STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 3

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

BRIEF OF RESPONDENT WISCONSIN DEPARTMENT OF NATURAL RESOURCES

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INTRODUCTION

Administrative agencies are creatures of the Legislature, with only those powers conferred by the statutes under which they operate. *Brown Cty. v. Dep't of Health & Soc. Servs.*, 103 Wis. 2d 37, 43, 307 N.W.2d 247 (1981). Because the Legislature has discretion to grant power to an agency, it follows that the Legislature can further define the limits of that power. The Legislature did just that on May 23, 2011, with the enactment of 2011 Wis. Act 21 ("Act 21").

Act 21 created a new statute in Wis. Stat. ch. 227, stating that an agency cannot implement or enforce any standard, requirement, or threshold, including as a term or condition of a license issued by the agency, unless it is explicitly required or explicitly permitted by statute or administrative rule. Wis. Stat. § 227.10(2m).

To help facilitate the Act's implementation, in February 2016, the State Assembly sought clarity from the Attorney General, and requested an opinion regarding how Act 21 impacted DNR's high capacity well program. On May 10, 2016, the Attorney General issued his opinion. He concluded, among other things, that Act 21 precludes DNR from relying on implied authority to regulate high capacity wells. Agreeing with the Attorney General's conclusions, DNR revised its high capacity well program to be consistent with Act 21. Relevant to this case, on September 30, 2016, DNR approved eight high capacity well applications under

the explicit legal framework in Wis. Stat. § 281.34. (R. Lutz 10–14, Creek 7–11 and 25–29, Pep 8–12, Fro 7–11, Turz 12–16, Lask 6–10, Laur 4–8, Dero 7–11[1] (together, the "Decisions").)

This case, at its core, is about respecting the Legislature's clear intent regarding the limits of agency power. Contrary to this intent, Petitioners want DNR to act beyond the scope of its delegated authority, namely, by rescinding well approvals and requiring DNR to consider cumulative and other environmental impacts that are not explicitly provided for in the statutes. But this is precisely the kind of agency action the Legislature abolished with the passage of Act 21.

Petitioners essentially accuse DNR of using Act 21 to avoid its obligations to protect the State's water resources. To the contrary, DNR is not avoiding its obligations. It is acting pursuant to the limited police power that the Legislature has delegated to the agency, thereby allowing the Legislature to do its job of creating the framework for protecting water resources. There are numerous other statutory and common law mechanisms that Petitioners could have used to pursue the relief they seek. They chose not to avail themselves of those mechanisms, and instead brought this judicial review action, making claims well beyond the scope of what the Court is able to remedy under Wis. Stat. ch. 227.

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[1] The numbering convention for the administrative record reflects the well approval associated with the particular document. For example, pages stamped with "Lutz" are associated with the well approval issued to Wayne Lutz, and pages stamped with "Creek" are associated with the two well approvals issued to Kyle Gordon and Creekside Homeland LLC. For convenience, DNR has provided the Court a tabbed hard copy of the administrative record.

The Decisions in this case were correct applications of Wis. Stat. §§ 281.34 and 227.10(2m). As explained below, they do not even trigger, let alone violate, the public trust doctrine. Because the Decisions were proper exercises of DNR's delegated police power, this Court should affirm the Decisions in their entirety and dismiss the petitions for judicial review.

BACKGROUND

I. Legal framework of Wisconsin's high capacity well program.

A. Relevant statutes and administrative rules.

In Wisconsin, an applicant must obtain approval from DNR before constructing a high capacity well. Wis. Stat. § 281.34(2); Wis. Admin. Code § NR 812.09(4). A high capacity well is a well that, together with all other wells on the same property, has a capacity of more than 100,000 gallons of water per day. Wis. Stat. § 281.34(1)(b).

DNR must follow detailed and specific requirements when considering and approving high capacity well applications. *See, e.g.*, Wis. Stat. §§ 281.34, 281.35; Wis. Admin. Code § NR 812.09; Wis. Admin. Code ch. NR 820.[2] First, DNR must determine the extent of regulatory review required by statute and rule. The Legislature established specific review requirements for high capacity well

[2] The categories of wells and standards for approval described in these statutes and rules are most relevant to this case, but they do not constitute the entire universe of requirements applicable to water withdrawals in Wisconsin. Additional application and operational requirements apply to withdrawals and diversions subject to the Great Lakes Compact, Wis. Stat. §§ 281.343–.348, and specific well design and construction requirements apply to all water supply wells, Wis. Stat. § 281.41; Wis. Admin. Code § NR 809.01.

applications with different characteristics—all are reviewed for compliance with location, construction, and operation requirements; while some are subject to a more rigorous review and approval process that typically includes an environmental review consistent with the Wisconsin Environmental Policy Act (WEPA), Wis. Stat. § 1.11; Wis. Admin. Code ch. NR 150. The following is a summary of the statutory review requirements for the types of high capacity wells most relevant here.

1. All high capacity wells.

Every high capacity well application must include the proposed location, construction features, pump installation features, the proposed rate of operation, and the distance to nearby public utility wells. Wis. Admin. Code § NR 812.09(4)(a). DNR uses this information to determine (1) if the proposed well will comply with location, construction, installation, and operation requirements, Wis. Admin. Code ch. NR 812; (2) if the proposed pumping rate and consumptive use triggers a "water loss" approval, Wis. Stat. § 281.35; Wis. Admin. Code § NR 142.06; (3) if a public water supply well may be affected by the proposed well, Wis. Stat. § 281.34(5)(a); Wis. Admin. Code § NR 812.09(4)(a)1.; and (4) if the location of the proposed well near sensitive resources triggers a WEPA review or requires additional conditions upon approval, Wis. Stat. § 281.34(4) (citing Wis. Stat. § 1.11); Wis. Admin. Code ch. NR 820.

All high capacity wells must comply with the construction and operation requirements. These requirements were established to protect groundwater and aquifers from contamination, and they vary depending on the type of aquifer, the

subsurface geology, and the type of well. Wis. Admin. Code §§ NR 812.01(1), 812.10–.26. All high capacity well approvals also require the owner to identify the location of the constructed well and submit to DNR an annual pumping report. Wis. Stat. § 281.34(5)(e). The Legislature did not authorize DNR to establish additional conditions or restrictions on a high capacity well unless it falls into one of the categories below.

2. Water loss approvals, groundwater management areas, and public utility wells.

A "water loss" approval is only required for new or increased withdrawals that are proposed to pump an average of more than 2 million gallons per day in any 30-day period. Wis. Stat. § 281.35. These are subject to more stringent application requirements. Wis. Stat. § 281.35(5); Wis. Admin. Code § NR 142.06. DNR may only grant a water loss approval after making a series of environmental impact determinations, including that "no public water rights in navigable waters will be adversely affected." Wis. Stat. § 281.35(5)(d)1.; Wis. Admin. Code § NR 142.06(3)(a). Notably, DNR is not required to make this or any other similar finding concerning "public water rights" when issuing high capacity well approvals under Wis. Stat. § 281.34. DNR is authorized to include additional conditions and reporting requirements in any water loss approval. Wis. Stat. § 281.35; Wis. Admin. Code § NR 142.06(3)–(6). It is undisputed that the wells challenged in this case do not trigger a water loss approval.

The Legislature also provided DNR authority to manage, regulate, and condition wells located in "groundwater management areas," Wis. Stat. § 281.34(9),

and wells that impact public utility wells. Wis. Stat. § 281.34(5)(a). It is undisputed that the wells in this case do not fall into these categories.

3. Wells that require WEPA review.

The Legislature established additional application and approval criteria for wells proposed to be located near sensitive environmental resources and those with high consumptive use. Wells in these categories require a WEPA review and approvals may contain additional conditions.

The Legislature established WEPA to ensure that all state agencies evaluate, among other things, the environmental impacts of proposed "major actions significantly affecting the quality of the human environment." Wis. Stat. § 1.11(2)(c). Under Wis. Admin. Code ch. NR 150, DNR's implementing regulations provide the substance and procedure for DNR to comply with its WEPA obligations. When a WEPA review is triggered, DNR is required to undertake an environmental review of potential impacts—including direct, secondary, and cumulative impacts—of the proposed well on the human environment. Wis. Admin. Code § NR 150.30(2)(g).

A WEPA review is triggered for wells proposed to be located in a groundwater protection area,[3] proposed to have water loss[4] of more than 95 percent, or that may

[3] A "groundwater protection area" is an area within 1,200 feet of an outstanding resource water, an exceptional resource water or a class I, II, or III trout stream. Wis. Stat. § 281.34(1)(am). The Legislature directed DNR to promulgate rules identifying class I, II, and III trout streams based on the quality and suitability of the stream environment for trout propagation. Wis. Stat. § 281.34(8).

[4] "Water loss" means a loss of water from the basin from which it is withdrawn as a result of interbasin diversion or consumptive use or both. Wis. Stat. § 281.35(1)(L).

have a significant environmental impact on a spring.[5] Wis. Stat. § 281.34(4)(a)1., 2., 3. Applications for these high capacity wells must be supplemented to include information about nearby sensitive resources, including the location, width, depth of water, seasonal flow of streams, and approximate flows of lake or flowage inlets; a description of the hydrogeologic conditions in the area; alternative well locations; and other information DNR may request. Wis. Admin. Code §§ NR 820.30–.32.

Regarding approvals for these wells, the Legislature requires DNR to include additional conditions "to ensure that the high capacity well will not result in significant adverse environmental impacts" to sensitive resources such as trout streams, outstanding resource waters and exceptional resource waters, and springs. Wis. Admin. Code § NR 820.30(2)(a); *see also* Wis. Stat. § 281.34(5)(b)–(d); Wis. Admin. Code §§ NR 820.30–.32. The Legislature further authorized DNR to exercise discretion in determining what types of conditions may be necessary, including conditions as to location, depth of lower drillhole, depth interval of well screen, pumping capacity, pumpage schedule, months of operation, rate of flow, and conservation measures. Wis. Admin. Code §§ NR 820.30(3)(b), 820.31(4)(d), 820.32(5), 820.33.

In 2015, Wis. Admin. Code ch. NR 150 was revised to specifically categorize all high capacity well applications and approvals not specifically identified in Wis. Stat. § 281.34(4) as "minor actions" that do not require a WEPA

[5] A spring "means an area of concentrated groundwater discharge occurring at the surface of the land that results in a flow of at least one cubic foot per second at least 80 percent of the time." Wis. Stat. § 281.34(1)(f).

review. Wis. Admin. Code § NR 150.20(1m)(h)–(i). DNR did not conduct a WEPA review prior to issuing the well approvals in this case because they are categorized as "minor actions." Wis. Admin. Code § NR 150.20(1m)(h). Petitioners have not alleged that DNR should have conducted a WEPA review.

4. 2011 Wisconsin Act 21.

In 2011, the Legislature created a new statute in Wis. Stat. ch. 227, stating that an agency cannot implement or enforce any standard, requirement, or threshold, including as a term or condition of a license issued by the agency, unless it is explicitly required or explicitly permitted by statute or administrative rule. 2011 Wis. Act 21; *see also* Wis. Stat. § 227.10(2m). This statute clarifies that agencies cannot use implied authority to implement or enforce terms or conditions of licenses. A high capacity well approval is a license. Wis. Stat. § 227.01(5).

B. Relevant Wisconsin Supreme Court decisions.

1. *Lake Beulah Management District v. Department of Natural Resources.*

The Wisconsin Supreme Court decided *Lake Beulah Management District v. Department of Natural Resources* in 2011. There, the court held that DNR was required "to consider the environmental impact of a proposed high capacity well when presented with sufficient concrete, scientific evidence of potential harm to waters of the state." *Lake Beulah Mgmt. Dist. v. Dep't of Nat. Res.*, 2011 WI 54, ¶ 46, 335 Wis. 2d 47, 799 N.W.2d 73. The court grounded this holding in DNR's general duties to manage and maintain the "waters of the state." *Id.* ¶ 39. As the basis of this general duty, the court relied on both the public trust doctrine

as well as the regulatory framework under Wis. Stat. ch. 281. *Id.* The court noted that there was nothing in Wis. Stat. §§ 281.34 or 281.35 that limited DNR's authority to consider the environmental impacts of a proposed high capacity well. *Id.* ¶ 41. The court acknowledged newly enacted Act 21 in a footnote of its opinion, but did not analyze or apply it in that case. *Id.* ¶ 39 n.31.

2. *Rock-Koshkonong Lake District v. Department of Natural Resources.*

Following *Lake Beulah*, the Wisconsin Supreme Court decided *Rock-Koshkonong Lake District v. Department of Natural Resources*, 2013 WI 74, 350 Wis. 2d 45, 833 N.W.2d 800, which clarified the geographic scope of lands and waters that are subject to constitutional "public trust authority," as opposed to police-power authority. *See, e.g.*, *id.* ¶ 86. *Rock-Koshkonong* made clear that whatever regulatory authority exists over lands and waters outside of the "ordinary high water mark" of a navigable lake or stream, that authority is statutory, and is not subject to constitutional requirements under the public trust doctrine: "There is no constitutional foundation for public trust jurisdiction over land, including non-navigable wetlands, that is not below the [ordinary high water mark] of a navigable lake or stream." *Id.* ¶ 86. Instead, regulation over those areas outside the ordinary high water mark is undertaken pursuant to legislatively delegated police power, and therefore must be evaluated in light of constitutional and statutory protections afforded to private property, and "may be modified from time to time by the legislature." *See id.* ¶ 101.

II. High capacity well program 2001–Present.

The following section provides historical context to Wisconsin's high capacity well program, as currently managed by DNR. In the years immediately before 2004, the statutes only allowed DNR to withhold or condition the approval of a high capacity well (that resulted in a water loss of 2 million gallons per day or less) based on the sole criterion of whether the well would affect public water supplies. *See* Wis. Stat. §§ 281.17(1), 281.35 (2001–02).[6]

On May 7, 2004, the Legislature enacted 2003 Wis. Act 310. This Act created Wis. Stat. § 281.34 and amended Wis. Stat. § 281.35, thereby setting in place much of the current regulatory structure detailed *supra*, Background sec. I.A., *see also* 2003 Wis. Act 310. Specifically, the Legislature expanded the statutory categories of wells it considered to be high risk for adverse resource impacts, and gave DNR authority to evaluate environmental impacts when those categories were triggered. Wis. Stat. §§ 281.34, 281.35.

The Wisconsin Legislative Council reports that during this time (before 2011), DNR generally did not evaluate the potential environmental impacts of a proposed high capacity well outside the explicit, enumerated risk

[6] More extensive regulation was required for wells above the 2 million gallon threshold. Wis. Stat. § 281.35(4), (5) (2001–02).

categories. (*See* Legislative Council Memorandum IM-2014-05 at 3–4, Oct. 27, 2014.)[7] This was because DNR determined that this framework did not give the agency authority to expand its review of high capacity well applications beyond the scope of the specific statutory requirements. (*Id.*)

After *Lake Beulah* was decided in 2011, DNR voluntarily began to screen all proposed high capacity wells for potential adverse impacts to any waters of the state. (*See id.* at 4.) This screening process did not include consideration of the cumulative impacts of other existing and proposed withdrawals in the area of a proposed well, except for other wells on the same property. (*Id.*) DNR declined to do a cumulative impacts screening for every case because it was not explicitly required by Wis. Stat. ch. 281, and because the *Lake Beulah* ruling did not require DNR to do this. (*Id.*)

In 2014, an administrative law judge (ALJ) issued a decision in a contested case regarding DNR's duties in the high capacity well program. *In the Matter of a Conditional High Capacity Well Approval for Two Potable Wells to be Located in the*

[7] Available at: http://docs.legis.wisconsin.gov/misc/lc/information_memos/2014/im_2014_05. DNR requests that the Court take judicial notice of this document, and what the Legislative Council, a nonpartisan legislative service agency, reported regarding DNR's implementation of the high capacity well program. *See* Wis. Stat. § 902.01(2)(b); *see also Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶ 11, 313 Wis. 2d 411, 756 N.W.2d 667 (a court may take judicial notice of matters of record in government files). This document is dated October 27, 2014, and does not reflect the most current developments regarding DNR's high capacity well program.

Town of Richfield, Adams County Issued to Milk Source Holdings, LLC, Case Nos. IH-12-03, *et al.*, Sept. 3, 2014 ("*Richfield Dairy*").[8] The ALJ decided that, to fulfill its obligations under Wis. Stat. ch. 281, its public trust duties, and *Lake Beulah*, DNR must consider cumulative impacts. *Richfield Dairy* 3. Although DNR did not seek judicial review, this decision is not binding on DNR's future policy changes or agency decisions, including the Decisions here. *See* Wis. Stat. §§ 227.01(13)(b), 227.10(1).[9]

In 2014, DNR voluntarily enacted a policy change whereby it began to consider cumulative impacts of existing and proposed withdrawals in the area for every high capacity well application. This resulted in confusion regarding the standards that a high capacity well applicant must meet to receive approval for a well application, particularly regarding when a cumulative impacts review was warranted, because there was no explicit framework for DNR to rely on. For example, in response to one applicant's questions about the high capacity review process, DNR staff explained that because there is no Wisconsin-specific statutory framework for a cumulative impacts analysis, DNR was using a framework developed for Michigan resources pursuant to direction from the Michigan Legislature. (R. Dero 16–17.)

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[8] The *Richfield Dairy* decision is attached to Petitioners' brief in opposition to DNR's motion to dismiss.

[9] No party has claimed that *Richfield Dairy* is binding here. At most, when agencies issue decisions that take different positions on interpretation of statutes, that only affects the level of judicial deference to be afforded that agency, not the validity of the decision. *Barron Elec. Co-op. v. Pub. Serv. Comm'n of Wis.*, 212 Wis. 2d 752, 763, 569 N.W.2d 726 (Ct. App. 1997). DNR's Decisions are entitled to due weight deference, as explained in Argument sec. I.A., *infra*.

Adding to this confusion was the mounting uncertainty of how Act 21 impacted DNR's authority to review and issue high capacity wells. In February 2016, the State Assembly requested an opinion from the Attorney General regarding how Act 21 impacted DNR's high capacity well program, and whether the *Lake Beulah* opinion interpreted and applied Wis. Stat. § 227.10(2m). The Attorney General issued his opinion on May 10, 2016. OAG–1–16.[10] Responding to the specific questions presented, the Attorney General concluded, among other things, that (a) *Lake Beulah* neither analyzed nor applied Act 21, and therefore, its holding was not controlling, *id.* ¶ 16; and (b) in light of Act 21, DNR did not have authority to conduct an environmental review or impose conditions outside the explicit statutory framework, *id.* ¶¶ 47–48.

After the Attorney General's opinion was issued, DNR enacted another policy change, whereby it reinstated its pre-*Lake Beulah* practices of following the explicit statutory framework when reviewing and approving high capacity wells.

III. Facts and procedural history.

Between March 2014 and May 2015, DNR received applications for the high capacity well approvals at issue in this case. (R. Lutz 1–9, Creek 1–6, Pep 2–7, Fro 1–6, Turz 1–5, Lask 1–5, Laur 1–3, Dero 1–6.) During its review of the well applications, DNR generated maps to identify the location of the proposed well, existing wells on the same property, and nearby environmental resources. (R. Lutz 15, Creek 13, Pep 1, Fro 12, Turz 17, Lask 11, Laur 9, Dero 13.) In

[10] Available at: https://docs.legis.wisconsin.gov/misc/oag/recent/oag_1_16.

accordance with Wis. Stat. § 281.34 and Wis. Admin. Code § NR 812.09, DNR reviewed each application to determine the proposed pumping capacity, the proximity of the proposed well to the closest sensitive resources, whether the application was for a well that triggered heightened review under the criteria in Wis. Stat. §§ 281.34 or 281.35, and to determine if it would impact a public water supply well. (R. Lutz 20–21, Creek 14–15 and 32–33, Pep 14–15, Fro 14, Turz 19–20, Lask 12–13, Laur 11–12, Dero 12.) DNR also evaluated the subsurface characteristics and properties of the local aquifer from which groundwater would be withdrawn. (R. Lutz 19, Creek 13 and 31, Pep 13, Fro 13, Turz 18, Lask 14, Laur 10, Dero 14.)

DNR determined that the proposed wells would comply with construction and operation requirements, that none of the applications proposed an average withdrawal of more than 2 million gallons per day in any 30-day period, none proposed to locate a well in a groundwater protection area, none proposed a water loss of more than 95 percent, none would have a significant environmental impact on a spring, and none would impact a public water supply well. (R. Lutz 20–21, Creek 14–15 and 32–33, Pep 14–15, Fro 14, Turz 19–20, Lask 12–13, Laur 11–12, Dero 12.) Thus, none of the proposed wells triggered a WEPA review or were subject to denial or additional conditions.

And for many applications, DNR field staff assisted DNR well application reviewers in determining whether a WEPA analysis would be

required. (R. Lutz 17, Creek 16, 18, and 34, Pep 16 and 19, Fro 54 and 56, Turz 21–22, Lask 15–16, Laur 14–15.) For one application, DNR conducted an exhaustive investigation to determine if a resource near the proposed well is a "spring," as the term is defined in Wis. Stat. § 281.34(1)(f), and if proximity to a spring would therefore trigger a WEPA review or require conditions to prevent impacts to the spring. (R. Fro 19–53 and 57–65); *see also* Wis. Stat. § 281.34(4)(a). DNR concluded the resource is not a spring. (R. Fro 53.)

On September 30, 2016, DNR issued the well approvals. (*See* R. Lutz 10–14, Creek 7–11 and 25–29, Pep 8–12, Fro 7–11, Turz 12–16, Lask 6–10, Laur 4–8, Dero 7–11.) Consistent with Wis. Admin. Code § NR 812.09, the Decisions confirm the location authorized for well installation; provide the maximum authorized withdrawal amounts; and include conditions for well construction, reporting and registration fees, among others. (*Id.*)

On October 28, 2016, Petitioners filed petitions for judicial review of nine high capacity well approvals issued by DNR on September 30, 2016, including the eight Decisions. After these nine cases were consolidated, one of the petitions was dismissed by stipulation. On June 9, 2017, the Court granted a petition for Wisconsin Manufacturers & Commerce, et al., to intervene in the case. On July 24, 2017, the Court granted two non-parties leave to file amicus briefs.

ARGUMENT

I. DNR's Decisions were supported by substantial evidence and were a correct application of the law.

A. Standards of judicial review.

The issue on review is whether the DNR acted properly in issuing the challenged well approvals. On judicial review under chapter 227, a court's inquiry "is limited to (1) whether the agency kept within its jurisdiction; (2) whether [the agency] acted according to law; (3) whether [the agency] acted arbitrarily, oppressively, or unreasonably; and (4) whether the evidence was sufficient that the agency might reasonably make the order or determination in question." *Estate of Szleszinski v. Labor & Indus. Review Comm'n*, 2007 WI 106, ¶ 22, 304 Wis. 2d 258, 736 N.W.2d 111.

Given this limited scope of review under chapter 227, a petitioner faces a challenging standard to overturn the agency's decision. Moreover, the party seeking to overturn an agency decision bears the burden of demonstrating error; the agency is not required to justify its decision. *See Xcel Energy Servs., Inc. v. Labor & Indus. Review Comm'n*, 2013 WI 64, ¶ 48, 349 Wis. 2d 234, 833 N.W.2d 665. If the petitioner is unable to carry this burden, the reviewing court must affirm the agency's decision. *See* Wis. Stat. § 227.57(2); *Volvo Trucks N. Am. v. Wis. Dep't of Transp.*, 2010 WI 15, ¶ 10, 323 Wis. 2d 294, 779 N.W.2d 423.

Judicial review is limited to the record before the agency, and must separately treat disputed issues of fact, law, and procedure. Wis. Stat. § 227.57;

see also Hiegel v. Labor & Indus. Review Comm'n, 121 Wis. 2d 205, 211, 359 N.W.2d 405 (Ct. App. 1984). Agencies' factual findings are reviewed under the "substantial evidence" standard, and are thus accorded significant deference. *See Volvo Trucks N. Am.*, 323 Wis. 2d 294, ¶ 19; *see also* Wis. Stat. § 227.57(6). "If there is credible evidence to sustain the finding, irrespective of whether there is evidence that might lead to the opposite conclusion, a court must affirm." *City of Oak Creek ex rel. Water & Sewer Util. Comm'n v. Pub. Serv. Comm'n of Wis.*, 2006 WI App 83, ¶ 13, 292 Wis. 2d 119, 716 N.W.2d 152 (quoting *L & H Wrecking Co. v. Labor & Indus. Review Comm'n*, 114 Wis. 2d 504, 509, 339 N.W.2d 344 (Ct. App. 1983)). Under this standard, a reviewing court should search the record for evidence to support the agency's decision. *See Brakebush Bros. v. Labor & Indus. Review Comm'n*, 210 Wis. 2d 623, 630, 563 N.W.2d 512 (1997).

Courts "will under certain circumstances give deference to an agency's statutory interpretation." *Neenah Foundry Co. v. Labor & Indus. Review Comm'n*, 2015 WI App 18, ¶ 16, 360 Wis. 2d 459, 860 N.W.2d 524 (citation omitted). Judicial deference has traditionally been granted at one of three levels: great weight, due weight, or no deference.[11] *See Volvo Trucks N. Am.*, 323 Wis. 2d 294, ¶¶ 12–13. Most relevant here, due weight deference is appropriate where the agency is

[11] DNR is aware that the doctrine of judicial deference is currently under review before the Wisconsin Supreme Court. *See Operton v. Labor & Indus. Review Comm'n*, 2017 WI 46, ¶¶ 71–81, 375 Wis. 2d 1, 894 N.W.2d 426 (Ziegler, J. concurring and Rebecca Bradley, J. concurring); *Tetra Tech EC, Inc., v. Wis. Dep't of Revenue*, No. 2015AP2019. It is DNR's position that in this case, the agency's interpretations of the well-permitting statutes is correct and survives any level of review, including de novo review.

charged with administering the statute, and where the agency has some experience with the statute in question. *See Racine Harley-Davidson*, 292 Wis. 2d 549, ¶ 13; *see also* Wis. Stat. § 227.57(10) (recognizing that "due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it"). Where due weight deference is applied, a reviewing court will sustain the agency's reasonable interpretation of a statute, even if another equally reasonable interpretation is presented. *See Volvo Trucks N. Am.*, 323 Wis. 2d 294, ¶ 15. Thus, under due weight deference, a court will set aside the agency's interpretation only if the court is convinced that a more reasonable interpretation exists. *See id.*

Courts review an agency's decision de novo when "the issue before the agency is clearly one of first impression, or when an agency's position on an issue has been so inconsistent so as to provide no real guidance." *Masri v. Labor & Indus. Review Comm'n*, 2014 WI 81, ¶ 24, 356 Wis. 2d 405, 850 N.W.2d 298 (citation omitted). De novo review also applies to an agency's interpretation of a statute governing the scope of the agency's authority. *See Jocz v. Labor & Indus. Rev. Comm'n*, 196 Wis. 2d 273, 291, 538 N.W.2d 588 (1995), *abrogated on other grounds by Coulee Catholic Sch. v. Labor & Indus. Rev. Comm'n*, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868.

Here, DNR's decisions to issue well permits under Wis. Stat. § 281.34 are entitled to due weight deference. The Legislature has charged DNR with authority to administer high capacity well permitting under Wis. Stat. § 281.34, and DNR

unquestionably has expertise in doing so. And notably, as outlined in Background sec. II, *supra*, DNR has long interpreted its authority under Wis. Stat. § 281.34 as being confined to the statutory terms, so that no additional analysis or conditions would be allowed.

To illustrate, before the 2011 *Lake Beulah* decision and the 2014 *Richfield Dairy* decision, DNR consistently applied the well-permitting framework in strict accordance with the statutory language. Contrary to what Petitioners suggest regarding DNR's position in that case, *Lake Beulah* arose because DNR applied the well-permitting statutes *without* considering extra-statutory factors such as "environmental impacts." *See*, *e.g.*, *Lake Beulah*, 335 Wis. 2d 47, ¶ 16 (noting that challengers argued that DNR "should have considered evidence of potential harm to Lake Beulah" before issuing well permit). The interpretation applied in these cases is therefore consistent with the agency's longstanding interpretation of the statute, and thus warrants due weight deference, but would also survive de novo review.

Applying due weight deference, this Court should uphold DNR's decision to issue the permits in question unless the Court concludes that the governing statutes dictated another, more reasonable decision. *See Volvo Trucks N. Am.*, 323 Wis. 2d 294, ¶ 15. To the extent that this Court reviews the scope of DNR's authority under Wis. Stat. § 227.10(2m) or the public trust, the Court's review of that question is de novo.

Finally, separate from DNR's application of the statutes, the agency's findings of fact regarding the well-permit applications are entitled to substantial

deference, and should be sustained unless there is no credible evidence in the record to support the agency's findings. *See City of Oak Creek ex rel. Water & Sewer Util. Comm'n*, 292 Wis. 2d 119, ¶ 13.

Applying these legal standards, the Decisions should be upheld.

B. DNR properly approved the eight high capacity well applications.

1. DNR's fact findings pertaining to its Decisions were consistent with statutory and regulatory requirements, and are supported by substantial evidence.

DNR's review and approval of the challenged wells was correct and consistent with the explicit authority provided in Wis. Stat. § 281.34 and Wis. Admin. Code chs. NR 812 and 820. DNR evaluated each well application and determined that none triggered any of the criteria that would require additional review or conditions. Wis. Stat. § 281.34(4)(a); (*see also* R. Lutz 20-21, Creek 14–15 and 32–33, Pep 14–15, Fro 14, Turz 19–20, Lask 12–13, Laur 11–12, Dero 12.) DNR further evaluated each application and determined that none of the wells would impact a public water supply, and that none would withdraw more than 2 million gallons per day in any 30-day period. Wis. Stat. §§ 281.34(5)(a), 281.35; (R. Lutz 20–21, Creek 14–15 and 32–33, Pep 14–15, Fro 14, Turz 19–20, Lask 12–13, Laur 11–12, Dero 12.) DNR's findings of fact—namely, that the eight proposed high capacity wells did not trigger a heightened environmental review under WEPA—are undisputed and should not be disturbed.

2. In light of its fact findings, DNR's conclusions of law were correct.

Upon these findings, and with substantial supporting evidence in the record, DNR properly issued high capacity well approvals. (R. Lutz 10–14, Creek 7–11 and 25–29, Pep 8–12, Fro 7–11, Turz 12–16, Lask 6–10, Laur 4–8, Dero 7–11.) Reading Wis. Stat. § 227.10(2m) together with Wis. Stat. § 281.34 and Wis. Admin. Code chs. NR 812 and 820, DNR correctly limited its analysis to its explicit authority to review and approve the high capacity well applications. As explained above, none of the well applications triggered a WEPA review, and the statutes do not allow DNR to condition or deny the well applications based on an environmental review.

3. Petitioners' arguments to the contrary are unavailing.

Petitioners' central argument is that, pursuant to *Lake Beulah* and in light of the eight exhibits they attached to their brief, DNR was required to conduct an unspecified impact analysis or consider impacts (including cumulative impacts) to surface waters, apparently separate and apart from the WEPA process. (Pet'rs' Br. 7–12, 16–17, Exs. 1–8.) Petitioners further argue that DNR should have either rejected outright or added conditions to each of the challenged well approvals. (*Id.* at 20.) Their argument fails for multiple reasons.

First, Petitioners have not met their burden to overturn DNR's fact findings. Petitioners' brief is devoid of any meaningful citation to the record. And of the eight "record citations" they attach as exhibits to their brief, four are not even part of the administrative record. (*See* Pet'rs' Exs. 1, 3, 7, 8.) If Petitioners believed that these

materials should have been included in one of the records on review, it was their obligation to move to supplement the record. *See Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n*, 84 Wis. 2d 504, 533, 267 N.W.2d 609 (1978) (recognizing that challenger bears burden to support supplementation of administrative record); *see also* Wis. Stat. § 227.55 (providing that court may require or permit record supplementation "when deemed desirable"). Petitioners have not moved to supplement any of the records on review.

In any event, none of the "record evidence" is cited for the proposition that DNR was incorrect regarding its finding that the proposed wells did not trigger a WEPA review or otherwise qualify for heightened review under the statutes. Indeed, Petitioners have not alleged that the well approvals triggered a WEPA analysis or that DNR failed in its obligation to comply with WEPA. Instead, the eight exhibits are cited for the proposition that DNR did not comply with its duties under *Lake Beulah* and the public trust doctrine. (Pet'rs' Br. 8–12.) As explained in Argument sec. II, *infra*, this argument is a nonstarter: subsequent controlling Wisconsin Supreme Court case law, as well as Act 21, prevent DNR from taking action outside the explicit regulatory framework described above.

Even if Petitioners' "record evidence" was relevant to the legal question at hand (and even if all eight exhibits were properly before the Court), the evidence they point to refers to DNR's evaluation of the proposed wells' cumulative impacts

together with existing wells, among other things.[12] Implicitly, Petitioners argue that DNR should have considered the evidence of the proposed wells' cumulative impacts together with existing wells (as well as other impacts) when it issued the Decisions. But Petitioners cannot challenge the Decisions based on a lack of consideration of cumulative impacts together with existing wells. Wis. Stat. § 281.34(5m).

With regard to cumulative impacts, Petitioners argue that because the adverse impacts they point to are not exclusively "cumulative impacts in conjunction with existing wells," the statutory bar in Wis. Stat. § 281.34(5m) cannot apply. (Pet'rs' Br. 8.) As DNR explained in its briefing on its motion to dismiss, this argument is without merit. Moreover, by its plain language, the statute is not limited to situations where the only challenge raised is a lack of consideration of the cumulative impacts of that high capacity well together with existing wells. Wis. Stat. § 281.34(5m). DNR maintains that the statute bars any such challenge, whether it appears as a single claim or one of many. However, the Court need not

[12] (Pet'rs' Br. Ex. 1 (describing "impacts to Lake Emily and Stolenberg Creek by existing high-capacity wells and the Lutz, Pavelski and Peplinski proposed well"); Ex. 2 (Lutz 17–18, Pep 19–20) (noting that "water resources listed above may already be affected by pumping in the area and are aware that the wells approved today may add to those impacts"); Ex. 3 at 2 (analyzing the potential impacts of the proposed Frozene well "in conjunction with the impact of existing high capacity wells"); Ex. 6 at 2 (Laur 14) (explaining that "Radley Creek has already been affected by groundwater withdrawal by other hicap wells in the region and the new well would add to that impact."); Ex. 7 (describing how DNR evaluated the proposed Derousseau well "in addition to the existing high capacity wells within the immediate vicinity"); Ex. 8 (describing that "the combination of existing irrigation wells with the proposed [Derousseau] irrigation well in the sand/gravel aquifer would have a direct impact on the surrounding wetlands").)

reach the question of whether Wis. Stat. § 281.34(5m) precludes Petitioners' challenge to the Decisions based on a lack of consideration of the proposed wells' cumulative impacts together with existing wells, because Petitioners' claims are completely foreclosed by controlling Wisconsin Supreme Court case law and Act 21, as further explained in Argument sec. II.

In a footnote, Petitioners suggest that DNR should have disregarded the statutory definition of "groundwater protection area" and considered whether proposed wells located more than 1,200 feet from a sensitive resource should nonetheless be subject to additional unspecified conditions. (Pet'rs' Br. 9 n.4.) Petitioners' argument on this point is undeveloped, but it reflects a theme that permeates their arguments—that DNR should act without regard to the statutes and rules that govern the high capacity well program.

Neither Wis. Stat. § 281.34 nor Wis. Admin. Code chs. NR 812 and 820 explicitly authorizes DNR to take the actions Petitioners demand. Petitioners would like this Court to conclude that the statutes and rules enacted by the Legislature and promulgated by DNR are the "minimum requirements" and that DNR can regulate above and beyond as it deems necessary or desirable. In other words, Petitioners prefer an undefined and therefore unbounded regulatory program instead of one with explicit requirements and limitations established by the Legislature. But Wis. Stat. § 227.10(2m) precludes DNR from implementing or enforcing requirements unless the agency is explicitly authorized by statute or rule. Conducting a WEPA analysis or a separate cumulative impact analysis for the well

applications in this case, and denying or conditioning the approvals based on such an analysis would go beyond DNR's explicit authority and contravene the legislative directive in Wis. Stat. § 227.10(2m).

DNR's Decisions were supported by substantial evidence in the record, and its conclusions of law were correct. Petitioners have not presented a more reasonable interpretation of the statutes. Because Petitioners have not met their burden to overturn these Decisions, they must be upheld.

II. DNR's approvals do not violate the public trust doctrine.

Petitioners devote most of their brief to the flawed argument that DNR failed to perform its public trust duties when it issued the Decisions. Relying on *Lake Beulah*, Petitioners curiously fail to discuss *Rock-Koshkonong*, a Wisconsin Supreme Court case that post-dates *Lake Beulah* and is directly relevant here. This case clarifies that regulation of high capacity well applications is not subject to constitutional public trust powers at all. *Lake Beulah* predates *Rock-Koshkonong* and does not apply Act 21; therefore, it is unhelpful here. Moreover, because the Legislature determines the scope and extent of DNR's delegated authority—under both the public trust doctrine and the police power—Act 21's clear limitation on the agency's authority controls here.

A. DNR's review and approval of the high capacity well applications are subject to delegated police power authority, not public trust powers.

Throughout their briefs, Petitioners and the amici argue that *Lake Beulah* is the last word on water regulation in Wisconsin. Only in passing do they

acknowledge that two years after *Lake Beulah*, the Wisconsin Supreme Court decided *Rock-Koshkonong Lake District v. Department of Natural Resources*, which significantly clarified the scope of constitutionally mandated water-resource regulation. In *Rock-Koshkonong*, the court explained that regulatory authority pertaining to water or lands outside the ordinary high water mark (OHWM)[13] of a navigable waterway is not within the constitutional public trust authority. *See, e.g.*, *Rock-Koshkonong*, 350 Wis. 2d 45, ¶¶ 90–94. The court confirmed that any authority to regulate outside the OHWM was grounded in the state's police power, not its constitutional public trust jurisdiction.

In light of *Rock-Koshkonong*'s clarification of the geographic limits on public trust authority, Petitioners' reliance on *Lake Beulah* is misplaced. Any 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. As such, the well-permitting framework does not implicate mandatory, constitutional rights.

[13] The "ordinary high water mark" refers to "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." *Rock-Koshkonong*, 350 Wis. 2d 45, ¶ 42 n.18 (quoting *Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816 (1914)).

1. Regulatory authority pertaining to water or lands outside the OHWM is within the state's police power, not its constitutional public trust authority.

a. Historical understanding of the public trust doctrine.

The public trust doctrine provides constitutional authority over navigable waters and lands beneath navigable waters. The doctrine arises from article IX, § 1, of the Wisconsin Constitution, which provides in pertinent part that "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." Under this provision, courts have held that the state holds in trust the lands under navigable waters, so that the public may use whatever navigable waters flow over those lands. *See Rock-Koshkonong*, 350 Wis. 2d 45, ¶ 78. The public's rights in these navigable waters include commercial navigation, recreation, fishing, hunting, and enjoying "scenic beauty." *See id.* ¶ 72.

Although the Wisconsin Constitution vests the Legislature with responsibility for the trust, the Legislature has in turn delegated certain authority to DNR for purposes of managing certain trust resources. *See id.* ¶ 77 n.28. Thus, whatever authority DNR has under the public trust doctrine, that authority is subject to legislative delegation or withdrawal. *See State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983) (recognizing that Legislature has "power of regulation to effectuate the purposes of the trust").

b. Public trust authority is grounded in state control of the lands lying below the OHWM.

Rock-Koshkonong clarified that regulatory authority pertaining to water or lands outside the OHWM is not within the constitutional public trust authority. There, the supreme court addressed whether a statute governing dams and bridges implicated the agency's authority over public trust resources. *See Rock-Koshkonong*, 350 Wis. 2d 45, ¶¶ 65–68. Specifically, the court examined whether DNR's authority over public trust resources extended to "private wetlands adjacent to [a navigable water] that are above the OHWM." *Id.* ¶ 65. The court explained that the constitutional authority did not extend "beyond navigable waters to non-navigable waters and land." *See id.* ¶ 77. "Eliminating the element of 'navigability,' . . . would remove one of the prerequisites for the DNR's *constitutional basis* for regulating and controlling water and land." *Id.* "Applying the public trust doctrine to non-navigable land above the OHWM would eliminate the rationale for the doctrine." *Id.*

In distinguishing between navigable and non-navigable waters, the court reaffirmed that the basis for public trust authority is the state's ownership or "virtual" ownership of the lands beneath navigable waters. *See id.* ¶¶ 82–84. For lakes, the doctrine provides that the state owns the land underlying the water body. *See id.* ¶ 82. For streams, the rule is different, and provides that it is riparians who own the streambed, but that their ownership is subject to the state's reservation of rights for the public to use that submerged land and the waters, as though they

were owned by the state. *See id.* ¶¶ 81–82. In both cases, however, it is the land under navigable waters that is subject to the trust. *See id.* ¶¶ 82–84.

c. Petitioners' mischaracterize the public trust doctrine, and ignore that the doctrine is grounded in state control of certain *lands*, not the waters that flow over those lands.

Throughout their brief, Petitioners seem to use "public trust waters/resources" interchangeably with "waters of the state," thereby suggesting that all waters of the state are subject to the public trust doctrine. (*See, e.g.*, Pet'rs' Br. 2, 13–14, 21.) This is both imprecise and incorrect. *Rock-Koshkonong* makes clear that "public trust resources/waters" exist in a limited geographic area, below the OHWM. In contrast, the statutorily defined "waters of the state" includes both navigable and non-navigable waters, including "all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction." Wis. Stat. § 281.01(18).

Petitioners assume that all of the "impacted waters" in the eight cases at bar are "public trust waters," but fail to cite anything in the record to support their assertion. (*See, e.g.*, Pet'rs' Br. 8–11.) Indeed, the water resources they identify are not necessarily navigable, and Petitioners have pointed to nothing showing the contrary.[14] Thus, not only do Petitioners rely on an incorrect understanding of

[14] A water is not "navigable" for purposes of the public trust doctrine merely by virtue of the fact that it is designated as an "exceptional resource water" (ERW) or an "outstanding resource water" (ORW). Wisconsin Admin. Code §§ NR 102.10 and 102.11 (defining "outstanding resource waters" and "exceptional resource waters").

public trust authority, they fail to even trigger their own theory through proper citation to the administrative record.

Regardless, even if all of Petitioners' identified water resource waters were navigable, the public trust doctrine does not encompass high capacity wells that are outside the OHWM. Outside of those lands covered by "navigable waters," the state does not hold title to the land, so any constitutionally mandated regulation could have "very significant" ramifications for private property. *Rock-Koshkonong*, 350 Wis. 2d 45, ¶ 77. For example, extending constitutional authority for regulation on non-navigable waters and lands "would create significant questions about ownership of and trespass on private land." *Id.* ¶ 84.

Recognizing the substantial implications of a doctrine that provided "constitutionally based jurisdiction over private land," *id.*, *Rock-Koshkonong* made clear that "[p]ublic trust jurisdiction has always been confined to a limited geographic area," *id.* ¶ 91, namely, that area "between the boundaries of ordinary high-water marks," *id.* (quoting *Diana Shooting Club*, 156 Wis. at 272). In doing so, the court drew a keen distinction between constitutional authority, which arises from Wis. Const. art. XI, § 1, and is limited to navigable waters and the lands thereunder, and police power authority, which arises from the Legislature's general duty to promote health, safety, and welfare. *See id.* ¶¶ 84–86. For lands outside the OHWM, "[t]here is no constitutional foundation for public trust jurisdiction." *Id.* ¶ 86.

Thus, any authority to regulate lands and waters outside the OHWM arises under the Legislature's police power. *See id.* ¶ 90. This means that the Legislature may—within its discretion, and without running afoul of any constitutional mandates—modify the scope of regulations pertaining to these lands and waters. *See id.* ¶ 101. DNR's delegated police power authority is therefore "subject to constitutional and statutory protections afforded to property, may be modified from time to time by the legislature, and requires some balancing of competing interests in enforcement." *Id*.

The limited scope of DNR's delegated constitutional authority is made clear by reference to the historical explanation for the difference in ownership of streambeds versus lakebeds. Whereas Petitioners' view would require the state to regulate *anywhere* based on *any* alleged "adverse impacts to [p]ublic [t]rust lakes and streams" (Pet'rs' Br. 26), this view runs headlong into the longstanding and common-sense recognition that "streams can change course . . . [and] become unnavigable over time." *See Rock-Koshkonong*, 350 Wis. 2d 45, ¶ 82. Based on this understanding, courts have long acknowledged that state ownership of streambeds "could be problematic and impractical," because what was once covered by water may no longer be so in the future. *See id.* ¶¶ 82–86.

This distinction is noteworthy because it illustrates that constitutional public trust authority has not been applied as expansively as Petitioners advocate. The doctrine never guaranteed a right to preserve all navigable waters in some idealized state, in perpetuity. Indeed, courts applying the doctrine contemplated that the

water levels over trust land would fluctuate. So rather than preserving a right to guaranteed water *levels*, courts have always recognized that the trust requires the state to preserve to the public the right to use *whatever navigable waters do exist*, wherever they may be found, and at whatever level they exist. *See id.* ¶ 83.

d. The existence of alternative statutory and common-law remedies further undercuts Petitioners' attempt to constitutionalize regulation of all waters.

The historical understanding of the scope of the trust directly undercuts Petitioners' central argument, which is that if navigable water levels are not protected through a sweepingly broad interpretation of the public trust doctrine, those waters will not be adequately protected. (*See* Pet'rs' Br. 25.) Their argument is based on two mistaken premises. The first is that the public trust mandates a certain, idealized water level. As discussed above, this view is based on an incorrect interpretation of the constitutional provision.

The second mistaken premise is that existing mechanisms are inadequate to protect navigable waters, so the well-permitting framework must be interpreted to *create* a constitutional mechanism to protect navigable waters. But there are multiple remedies available to protect water resources, including both statutory and common law mechanisms, and which apply to both navigable and non-navigable waters.

These remedies include Wis. Stat. § 30.03(2), under which a district attorney or the Attorney General, on DNR's request "shall institute proceedings to . . . abate any nuisance committed under [ch. 30] or ch. 31," as well as Wis. Stat. § 30.03(4)(a),

under which DNR may institute enforcement efforts if the agency learns of "a possible infringement of the public rights relating to navigable waters." Similarly, Wis. Stat. § 30.294 provides that "any person" may bring an action to enjoin alleged violations relating to the laws governing navigable waters. *See also Lake Beulah*, 335 Wis. 2d 47, ¶ 61 n.42 (pointing to "citizen suit" provision as possible remedy for alleged public nuisance affecting rights in navigable waters). Further, Wis. Stat. § 31.02(1) provides a mechanism for petitioning DNR to "by order fix a level for any body of navigable water below which the same shall not be lowered." *See also Rock-Koshkonong*, 350 Wis. 2d 45, ¶¶ 2–3, 24 (recognizing that Wis. Stat. § 31.02(1) "authorizes the DNR to regulate the level and flow of water in the navigable waters of Wisconsin").

In addition, if Petitioners believe high capacity well approvals should receive more environmental review procedure than the law currently provides, they could have challenged the relevant rules, Wis. Admin. Code § NR 150.20(1m)(h)–(i), when they were revised in 2015. Petitioners did not seek this remedy.

And beyond statutory or regulatory remedies, Wisconsin courts have recognized a common-law tort remedy for unreasonable harm to groundwater resources. *See State v. Michels Pipeline Constr., Inc.*, 63 Wis. 2d 278, 302–03, 217 N.W.2d 339 (1974) (adopting Restatement (Second) of Torts § 858A (Am. Law Inst., Tentative Draft No. 17, 1971), regarding liability for use of ground water).

All of these alternative mechanisms demonstrate that the Legislature has maintained numerous adequate mechanisms by which the waters of the

state—including navigable waters—may be protected. Petitioners might have pursued any of these other avenues for the relief they now seek. But they have not done so. Instead, they have attempted to use the judicial review process to create a constitutionally mandated mechanism for water-resource protection, based on their suggestion that DNR or the Legislature has abdicated its constitutional obligations. In light of the existence of all these other remedies, not to mention the limited scope of judicial review, Petitioners' argument must be rejected.

2. Regulation of high-capacity wells is undertaken pursuant to the state's police power, not the constitutional public trust.

The court's recognition of the limits of constitutional trust power in *Rock-Koshkonong* has a direct bearing on DNR's Decisions in this case: whatever regulatory authority DNR has over high capacity well permitting, that authority is not derived from the agency's delegated authority under the public trust doctrine because the high capacity wells are located on land outside the OHWM of any alleged navigable water. (R. Lutz 15, Creek 13, Pep 1, Fro 12, Turz 17, Lask 11, Laur 9, Dero 13.) Instead, DNR's regulatory authority over wells is grounded in the state's police power, delegated to the agency by statute, and subject to modification by the Legislature. *See Rock-Koshkonong*, 350 Wis. 2d 45, ¶ 101.

Rock-Koshkonong makes clear that there is not a constitutional requirement under the public trust doctrine to regulate non-navigable lands in furtherance of the public right in navigable waters. *See id.* ¶ 86; *see also id.* ¶¶ 87–91. Because DNR's administration of well permitting derives from the police power, its permitting

decisions do not even implicate public trust concerns. Petitioners are incorrect when they argue that DNR's application of the well-permitting statutes in accordance with Act 21 (*i.e.*, Wis. Stat. § 227.10(2m)) violates the public trust doctrine or is unconstitutional as applied. (*See* Pet'rs' Br. 24–27.)

The question presented in this case is one of statutory interpretation: did the Legislature delegate to DNR regulatory authority to conduct any review of high capacity wells beyond what is included in Wis. Stat. § 281.34, or to impose conditions on the issuance of a well permit beyond the conditions contemplated under the statute? As set forth *supra*, Argument sec. I.B., the Legislature did not delegate such extra-statutory authority to DNR. And without such authority, DNR's decisions to issue the permits at issue were correct and in accordance with the agency's statutorily defined powers.

Because the wells at issue here are not located below the OHWM of any navigable water, any well-permitting authority is based solely on the police power. As such, DNR's authority is limited to whatever police powers the Legislature may explicitly delegate. And as is evident in the language of Wis. Stat. §§ 281.34(4)–(5) and 227.10(2m), DNR's statutory authority does not include authority to base a permit decision on an unspecified assessment of "environmental impacts."

B. *Lake Beulah* is unhelpful here because it predates *Rock-Koshkonong* and does not apply Act 21.

Petitioners argue that *Lake Beulah* is the "seminal case" regarding DNR's authority and duties when acting on a high capacity well application. (Pet'rs' Br. 3.) Based on this assumption, they argue that *Lake Beulah* required DNR to consider

impacts (including cumulative impacts) to surface waters in the eight cases at bar, (*id.* at 16), that DNR did not consider those impacts, and that if DNR had considered those impacts, it should have denied these well applications or approved them with conditions (*id.* at 17).

This argument is flawed because its legal premise is flawed. *Lake Beulah* predates *Rock-Koshkonong*, and the *Lake Beulah* opinion did not analyze or apply Act 21. Because *Rock-Koshkonong* and Act 21 render the legal landscape drastically different, *Lake Beulah* is not instructive here. Moreover, Petitioners' argument on this point ignores that the Legislature defines the scope and extent of DNR's regulatory authority, whether under the public trust doctrine or the police power.

1. *Lake Beulah* predates *Rock-Koshkonong*.

The *Lake Beulah* court held that DNR has the authority and a "general duty" to consider the environmental impact of a proposed well when presented with sufficient scientific evidence of potential harm to "waters of the state." *Lake Beulah*, 335 Wis. 2d 47, ¶ 46. The court explained that DNR's authority stemmed from the agency's delegated general duties under the public trust doctrine, as well as the regulatory framework under Wis. Stat. ch. 281. *Id.* ¶ 39. The court noted that there was nothing in Wis. Stat. §§ 281.34 or 281.35 that limited DNR's authority to consider the environmental impacts of a proposed high capacity well. *Id.* ¶ 41. Thus, while DNR was not required to investigate the potential harm of every high capacity well or conduct a formal review for every application, DNR's "general duty" required it to do so when presented with concrete evidence of harm. *Id.* ¶¶ 45–46.

Lake Beulah's analysis is unhelpful in this case because it predates *Rock-Koshkonong*. Any statements in *Lake Beulah* pertaining to public trust authority must be viewed through the lens of *Rock-Koshkonong*'s "constitutional v. police power" dichotomy. The court in *Lake Beulah* also referred to a "general duty" over "the waters of the state" as the basis for regulating high capacity wells, without distinguishing between public trust authority and police power authority. *See id.* ¶ 39.

Rock-Koshkonong resolves any question about the scope of each type of authority. Under *Rock-Koshkonong*, whatever regulatory authority DNR possesses over high capacity wells, that authority is not grounded in the constitution's public trust doctrine. So when the court in *Lake Beulah* referred to a "general duty" over "waters of the state," *Rock-Koshkonong* makes clear that only part of that duty (over only some of the "waters of the state"—the navigable waters) is grounded in the constitution; the rest is grounded in the police power. *See Rock-Koshkonong*, 350 Wis. 2d 45, ¶¶ 90, 102.

No doubt Petitioners will argue that *Rock-Koshkonong* does not undermine their constitutional argument, and that *Lake Beulah* continues to stand for the proposition that wells located outside the OHWM should be regulated under the constitutional protection for navigable waters. Even putting aside whether *Lake Beulah* ever stood for the broad and absolute proposition that Petitioners now suggest (*e.g.*, that DNR unconditionally "must" consider cumulative and other

environmental impacts pursuant to its public trust obligations (*see, e.g.*, Pet'rs' Br. 18, 25)), *Rock-Koshkonong* resolved the scope of DNR's delegated constitutional authority. *See, e.g.*, *Rock-Koshkonong* 350 Wis. 2d 45, ¶¶ 86–91. Thus, when Petitioners argue that *possible impacts* to surface waters (or "waters of the state") remain a viable hook for extending constitutional jurisdiction to wells located outside an OHWM, their argument is foreclosed by *Rock-Koshkonong*.

The Town of Rome and the Central Sands Water Action Coalition (CSWAC, together, "amici") make public trust arguments that are wholly duplicative of Petitioners' arguments, and add nothing meaningful to the questions presented on judicial review. Indeed, like Petitioners, amici fail to even acknowledge the *Rock-Koshkonong* decision and the clear distinction the court drew between lands under navigable waters and those waters and lands outside the OHWM of any navigable water. Because *Rock-Koshkonong* controls any inquiry into the scope of DNR's constitutionally mandated responsibilities, and because amici fail to even cite the case, amici's public-trust arguments should be rejected out of hand.

2. *Lake Beulah* did not analyze or apply Act 21.

Rock-Koshkonong aside, *Lake Beulah* did not apply Act 21 when evaluating DNR's authority under the public trust doctrine and relevant statutes. Nowhere in the body of the decision does the court consider whether Act 21 affects DNR's authority to deny or condition high capacity well permit applications. While the court acknowledged the newly enacted Act 21 in a single footnote, the court

concluded that Act 21 did not apply in that case. *Lake Beulah*, 335 Wis. 2d 47, ¶ 39 n.31. Thus, *Lake Beulah* does not address the central question in this case: whether Act 21 limits DNR's authority to deny or condition a high capacity well permit application when the criteria in Wis. Stat. § 281.34(4) are not triggered.

In their brief, Petitioners argue at length that the supreme court "addressed" Act 21, meaning that the court's holding regarding DNR's authority incorporates an analysis under Act 21. Yet in the document attached to their affidavit, Petitioners' counsel of record argued the exact opposite position—that the supreme court "did not address the effect of Wis. Stat. § 227.10(2m), which had been enacted shortly before the decision but after the agency actions at issue in the case." (Sinderbrand Aff. Ex. A at 2.) Despite Petitioners' counsel's own conflicting views on the matter, the analysis below demonstrates the flaws in their current argument.

Petitioners' argument that the *Lake Beulah* court applied Act 21 when evaluating DNR's authority to regulate its high capacity well program is premised on a single footnote in the opinion. (Pet'rs' Br. 18–19 (citing *Lake Beulah*, 335 Wis. 2d 47, ¶ 39 n.31).) As a general matter, the supreme court would not have disposed of such a weighty issue in a single footnote. If Act 21 had been part of the court's analysis, then it would have appeared in the paragraphs comprising the court's reasoning for its holding. Regardless, the footnote does not support Petitioners' current argument. That footnote states in relevant part:

> Our conclusion is not affected by the argument . . . that 2011 Wisconsin Act 21, enacted on May 23, 2011, further circumscribes the DNR's authority to consider environmental harm under Wis. Stat. ch. 281. . . .

> None of the parties argues that the amendments to Wis. Stat. ch. 227 in 2011 Wisconsin Act 21 affect the DNR's authority *in this case*. The DNR responds that Wis. Stat. ch. 281 does explicitly confer authority upon the DNR to consider potential environmental harm presented by a proposed high capacity well. The conservancies agree. The Village maintains that the DNR lacks such authority under Wis. Stat. ch. 281 but states that "Wis. Stat. § 227.10(2m) does not change the law as it relates to the authority of the [DNR] to issue high capacity well approvals under Wis. Stat. § 281.34." We 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 added).

Petitioners argue that this footnote means that the court held that Act 21 was inapplicable because there was explicit authority in the statutes to consider environmental harm. This is wrong. The footnote explains that while the parties *dispute* whether Wis. Stat. ch. 281 gives DNR explicit authority to consider potential environmental harm, the court agreed that Act 21 did not affect its analysis in this case. The footnote is silent as to why the court agreed with the parties as to the inapplicability of Act 21 in the *Lake Beulah* case, but it was not because the court took a side regarding Act 21's effect on DNR's authority. The conclusion is inescapable: *Lake Beulah* did not address Act 21.

3. The Legislature dictates the scope and extent of DNR's regulatory authority.

As explained above, Act 21 places a permissible and appropriate limit on DNR's authority to regulate high capacity wells. Neither the Wisconsin statutes nor the public trust doctrine gives DNR authority to regulate high capacity wells beyond what is explicitly allowed in state statute or rule. The Decisions faithfully follow the explicit statutory framework designed by the Legislature, and should be upheld.

But even if DNR's authority to regulate high capacity wells could be construed as a delegation of "constitutional" powers rooted in the public trust, the Legislature, as the trustee of the public trust authority, has explicitly and properly limited DNR's authority through the enactment of Act 21 and Wis. Stat. § 227.10(2m).

In the *Lake Beulah* opinion, the court analyzed Wis. Stat. ch. 281 and concluded that Wis. Stat. §§ 281.11 and 281.12 provide DNR with broad public trust authority to regulate high capacity wells. *Lake Beulah*, 335 Wis. 2d 47, ¶ 34. The court further found that nothing in Wis. Stat. §§ 281.34 or 281.35 limits DNR's authority in the high capacity well program. *Id.* ¶ 41. Importantly, the court did not say that a limit on DNR's well permitting authority would run afoul of the constitution, only that the Legislature had not provided such a limit. *Id.* ¶ 42.

In Wis. Stat. § 227.10(2m), the Legislature has set forth the precise limit on DNR's regulatory authority that the *Lake Beulah* court found lacking. Regardless of whether DNR's well permitting authority is rooted in the public trust or in police powers, the explicit legislative limit on DNR's authority must be respected by the agency and the courts.

While Petitioners clearly desire a more robust permitting framework for the high capacity well program, that is an issue for the Legislature to resolve. Indeed, it is the Legislature—not DNR, not the courts—that dictates the scope of delegated authority under both the public trust doctrine and the police power. *See State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983) (noting that Legislature holds

"primary authority to administer this trust for the protection of the public's rights"); *see also Rock-Koshkonong*, 350 Wis. 2d 45, ¶ 101 (recognizing Legislature's authority to delegate, and limit, "DNR's police power-based statutory authority").

Moreover, the Legislature continues to maintain, and even expand, avenues by which citizens can seek meaningful policy changes to the well-permitting program. For example, the Legislature recently enacted 2017 Wis. Act 10 ("Act 10") to create new obligations for DNR to study the effect of groundwater withdrawals on Wisconsin's resources, including navigable waters. Wis. Stat. § 281.34(7m)(b). Newly enacted Wis. Stat. § 281.34(7m) requires DNR to evaluate and study the hydrology of Pleasant Lake and a designated study area within the Central Sands.[15] Act 10 provides for an open and transparent process for this evaluation, requiring DNR to hold a public hearing on its report and any legislative recommendations. Wis. Stat. § 281.34(7m)(d). Though this Act is not directly relevant to the eight Decisions in this judicial review (and regardless of any opinion on the Legislature's most recent policy decision itself), the salient point is that the Legislature is responsible for enacting an appropriate framework for Wisconsin's high capacity well program. Petitioners' attempted end-run around the Legislature is improper.

The Legislature has established a framework for approving high capacity well permits and has granted specific authorities for DNR, district attorneys, the

[15] Pleasant Lake is one of the resources Petitioners allege will be impacted by a challenged well; most of the other challenged wells are located within close proximity to the legislatively-designated study area.

Attorney General, and citizens to provide additional protections for public trust resources outside of the well permitting program. Given the Legislature's clear authority in this area, this Court should reject Petitioners' request to disregard the Legislature's framework, and affirm DNR's decisions in this case.

III. Amici's arguments should be rejected.

Much of what amici argue regarding the public trust doctrine is highly duplicative of Petitioners' arguments, and those arguments have been addressed above. The new arguments raised are either irrelevant or without merit.

Judicial review under Wis. Stat. ch. 227 is highly circumscribed, and is confined to whether the agency acted in accordance with existing law. Because the amici ask this Court to decide this case based on their policy preferences, their arguments have no place on judicial review. Further, the "regulatory certainty" that both amici purportedly seek is precisely what Act 21 restored, by once again clarifying that the high capacity well statutes mean exactly what they say, and nothing more.

A. Amici's arguments have no place in an action for judicial review.

On a petition for judicial review, a court's review "shall be confined to the [administrative] record." Wis. Stat. § 227.57(1). Judicial review proceedings are therefore no place to advance new theories about what the legislative policy ought to be, or suggest a policy position that the court should take to best serve interested parties. *Cf. Joint Sch. Dist. No. 1, of Town of Wabeno v. State*, 56 Wis. 2d 790, 794–95, 203 N.W.2d 1 (1973) (recognizing that "the merits of a school district

reorganization is a legislative determination of public policy questions which does not raise justiciable issues of fact or law").

But this is just what amici ask this Court to do when they proclaim what might happen if this Court affirms the permits at issue. Both amici trot out a parade of horribles that would follow from a decision recognizing DNR's limited statutory authority under Wis. Stat. § 281.34. For example, CSWAC suggests that this Court's decision must account for the possibility that DNR's statutory approach might have a "chilling impact" on the purchase or improvement of waterfront property. (CSWAC Br. 9.) Likewise, the Town of Rome suggests that local governments might be "strained" by a decision affirming DNR's approach here, and that the permit decisions here "demonstrate a dangerous trend toward state abdication of constitutional authority." (Town of Rome Br. 11.)

The implied suggestion in both of these arguments demonstrates the impropriety of their requests. Both amici seem to suggest that this Court's decision must account for the broad, societal implications of its decision. Such policy-based considerations simply have no place on judicial review of administrative decisions.

B. Amici's requests for "predictability" are disingenuous.

Amici tell this Court that society will be better off if the Court adopts their view of DNR's constitutional and statutory authority. As a rhetorical hook, amici suggest that their approach has the benefit of promoting "predictability," which will best allow amici, their members, and other local governments to organize their affairs and rely on DNR's regulatory efforts. (*See, e.g.*, CSWAC Br. 9.)

To be clear, the "predictability" the amici want is a policy approach that they argue is consistent with *Lake Beulah* and the ALJ's decision in *Richfield Dairy*. But that "predictability" is not a predictable approach at all. As discussed at length, *supra*, their approach is unmoored from statutory language, and ignores all geographical limitations on public trust authority. Petitioners' and amici's approach therefore would not provide guidance to anyone—DNR, local governments, permit applicants, or the public—about what DNR must do in any given case.

As should be clear, DNR's application of these statutes here upholds, rather than undermines, predictability and stability in the high capacity well program. DNR issued the permits in this case in accordance with the agency's longstanding (albeit interrupted) approach toward high capacity well permits. The permits here were issued pursuant to the plain and limited authority under Wis. Stat. §§ 281.34 and 227.10(2m). Because DNR's decisions were supported by governing law, this Court must affirm DNR's issuance of the Decisions.

CONCLUSION

For these reasons, DNR respectfully requests that the Court deny the petitions for review, affirm the Decisions, and dismiss these consolidated cases.

Dated this 4th day of August, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed the foregoing Brief of Respondent Wisconsin Department of Natural Resources 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 4th day of August, 2017.

/s/ Gabe Johnson-Karp
GABE JOHNSON-KARP