreme Court challenging the current law of deference to administrative agencies by Wisconsin courts. The present litigation presents a unique confluence of legal analysis and administrative action that we believe justifies this court in considering the persuasive guidance of the OAG.

makes clear that permit conditions and rulemaking may no longer be premised on implied agency authority."

The attorney general opinion continues on the Constitutional question "that DNR's imposition of cumulative impact analyses for all high capacity wells is precluded by Act 21. I further conclude that Wis. Stat §281.34(5m) clearly illustrates the Legislature's intent to concede very limited public trust authority to DNR regarding cumulative impacts of high capacity wells."

In *The Voice of Wisconsin Rapids, LLC and Jeff Williams, v. Wisconsin Rapids Public School District and Colleen Dickman,* CA 364 Wis. 2d 429 ¶13, 867 N.W. 2d 825, an open records dispute, the District IV Court of Appeals noted: "[O]pinions of the attorney general are not binding as precedent, but they may be persuasive as to the meaning of statutes. The legislature has expressly charged the state attorney general with interpreting open meetings and public records statutes, and provided that '[a]ny person may request advice from the attorney general as to the applicability' of the laws. Wis. Stat. §§19.98 and 19.39. Thus, the interpretation advanced by the attorney general is of particular importance here." Citing *State v. Beaver Dam Area Dev. Corp.* 2008 WI 90 ¶37, 312 Wis. 2d 84, 752 N.W.2d 295.

Here, the attorney general opinion should be persuasive with the court. The citizens directly before this court – the challenged well permittees – do not have the benefit of direct statutory authority to request a formal attorney general opinion on this matter, as they would under Wisconsin open meetings and in public records disputes. However, the request for the attorney general opinion here came from the Speaker of the Wisconsin State Assembly.

Reviewing the Speaker's and Assembly Organization Committee's February 2016 letter requesting the formal attorney general opinion, a primary motivating factor was to remove the shroud of administrative uncertainty and indecision leading to the backlog of well permit

applications pending before the DNR at that time. The Assembly Speaker, on behalf of Wisconsin citizens such as these well permittees, was seeking transparency regarding the implementation by the DNR of the Act 21 amendments to the Administrative Procedures Act that should be – and we will argue in this brief are – facially clear, both within the well permitting statutory framework, and under the state constitution.

Administrative certainty in the DNR well-permitting process followed from the legal clarity contained in the attorney general opinion. In fact, some permittees before the Court in this consolidated case were among those well permit applicants whose permits were "backlogged" within the DNR until the issuance of the attorney general opinion.

It was on behalf of permittees like those before the Court that the Assembly Speaker sought clarification of the legislative regulatory parameters contained in the attorney general opinion that led to the full implementation of Act 21 by the agency. The DNR was guided and persuaded by that analysis. Therefore, the legal analysis of the attorney general opinion should carry persuasive value in analyzing the issues now before this court.

The Wisconsin Supreme court held in *Town of Vernon v. Waukesha County*., 102 Wis. 2d 686, 692, 307 N.W. 2d 227, 230 (1981) that "[a]lthough a well-reasoned attorney general's opinion is always of some persuasive value when a court later addresses the meaning of the same statute (*see State v. Ludwig,* 31 Wis.2d 690, 698, 143 N.W.2d 548 (1966)), it is particularly persuasive when the record shows that that opinion was accepted by the administrative agency primarily concerned with the implementation of the statute and that interpretation has been given a practical and uniform effect over a long period of time."

It is for this court to decide the sufficiency of time that must pass between the issuance of an attorney general opinion, and its acceptance by an administrative agency in construing statutory

questions like those at the heart of the dispute here. However, in *State v. Ludwig* cited above the court found "We agree with the attorney general's analysis (an attorney general opinion) and reiterate what we said recently in *Green v. Jones* (1964), 23 Wis. (2d) 551, 558, 128 N. W. (2d) 1, that attorney general's opinions relating to the purposes of a statute are 'persuasive guides as to the meaning and purpose of the enactment.'"

While *de novo* or no-deference review may appear, on first impression, to be appropriate as the standard of review in this proceeding. We urge the court to consider the persuasive guidance of the attorney general opinion, based upon the DNR's adoption of it, as well as its nexus to the legislature's original request for a formal attorney general opinion seeking to clarify administrative uncertainty regarding this very issue.

II. Agencies are only Afforded that Authority Delegated to them by the Legislature. The Court in *Lake Beulah* found Sweeping Implied Authorities in Prefatory Statutory Provision. Through Act 21, the Legislature Overturned *Lake Beulah* Relating to Implicit Regulatory Authority.

A. Through Act 21, the Governor and Legislature Intended to Eliminate Implied Agency, and In Doing So, Reverse *Lake Beulah*.

The Wisconsin Supreme Court recently reprised that it is "the fundamental principle that both our state and the federal Republic separate governmental powers between independent legislative, executive, and judicial branches." *Gabler v. Crime Victims Rights Bd*., 2017 WI 67, ¶3, No. 2016AP275 (June 27, 2017).

Alexander Hamilton wrote, "[t]he interpretation of laws is the proper and particular province of the courts." *The Federalist Papers,* No. 78 (Alexander Hamilton). Highlighting the role of the judicial branch in *Gabler*, the court found "[n]o aspect of the judicial power is more fundamental than the judiciary's exclusive responsibility to exercise judgment in cases and controversies arising under the law." *Gabler,* 2017 WI 67, ¶37. Yet, James Madison explains that

"[i]n republican government, the legislative authority necessarily predominates.' *The Federalist Papers*, No. 51, ¶6.

The *Lake Beulah* decision and Act 21 reflects an effective and permissive interaction between the executive, legislative and judicial branches on the issue before this court. Specifically, the executive and legislative branches exercised their prerogative to clarify or otherwise restate the law on which they deem the judiciary miscalculated. On this point, then Judge Neil Gorsuch observes that if the executive or legislative branches believe the courts missed the mark, "the Constitution prescribes the appropriate remedial process. It's called legislation." *Guitierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (2016) (Gorsuch, J., concurring).

In *Lake Beulah*, the court missed the mark; as a result, the governor and legislature enacted 2011 Wis. Act. 21.

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 there are 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. *Reading Law*, Anthony Scalia, Brian Gardner, pp. 220.

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.

In response to these two appellant cases, in part, Gov. Walker unveiled his legislative proposal that would become Act 21.

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 was 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

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[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.

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

Through Act 21, the legislature exercised its 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. Taken together, these provisions eliminate implied agency authority.

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 meaning of Wis. Stat. § 227.10 (2m). The law on its face is clear. DNR must have explicit authority in a statute or rule to impose such conditions.

B. The Lake Beulah Court Did Not Take Up the Invitation to Interpret Wis. Stat. § 227.10(2m).

Section 227.10(2m) was created by Act 21, effective June 8, 2011. The provision that controls here did not exist until after the briefing and oral argument in *Lake Beulah*. A group of *amici*, including Intervenors Wisconsin Manufacturers & Commerce, Dairy Business Association, and Midwest Food Processors Association, did attempt, however, to have the Supreme Court consider Wis. Stat. § 227.10(2m) as a supplemental authority pursuant to Wis. Stat. § 809.19(10).

In response, all the parties in the case, including DNR, asserted for multiple reasons that Wis. Stat. § 227.10(2m) was not relevant to the *Lake Beulah* case. Merely referencing the attempt

by the *amici* group in a footnote, the Supreme Court stated that they "agree with the parties that 2011 Wisconsin Act 21 does not affect our analysis *in this case*. Therefore, we do not address this statutory change any further." *Lake Beulah,* 335 Wis. 2d 47, ¶ 39 n. 31 (emphasis ours). Nowhere else in the 48-page decision did the Supreme Court reference Wis. Stat. § 227.10(2m). A fair interpretation of this footnote is that the Supreme Court merely chose to find the newly enacted law inapplicable to the case before them. Nothing more can be read from this *Lake Beulah* footnote. It simply stretches reason that the Supreme Court would address in a footnote an issue of such import that was not previously before the court.

C. The Legislature Has Not Delegated DNR the Authority to Regulate High Capacity Wells Under the Public Trust Doctrine.

As discussed below, Wisconsin's public trust doctrine applies only to lands below the ordinary high water mark, thus, making the doctrine inapplicable to high capacity wells. In addition, Chapter 281 does not provide DNR any explicit public trust authority with respect to high capacity wells.

Wis. Stat. § 227.10(2m) provides:

> No agency may implement or enforce any standard, requirement, or threshold, including 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. . . . (Emphasis ours.)

Because the court "'assume[s] that the legislature's intent is expressed in the statutory language,' statutory interpretation begins with the language of the statute." And "[i]f the meaning of the statute is plain, and therefore unambiguous, our inquiry goes no further and we apply the statute according to our ascertainment of its *plain meaning*." *Sheboygan County Dep't of Health & Human Servs. v. Tanya M.B.*, 2010 WI 55, ¶ 27, 325 Wis. 2d 524 (citing *State ex rel. Kalal v.*

Circuit Court for Dane County, 2004 WI 58, ¶¶ 44-45, 271 Wis. 2d 633, 681 N.W.2d 110). (Emphasis ours.)

The dispositive language in Wis. Stat. § 227.10(2m) is the term "explicitly." It is neither ambiguous nor vague, and its plain meaning is:

> **Explicit**. 1 clearly stated and leaving nothing implied; distinctly expressed; definite; *distinguished from implicit*. *Webster's New World College Dictionary* (4th Edition). (Emphasis ours.)

Given the meaning of "explicit," any DNR public trust authority must be clearly stated in the statutes, and notably, *not* implied. Moreover, when the state legislature is delegating authority based on the public trust doctrine, "such delegation of authority should be in clear and unmistakable language and cannot be implied from the language of a general statute…" *City of Madison v. Tolzman*, 7 Wis. 2d 570, 575, 97 N.W.2d 513 (1959).

The Legislature conferred DNR limited but explicit authority when it enacted language regulating high capacity wells under Wis. Stat. § 281.34. This section created a comprehensive permitting framework based on specific criteria. It is a delegation of police power by the legislature, containing no explicit language that could reasonably be construed as a delegation of public trust authority.

With the enabling legislation, Wis. Stat. § 281.34, lacking explicit public trust delegation, Petitioners look for implicit authorities under statutory prefatory provisions, and find them explicit. For public trust authority, Petitioners look to Wis. Stat. §§ 281.11 and 281.12, which provide in part:

> The department shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private. Wis. Stat. §281.11.
>
> The department shall have general supervision and control over the waters of the state. It shall carry out the planning, management and regulatory programs

> necessary for implementing the policy and purpose of this chapter. Wis. Stat. § 281.12.

These provisions are, however, not explicit. Act 21 has provisions that validate what should be a clear reading of Wis. Stat. § 227.10(2m).

Although the plain meaning of "explicit" should exclude the use of implicit authorities found in Wis. Stat. §§ 281.11 and .12 for permit conditions, the governor and the Legislature sent a clear message through other provisions in Act 21 that these prefatory provisions do not provide sufficiently explicit regulatory authority. Sections Wis. Stat. 227.11 (2)(a)1. and 2, both created by Act 21, provide in part:

> A statutory or nonstatutory provision containing a statement or declaration of legislative intent, *purpose*, findings, or *policy* does not confer rule−making authority on the agency or augment the agency's rule−making authority beyond the rule−making authority that is explicitly conferred on the agency by the legislature.
>
> A statutory provision describing the agency's general *powers* or *duties* does not confer rule−making authority on the agency or augment the agency's rule−making authority beyond the rule−making authority that is explicitly conferred on the agency by the legislature. (Emphasis ours)

Relating to these provisions in Act 21, Governor Walker wrote that there was a need for "legislation that states . . . that the departments' broad statements of policies or general duties or powers provisions do not empower the department to create rules not explicitly authorized in the state statutes" to individuals who are not accountable to Wisconsin citizens. (Walker, Regulatory Reform Informational Paper, Dec. 21, 2010.) Similarly, Secretary for Administration Mike Huebsch stated that, "the most critical aspects of this legislation are to . . . limit [the ability to create] rules to the express authority granted by the Legislature . . ." (Huebsch Testimony, SB 8, (Feb. 1, 2011)). And finally, Tom Tiffany, the lead author of AB 8 (companion bill to SB 8) said, "[The] agency's general powers do not confer rule-making authority. In other words they can't use

their mission statement in order to write a rule." (Transcript of Jan. 2011 Special Session Assembly Floor Debate on AB 8, (Feb. 2, 2011)). (AB 8 was enacted as Act 21.)

Sections Wis. Stat. 227.11 (2)(a)1. and 2 clearly took aim at agency "mission statements." The Legislature made it clear that statements of policy and purpose referring to DNR's role in *managing the waters of the state* and its general powers and duties to *supervise and control the waters of the state*, under Wis. Stat. §§ 281.11 and 281.12, respectively, are not to be a basis for rulemaking authority. And it necessarily follows that these prefatory provision are not explicit authority for permit conditions or public trust because they are simply not explicit in any plain meaning of that word; something "clearly stated and leaving nothing implied."

The policies set forth in Act 21 are consistent with many courts and commentators' views that the statutory prologue cannot be invoked when the text is clear. *See Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) finding that "It is a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists. Courts should look to materials like preambles and titles only if the text of the instrument is ambiguous." The court in *Jogi* also cites Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 47.04, at 146 (5th ed.1992) ("The preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.").

And as a practical matter, to allow these general, all-encompassing prefatory statements in Wis. Stat. §§ 281.11 and 281.12 to override the explicit requirements in Wis. Stat. § 283.34 renders both Wis. Stat. § 227.10(2m) and § 281.34 meaningless. That is, the legislature need not have bothered enacting Wis. Stat. §281.34 with explicit language for permit conditions in high capacity wells because Wis. Stat. §§ 281.11 and 281.12 would, according to the Petitioners reasoning, provide requisite authority for DNR to impose those conditions set forth in § 281.34(5)(a)-(dm)

even if § 281.34(5)(a)-(dm) never existed. The entire purpose of defining the scope of an agency's regulatory program through enabling legislation, like that for high capacity wells under Wis. Stat. § 281.34, would be defeated because DNR would have unlimited plenary powers that swallow the more specific statutory framework. The legislature's work would be done by merely enacting the preamble provisions – a untenable scenario.

Clearly the legislature was targeting the expansive use by agencies of general prefatory provisions to find sweeping authorities that were never intended to be the basis for regulatory mandates. Intent aside, the use of the word "explicitly" in Wis. Stat. § 227.10(2m) rules out the option of using these general statements of policy and duties as a delegation of public trust authority.

III. The Public Trust Doctrine Applies Only to Lands Below the Ordinary High-Water Mark. Therefore High Capacity Wells Are Outside the Reach Of The Public Trust Doctrine.

A. The Public Trust Doctrine Applies Only to Navigable Waters and Therefore Should Not Apply to These High Capacity Wells.

Shortly after its decision in *Lake Beulah*, the Wisconsin Supreme Court issued a decision in *Rock-Koshkonong Lake District v. DNR,* 2013 WI 74, 350 Wis.2d 45, 833 N.W. 2d 800. In *Rock Koshkonong* the court provided clear guidance on the reach of the Public Trust Doctrine that is instructive here.

The court rejected DNR's attempt at that time to extend its public trust regulatory authority beyond navigable waters to non-navigable wetlands above the ordinary high water mark. The court explained that if it were to accept the DNR's claim, it would eliminate the element of "navigability" from the public trust doctrine and therefore "remove one of the prerequisites for the DNR's constitutional basis for regulating" water. According to the court, this "would eliminate the rationale for the doctrine." *Id*. at p.65.

The court's decision in *Rock-Koshkonong* marked an important turning point in the public trust doctrine line of cases. *Rock-Koshkonong*, with no reservation, eliminates DNR public trust authority for waters of the state above the ordinary high water.

The Brief of Respondent Department of Natural Resources in this case undertakes an important analysis regarding this distinction between DNR's regulatory responsibilities delegated by the Legislature in its role as trustee under the constitutional Public Trust Doctrine, and DNR's specific responsibilities delegated by the legislature under the legislature's constitutional police powers. These distinctions bear repeating.

It follows from the DNR's analysis that "public trust waters/resources" are not interchangeable with "waters of the state" either from the legislature's constitutional authorities or more importantly, here, from the executive branch agency's explicitly delegated regulatory responsibilities. *Rock-Koshkonong* clarified the specific geographic boundaries that allow the courts to draw the important line of demarcation between those regulatory areas that fall specifically under the Public Trust Doctrine waters (paragraph 78), and those that are "beyond navigable waters" (paragraph 77) and thus outside of the constitutional reach of the Public Trust Doctrine. These waters outside the reach of the Public Trust Doctrine are thus exclusively regulated under the legislative Police Power delegation of regulatory authority.

B. The High Capacity Well Permits at Issue Here Are "Waters of the State" and Are Subject to Legislative Police Power Authority Delegated to DNR

The lands on which these eight contested well permits are located are not lands below the OHWM of navigable water bodies. The Public Trust Doctrine therefore is not applicable. Rather, they are police power "waters of the state" or non-navigable waters. The significance, as DNR's brief points out, is that "[a]ny regulatory authority over high capacity wells (which are necessarily located outside the OHWM of any navigable waterway) is a delegated police power, not a

delegated constitutional power." (Br Of Respondent DNR at page 26) The Supreme Court confirmed in *Rock-Koshkonong*, *Id*. at pargraphs 90-94, that, as DNR notes in its brief, "[a]ny authority to regulate outside the OHWM was grounded in the state's police power, not its constitutional public trust jurisdiction." (DNR Response Br. 26)

Therefore, the Court must look solely to legislative regulation of high capacity wells exercised under its police power authority, delegating explicit responsibility to DNR to approve high capacity well permits under that regulatory structure, in deciding this case.

IV. The Statutory Framework for Regulating High Capacity Wells Under Wis. Stat. § 281.34 Arises from Continued and Deliberate Legislative Debate and Choice. It is the Exclusive Source of DNR's Explicit Authority to Regulate High Capacity Wells.

A. The History of Developing Wis. Stat. §281.34 (Groundwater Withdrawals).

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 current statutory framework for high capacity well permits resulted from collaborative and deliberate legislative debate and policy choices. If the Court finds, as Petitioners urge, that DNR has Public Trust Authority arising out of Chapter 281 prefatory clauses, then Wis. Stat. § 281.34 framework, deliberately developed over decades, is rendered meaningless. DNR would be allowed, in fact directed, to impose conditions not enumerated in the statutes, on an ad hoc permit by permit basis. The result will be regulatory uncertainty as permit applicants await DNR verdicts as to what conditions will apply, or if, a permit is even allowed.

Until 1985, the general standard at § 281.34(5)(a), which protected public utility wells, was the only standard applicable to high capacity well permits. In 1985 Wis. Act 60, the legislature expanded DNR's permit authority for high capacity wells over 2 million gallons per day (gpd). In 2003 Wis. Act 310 ("Act 310"), the legislature expanded DNR's permit authority for high capacity wells once again, explicitly regulating wells with capacities of between 100,000 and 2 million gpd.

Act 310 evidences the deliberate legislative approach desired for the regulation of high capacity wells through the creation of a Groundwater Advisory Committee for purposes of reporting 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.[6]

B. The Legislature, through § 281.34, Set Forth Explicit Requirements for High Capacity Well Permits that Included Offramps to Address Unique Environmental Challenges.

Any person owning property on which a high capacity well is to be located must first obtain approval from DNR before construction of such well. Wis. Stat. § 281.34(2). A high capacity well is defined as any well or combination of wells on the same property that have the capacity to pump 100,000 gallons of water per day. Wis. Stat. § 281.34(1)(b). Every high capacity well application must include information that will allow DNR to determine that the proposed well complies with location, construction, installation, and operation requirements at Wis. Admin. Code ch. NR 812. Based on information in the application, DNR is able to determine:

- When the proposed pumping rate and consumptive use triggers a "water loss" approval. Wis. Stat. § 281.35.
- If a public water supply well may be affected by the proposed well. Wis. Stat. § 281.34 (5)(a).
- If the location of the proposed well is near sensitive resources that would trigger Wisconsin Environmental Policy Act (WEPA) review or require additional conditions for approval. Such heightened environmental review is required for high capacity well that:

[6] *2007 Report to Legislature*, Wisconsin Groundwater Advisory Committee (December 2007). Available at: http://www.friendsofthelittleploverriver.org/assets/Reports/2007-GAC-Final-Report.pdf.

- Is located in a groundwater protection area.
- Will result in a water loss of more than 95% of the amount of water withdrawn.
- May have a significant environmental impact on a spring.

Wis. Stat. § 281.34 (4)

Therefore, DNR must follow clear and explicit requirements established by the legislature over decades of deliberation. DNR's review and approval of the well permits in these cases followed these explicit requirements. In this regard, DNR determined that the high capacity wells as proposed did not trigger heightened environmental review under WEPA. Thus, no further analysis was required or allowed.

C. 2017 Wis. Act 10 Sets Forth the Legislature's Approach to Address Cumulative Impacts and Challenges Associated with the Central Sands Region.

1. The Legislative Process to Develop 2017 Act 10 is a Case Study on Why the Legislature is Better Equipped to Address the Issues Before the Court.

The legislative process in Wisconsin is many things to many people, but it is accurate to say it provides extensive opportunity for public input and debate. The Wisconsin Legislative Reference Bureau describes the process in a 67-page research bulletin.[7] Beyond extensive process requirements, Wisconsin's bicameral legislative body has a complex organizational, structural, and leadership framework. The legislature must also adhere to protocols for drafting, introduction, committee consideration, including public hearings, and floor action. And finally, gubernatorial approval. The latest update to Wisconsin's high capacity well program is a case study of the legislative process.

[7] *Legislative Process in Wisconsin*, State of Wisconsin Legislative Reference Bureau, Research Bulletin 14-2, December 2014. http://legis.wisconsin.gov/lrb/media/1093/14rb2.pdf.

2017 Senate Bill 76 was introduced on February 21, 2017.[8] Its companion bill, Assembly Bill 105, was introduced on March 1, 2017. The bills were referred to respective committees in the Senate and Assembly. Those committees held a joint hearing on March 15, 2017. At that hearing, over 300 organizations and individuals testified or registered positions on the bills.[9] Wisconsin Legislative Council hearing material included 142 pages of testimony.[10] Notably, seven of the eight intervenors in this case testified in support of the bill. Petitioner Clean Wisconsin and *Amici* Central Sands Water Action Coalition and the Town of Rome testified against the bill.

The Senate Committee on Labor and Regulatory Reform recommended passage of SB 76 on March 28, 2017. Ten Senate amendments to SB 76 were introduced and considered. The bill was placed on the Senate calendar and passed that house on April 4, 2017. The legislation was received in the Assembly on April 5, 2017. Four Assembly amendments were introduced and considered. The Assembly concurred in SB 76 on May 2, 2017. It was enrolled on May 11, 2017, and presented to the Governor on May 31, 2017. The Governor approved the legislation on June 1, 2017, which became 2017 Wisconsin Act 10 ("Act 10"). It was published on June 2, 2017.

Act 10 authorizes the owner of a previously approved high capacity well to repair, replace, reconstruct, or transfer ownership of the well without obtaining additional DNR approval. Wis. Stat. § 281.34(2g). The Act also requires DNR to evaluate and model the hydrology of three specified lakes and allows DNR to evaluate the hydrology of other streams

[8] The legislative history of Senate Bill 76 and related documents can be found at: https://docs.legis.wisconsin.gov/2017/proposals/sb76.

[9] *Senate Record of Committee Proceedings*. https://docs.legis.wisconsin.gov/2017/related/records/senate/labor_and_regulatory_reform/1378189.

[10] *Legislative Council Hearing Materials for SB76* (3/15/2017). https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2017/sb76/sb0076_2017_03_15.pdf. The Legislative Council collects material during the public hearing of a bill or joint resolution. The materials are not the official committee record, but generally represent items distributed to the committee. Some documents may not be scanned due to volume or copyright.

and lakes in Wisconsin's central sands region, specified in the act as the Designated Study Area. DNR may request funding and positions for the evaluation of modeling. Wis. Stat. § 281.34(7m)(b).

The purpose of the hydraulic evaluation is to determine whether existing and potential groundwater withdrawals are causing or are likely to cause a significant reduction of a navigable stream's or navigable lake's rate of flow or water level below its average seasonal levels. If DNR concludes such impacts either are or will be occurring, the agency must determine whether to recommend to the legislature mitigating measures. A decision by DNR to recommend mitigation measures must include the following information:

- The extent DNR has determined that cumulative groundwater withdrawals in all or part of the study area cause, or are expected to cause, a significant reduction in a navigable water body's rate of flow or water level.
- The scientific information DNR used to establish there is a hydraulic connection between the groundwater and navigable waters in the study area.
- The geographical boundaries of the area on which DNR recommends mitigation measures.
- The proposed mitigation measures DNR recommends the legislature adopt, by statute, to mitigate impacts on navigable waters.
- An economic analysis relating to the impact the recommended mitigation measures would have on businesses, utility ratepayers, local government, in the state's economy.

Wis. Stat. § 281.34(7m)(c).

The legislative directives on DNR relating to high capacity well impacts on navigable waters in Wisconsin's central sand regions are comprehensive and reflect extensive legislative deliberation, aided by substantial public input.

2. Petitioner and *Amici* were Involved in the Legislative Process Resulting in 2017 Wis. Act 10 –Not Getting their Desired Outcome, They Now Ask This Court to Dictate an Alternative Regulatory Approach.

The Wisconsin Legislature carefully crafted a graduated regulatory framework in §§ 281.34 and 281.35 to govern the permitting of high capacity wells by DNR. This includes the latest iteration to the program enacted by Act 10 addressing the unique concerns over groundwater withdrawal in Wisconsin central sands region by directing that DNR evaluate and model the hydrology of the region. Upon completion of this study, DNR must issue a decision on whether to recommend the legislature enact mitigating measures.

In testimony before committee at the hearing on SB 76/AB 105, Petitioner Clean Wisconsin and *Amici* argued the bills should provide a more rigorous permitting framework for the high capacity well program and expressed concerns over its scope and lack of guarantees it will result in their desired outcomes. (Legislative Council Hearing Material.) For example, Petitioner Clean Wisconsin submitted testimony that "the areas designated for study in the bills. . . are arbitrary and a weak attempt at providing a next step." *Id*. *Amicus* Central Sands Water Action Coalition also voiced concerns relating to the study:

> We believe that the most glaring weakness in the proposed studies, is that they come with no guarantees. DNR may make a recommendation for change based [on] the findings of said studies, or they might not. If the DNR did recommend changes, *the legislature would have to pass a bill to affect those changes. Id*. (Emphasis added.)

It should be safe to say that none of the 310 organization and individuals voicing their opinion at the committee hearing were completely satisfied with the bill. *But this is what democracy looks like*. Developing legislative policy is a deliberative, comprehensive, and sometimes controversial process. But the process to develop and enact laws can only be accomplished in the legislative arena. Yet, Petitioner Clean Wisconsin, having failed to achieve

their desired results in recently enacted high capacity well legislation, is urging the court to *enact* their preferred policies.[11]

The DNR evaluation required by Act 10 is a needed and, at least at this time, a required prerequisite to further regulation of high capacity wells. It is a legislative prerogative to stay further regulation pending the outcome of DNR analysis of the impacts high capacity wells may have on surface waters. It is an issue of utmost import, and getting it right is best left to the deliberations of elective officials, not to agency *experts* or the courts. Although Petitioners and *Amici* have every right to argue before the legislation the *facts are set* on this issue, their exhibits in this case provide evidence of the uncertainty relating to the impact of high capacity wells on surface waters.

For example, one of Petitioners' exhibits are emails between DNR and University of Wisconsin Stevens Point staff that notes "we conflict substantially in the diversions. . . Could be because of the different models? Which do you think has the strongest link to reality?" Petitioners Exhibit 1. In another exhibit, it is noted that "the predicted streamflow depletion may be over-estimated, so the stream depletion results given here are used an upper bound on possible impacts." Exhibit 3. In their brief Petitioners quote from an exhibit that "the 1.7-inch model drawn down at Pheasant Lake, coupled with the calculated drawdown for the not yet constructed Richfield Dairy well, would reach the level the ALJ considered a significant impact for the lake (more than 2.5-3 inches)." (Pet'rs' Br. at 10.) The Petitioners conveniently omit the next sentence in that exhibit that states "[h]owever, because the impact is modeled for steady state conditions at the maximum

[11] Neither is this the first dance of these parties on these issues before a court. Petitioner Clean Wisconsin and intervenors Wisconsin Manufacturers & Commerce, Dairy Business Association, Midwest Food Processors Association, and Potato & Vegetable Growers Association were all intervenors in the *New Chester Dairy* case in Outagamie County Circuit Court. In that case, Judge McGinnis found that DNR imposed unlawful permit conditions for high capacity wells and that, under 2011 WI Act 21, agencies cannot use implied authorities to impose regulatory requirements. *New Chester Dairy*, at 6. Petitioner Clean Wisconsin did not to appeal that decision.

conditioned pumping rate, it is likely that the actual drawdown would be less than 1.7 inches." Exhibit 3, at 3.

Neither an ALJ or a court should determine what is the threshold impact to trigger a regulatory response such as denial of a permit application needed for businesses to operate in Wisconsin. Clearly, in this instance, the legislature is assuming that responsibility, and correctly so, by directing DNR to evaluate the impacts of high capacity wells to surface waters. Upon a DNR determination of need, DNR is to provide the legislature recommendations for further enactments.

Yet, Petitioners ask the court to override this legislative judgment governing the permitting of high capacity wells and instead request the Court to install virtually the same unworkable approach adopted in by the court in *Lake Beulah.* In that case, recall, the court proffered no discernible standards to guide the DNR's evaluation of well permit applications.[12] Similarly, in addition to voiding the eight permits that are the subject of these cases, Petitioners request the Court to "direct the DNR to fulfill its statutory and constitutional duty to protect the Public Trust resources when acting on high capacity well applications." (Pet'rs' Brief at 27.) If the Court grants Petitioners the relief requested, the result will be renewed regulatory uncertainly and paralysis. The regulated community has seen this failed approach before.[13]

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[12] In *Lake Beulah*, the court concluded that "DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state. Upon what evidence, and under what circumstances, the DNR's general duty is implicated by a proposed high capacity well is a highly fact specific matter that depends upon what information is presented to the DNR decision makers by the well owner in the well permit application and by citizens and other entities regarding the permit application while it is under review by the DNR." *Lake Beulah* at 3 (footnotes omitted).

[13] In his affidavit in support of the petition to intervene in this case, John Holevoet, Director of Government Affairs for the Wisconsin Dairy Business Association stated that "the relief sought by the petitioners would likely return Wisconsin to the ineffective permitting of high capacity wells, including backlogs of permit applications, that was DNR's practice prior to the attorney general's opinion." Holevoet Affidavit. In testimony before the committee on SB 76, James Ostrom with Milk Source said that his company "had projects delayed and spent a significant amount of money on legal fees because of the uncertainty in high capacity well permitting created by the Wisconsin Supreme Court's 2011 *Lake Beulah* decision. We have been involved in to contested cases proceeding over high-capacity well permits since 2011. As a company, we can speak first-hand how this uncertainty has interfered with and discouraged

The confusion created by the *Lake Beulah* decision resulted in Wisconsin State Assembly requesting guidance from the Attorney General.[14] This confusion also created regulatory uncertainty for the business community and a high capacity well permit application backlog due to DNR's inability to effectuate the court's directive. The result would be the same if this court were to grant Petitioners' request. DNR's high capacity well program would again be paralyzed with uncertainty, with those businesses needing wells either having to curtail Wisconsin operations or move out of state.

There are simply no discernible standards that could arise from Petitioners requested relief. Directing DNR to fulfill its statutory and constitutional duty to protect the public trust resources when acting upon all high-capacity well applications creates, at best, an ad hoc approach to permit decisions, with policies being set, if at all, on a permit by permit basis. It violates the basic premise of notice underpinning Chapter 227. This was the failure of *Lake Beulah,* resulting in its reversal by Act 21, and the requirement that DNR implement only policies consistent with the explicit requirements pursuant to Wis. Stat §281.34.

If there are any additional changes that need to be made to Wisconsin's high capacity well statute, the legislature should make those changes. Such legislative enactment allows the applicants (and DNR) to know what standards they must meet at the time their applications are submitted. This provides businesses an opportunity to anticipate and plan for building or expanding operations in Wisconsin that require high capacity wells. Without clear standards set

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our plans to invest in Wisconsin. Our decision to expand into Michigan was made as these contested cases continue to drag on. Legislative Council Committee Material.

[14] In its request for the attorney general opinion, the Assembly Committee on Organization noted the "confusion surrounding the authority of DNR under Chapter 281 and the public trust doctrine" that has resulted in "a substantial backlog in permit requests, bringing the issuance of new permits to a standstill." Request for OAG Opinion, Assembly Committee on Organization.

by the legislature, businesses needing such permits have the unavoidable option of either not building or expanding in Wisconsin or doing so in another state.

CONCLUSION

Respondents urge the court to find, as required by Act 21, that the general agency duties found at Wis. Stats. §§ 281.11 and 281.12 do not delegate nor confer Public Trust or any other authorities on DNR to provide Petitioners' requested relief. Also, that DNR's explicit regulatory authority when approving the eight high capacity well permits being challenged here is found exclusively at Wis. Stat. § 281.34. Further, that the Public Trust Doctrine, and any delegated authority under it, does not apply to high capacity wells located on lands that are not below the ordinary high-water mark of navigable waters of the state. Finally, that consistent with the requirement for explicit regulatory authority noted above, applicants should be able to rely exclusively upon those standards found at Wis. Stats. § 281.34, rather than be subject to regulatory uncertainty arising out of judicial directions resulting in DNR imposing conditions or (denials) on a permit by permit basis.

DATED this 7th day of August, 2017.

Respectfully Submitted,

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Wisconsin Cheese Makers Association
Wisconsin Farm Bureau Federation
Wisconsin Paper Council
Wisconsin Corn Growers Association

CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed the foregoing Brief of Intervenors with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

A copy is also being mailed this date to:

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Dated this 7th day of August, 2017

/s/ Robert I Fassbender
ROBERT I. FASSBENDER