No. 18AP59

In the Wisconsin Court of Appeals

DISTRICT II

CLEAN WISCONSIN, INC., AND
PLEASANT LAKE MANAGEMENT DISTRICT,
PETITIONERS-RESPONDENTS,
v.
WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
RESPONDENT-APPELLANT,

WISCONSIN MANUFACTURERS & COMMERCE, DAIRY BUSINESS ASSOCIATION, MIDWEST FOOD PROCESSORS ASSOCIATION, WISCONSIN POTATO & VEGETABLE GROWERS ASSOCIATION, WISCONSIN CHEESE MAKERS ASSOCIATION, WISCONSIN FARM BUREAU FEDERATION, WISCONSIN PAPER COUNCIL AND WISCONSIN CORN GROWERS ASSOCIATION,
INTERVENORS-CO-APPELLANTS,

On Appeal From The Dane County Circuit Court,
The Honorable Judge Valerie Bailey-Rihn, Presiding,
Case Nos. 16CV2817, 16CV2818, 16CV2819, 16CV2820,
16CV2821, 16CV2822, 16CV2823, 16CV2824

OPENING BRIEF AND APPENDIX OF RESPONDENT-APPELLANT, WISCONSIN DEPARTMENT OF NATURAL RESOURCES

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ISSUES PRESENTED

1. Did DNR lawfully approve eight high capacity wells without conducting an additional environmental review not required by statute or rule, given that Act 21 prohibits agencies from enforcing any requirement that is not "explicitly" permitted, and given that no statute explicitly authorizes additional environmental review for these wells?

The circuit court answered no.

2. Is Petitioners' claim that DNR failed to "consider . . . cumulative impacts" when approving the wells barred by Wis. Stat. § 281.34(5m), which prohibits any person from "challeng[ing] an approval . . . of a high capacity well based on the lack of consideration of [ ] cumulative environmental impacts"?

The circuit court answered no.

INTRODUCTION

Enacted in 2011, Act 21 transformed administrative law in Wisconsin, confining agencies' authority to that "explicitly" conferred by the Legislature. Wis. Stat. §§ 227.10(2m), 227.11(2)(a). The Department of Natural Resources (DNR) sought to conform its high-capacity-well program to this new mandate by reviewing the environmental impact of proposed wells only where specifically authorized by statute. None of the eight wells at issue in this case fit any of the statutory criteria for environmental review, so, following Act 21's imperative, DNR approved the wells without conducting an additional environmental review beyond the statutory review requirements. Petitioners argue that DNR should have further considered environmental impact despite Act 21.

They rely primarily on the Wisconsin Supreme Court's decision in *Lake Beulah Management District v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, an opinion grounded upon the pre–Act 21 paradigm. Although the Court mentioned Act 21 in a footnote (it was enacted shortly before the opinion was released), *id.* ¶ 39 n.31, the timing of the law, the context in which it was raised to the Court (in a letter from one of six *amici curiae*), and the Court's cursory treatment of the law (driven by the parties' dismissive responses to the letter) all strongly indicate that the Court did not fully engage

its substance. Considered anew, it is clear that Act 21 applies here, and that *Lake Beulah* is not controlling.

Petitioners respond by invoking the public trust doctrine, suggesting that the State Constitution requires DNR to always assess environmental impact—even over a legislative directive to the contrary. Even *Lake Beulah* did not go that far. The Court there acknowledged that because agencies have only those powers that the Legislature has delegated to them, the Legislature can at any time "revok[e]" or "limit[ ]" DNR's public trust authority. *Id.* ¶ 21. By enacting Act 21, the Legislature has done exactly that.

There is no plausible claim that by limiting DNR's authority, the Legislature is somehow shirking its own constitutional duty to protect Wisconsin's water resources. The Legislature carefully designed a graduated framework for environmental review: large enough wells always receive environmental review, small enough wells never do, and wells in between sometimes do, depending on criteria tailored to identify wells most likely to harm nearby waters. And the Legislature continues to refine its rules, demonstrating that it takes its public trust duties seriously. For example, it recently ordered DNR to study and provide recommendations for addressing the unique water issues in the Central Sands region, where all but one of the challenged wells are located. 2017 Wis. Act 10. This measured, comprehensive, and systematic approach to managing Wisconsin's waters fully satisfies the Wisconsin Constitution.

In case there were any lingering suspicions that, even after Act 21, DNR retains a roving commission to perform ad hoc environmental review outside the statutorily prescribed categories, the Legislature has passed yet another law to remove all doubt. That statute unambiguously bars anyone from "challeng[ing] a[ ] [well] approval . . . based on the lack of consideration of [ ] cumulative environmental impacts." Wis. Stat. § 281.34(5m). Petitioners challenge the approvals on exactly that ground (among others). To the extent Petitioners' claim relies on cumulative impacts, it should have been dismissed.

The circuit court misinterpreted, and therefore disregarded, Section 281.34(5m), held that it was bound by *Lake Beulah* and the public trust doctrine, and then reversed the well approvals. This Court should reverse.

ORAL ARGUMENT AND PUBLICATION

In light of the statewide importance of both Act 21 and DNR's high-capacity-well program, this case merits oral argument and publication.

STATEMENT OF THE CASE

A. Legal Background

1. General Regulatory Framework Governing High Capacity Wells

Wisconsin requires DNR approval for any "high capacity well" that can pump over 100,000 gallons per day (gpd). Wis. Stat. § 281.34(1)(b), (2). An applicant for a high

capacity well must provide its "location, construction or reconstruction features, pump installation features, [ ] proposed rate of operation and [ ] distance to nearby public utility wells," Wis. Admin. Code § NR 812.09(4)(a), which DNR uses to determine which requirements apply and whether they are met. Wells with a capacity below 100,000 gpd do not require DNR's approval; the owner must simply "notify" DNR "of the location of [the] well." Wis. Stat. § 281.34(3).

A few requirements apply to all high capacity wells. The physical pumps must comply with certain construction and operation requirements, tailored to the specific type of well, aquifer, and subsurface geology, in order to "protect[ ] groundwater and aquifers from contamination." Wis. Admin. Code §§ NR 812.01(1)(b); 812.10–.26. And each well owner must "identify the location of the high capacity well and submit an annual pumping report." Wis. Stat. § 281.34(5)(e)(2).

Various other requirements apply in limited situations. For example, DNR may disapprove or impose conditions on a proposed well if it "may impair the water supply of a public utility." Wis. Stat. § 281.34(5)(a). The Legislature also authorized DNR "to address the management of groundwater" in certain areas "surrounding Brown County and Waukesha County." *Id.* § 281.34(9).

2. Environmental Impact Review

The statutes sometimes require DNR to conduct an environmental review, and divide wells into three broad categories: (1) wells with a pumping capacity of less than 100,000 gpd ("small wells"), (2) wells with a "water loss" of over 2 million gpd in any 30-day period ("large wells"), and (3) wells in between ("medium wells"). *See Lake Beulah Mgmt. Dist. v. DNR*, 2010 WI App 85, ¶ 21, 327 Wis. 2d 222, 787 N.W.2d 926, *aff'd in part, rev'd in part*, 2011 WI 54.

Small wells—those with a capacity of less than 100,000 gpd—*never* require environmental impact review. As noted above, they do not even require DNR's approval; the owner must simply "notify" DNR "of the location of [the] well." Wis. Stat. § 281.34(3).

Large wells, on the other hand, always require environmental review. Large wells are subject to more stringent application requirements, Wis. Stat. § 281.35(5)(a), and DNR may only approve them if it finds, among other things, that "no public water rights in navigable waters will be adversely affected," *id.* § 281.35(5)(d)(1), and that "the proposed withdrawal will not have a significant detrimental effect on the quantity and quality of the waters of the state," *id.* § 281.35(5)(d)(6). DNR may impose "any [ ] conditions . . . necessary to protect the environment . . . and to ensure the conservation and proper management of the waters of the state," *id.* § 281.35(6)(a)(7), including "the authorized base level of water loss," "the uses for which water may be

withdrawn," and "reporting" "requirements," *id.* § 281.35(6)(a)(2), (6)(a)(4), (6)(a)(6).

Wells in the middle category—with capacity over 100,000 gpd and water loss less than 2 million gpd—require environmental impact review only if they fall into one of three subcategories, *see* Wis. Stat. § 281.34(4), outlined below. If a medium well fits any of these subcategories, DNR must conduct an "environmental review" under the Wisconsin Environmental Policy Act (WEPA), *id.*; *see* Wis. Stat. § 1.11, by "evaluat[ing] [ ] the probable . . . direct, secondary and cumulative effects of the [well]," Wis. Admin. Code § NR 150.30(2)(g). DNR may approve the well only if it will "not cause significant environmental impact." Wis. Stat. § 281.34(5)(b), (c), (d). Finally, DNR may impose conditions, including "as to location, depth, pumping capacity, rate of flow, and ultimate use," to ensure that a proposed medium well "does not cause significant environmental impact." *Id.*

The first category of medium wells that require environmental review are those "located in a groundwater protection area." *Id.* § 281.34(4)(a)(1). A "groundwater protection area" is any area "within 1,200 feet of" an "outstanding resource water," an "exceptional resource water" or a "class I, class II, or class III trout stream." *Id.* § 281.34(1)(am). "Outstanding" and "exceptional" waters are waters so designated by DNR, *see* Wis. Admin. Code §§ NR 102.10–11, that "provide outstanding recreational opportunities, support valuable fisheries and wildlife habitat,

have good water quality, and are not significantly impacted by human activities," *see* Wis. DNR, *Outstanding and Exceptional Resource Waters* (Oct. 20, 2016), http://dnr.wi.gov/topic/SurfaceWater/orwerw.html (all websites in this Brief were last visited on May 1, 2018).[1] Of the approximately 42,000 miles of streams and rivers in Wisconsin, 7.6% are designated "outstanding" and 11% "exceptional." *Id.* Of Wisconsin's 15,000 lakes and impoundments, 103 are designated "outstanding." *Id.* Trout stream classifications depend on a stream's natural ability to support trout—class I streams have a "self-sustaining population of trout," whereas class III streams require "annual stocking." Wis. Stat. § 281.34(8); Wis. Admin. Code § NR 1.02(7)(b). Approximately 31% (13,175 miles) of Wisconsin's rivers and streams are classified trout streams. Wis. DNR, *Trout Stream Maps*, https://bit.ly/2c1dDgt.

A medium well is also subject to environmental review if it will result in "a water loss of more than 95 percent of the amount of water withdrawn." Wis. Stat. § 281.34(4)(a)(2). "Water loss" is defined the same way as for the 2 million gpd threshold described above.

Third and finally, medium wells "that may have a significant environmental impact on a spring" also require an

[1] The websites cited in this Brief provide background information that is judicially noticeable as "legislative facts." *See State v. Barnes*, 52 Wis. 2d 82, 87 & n.2, 187 N.W.2d 845 (1971); *e.g.*, *Andersen v. DNR*, 2011 WI 19, ¶ 31, 332 Wis. 2d 41, 796 N.W.2d 1 (citing DNR website).

environmental review. Wis. Stat. § 281.34(4)(a)(3). The Wisconsin Geological and Natural History Survey is currently working on an inventory of Wisconsin's springs, and as of April 2017, had surveyed "more than 380 springs" in Wisconsin. Wis. Wetlands Ass'n, *Surveying Wisconsin's Springs* (Apr. 25, 2017), https://bit.ly/2JGKzYX; UW Extension, *Springs*, Wis. Geological and Nat. History Survey, https://bit.ly/2h14c2K; UW Extension, *2016 Year in Review* at 4, Wis. Geological and Nat. History Survey, https://bit.ly/2ranmau.

The statutes do not authorize or require an environmental review for medium wells that do not fall into one of these three categories. *See* Wis. Stat. § 281.34; *Lake Beulah*, 2010 WI App 85, ¶ 23. Accordingly, for purposes of compliance with WEPA, DNR considers medium wells outside these categories to be "minor actions." *See* Wis. Admin. Code § NR 150.20(1m)(h)–(i).

B. Historical Background

The Legislature enacted this environmental-review framework for medium wells in 2004. 2003 Wis. Act 310. Before that, DNR was authorized to conduct environmental review only for large wells, Wis. Stat. § 281.35(4)(b) (2001–02), while medium wells were reviewed only for their impact on a public water supply, *id.* § 281.17(1)(b) (2001–02). Following the enactment of Act 310, DNR began evaluating the environmental impact of wells in the categories described

above, *supra* pp. 6–9, but not of other wells, *see* Legislative Council Memorandum IM-2014-05 at 3–4 (Oct. 27, 2014), https://bit.ly/2FuKvc3.

Meanwhile, a legal challenge involving DNR's environmental-review authority that began in 2003 was winding its way through courts and administrative proceedings. *See Lake Beulah*, 2010 WI App 85, ¶¶ 2–13. DNR had approved a medium well that the Village of East Troy wanted to construct near Lake Beulah. *Id.* ¶ 3. Local conservancies challenged the approval, arguing that DNR failed to "independently consider the environmental effects." *Id.* ¶ 5. Although the well did not fall into any of the categories where environmental review is specifically required, the conservancies argued that DNR's "broad, general grant of authority" in Sections 281.11 and 281.12, along with the public trust doctrine, gave DNR both the authority and an "affirmative obligation" to consider environmental impact and to impose conditions or deny an application if the impact were significant enough. *Id.* ¶¶ 17, 29 (emphasis removed). The Village, on the other hand, argued that DNR was "precluded" from considering environmental impact outside the specific categories outlined above, *supra* pp. 6–9, because Sections 281.34 and 281.35 "create a comprehensive statutory framework" for wells and therefore "supersede[ ]" the "general grants of authority" in Sections 281.11 and 281.12. *Lake Beulah*, 2010 WI App 85, ¶¶ 17, 20. Between these two positions, DNR argued that it

had the authority to address environmental impact, but no affirmative duty to do so unless presented with "'scientific evidence' of a likely adverse impact" from a well. *Id.* ¶¶ 8, 31.

The Court of Appeals issued its opinion in the case on June 16, 2010, holding that the "general statutes" (Sections 281.11 and 281.12) gave DNR sufficient authority to consider environmental impact. *Id.* ¶¶ 17–28. As to the Village's argument that any general authority "was overridden by" the "specific rules for high capacity wells" in Sections 281.34 and 281.35, the court reasoned that, given the "importan[ce]" of the background public trust doctrine, "there [would have to] be some evidence that the legislature intended" to "revoke the general grant of authority to the DNR" to "manage the public trust doctrine." *Id.* ¶¶ 17, 20, 23, 25. Because Sections 281.34 and 281.35 were "silent as to whether DNR may review . . . potential environmental effects" for wells outside the defined categories, the court found "no [such] evidence." *Id.* ¶¶ 25, 27. The court also concluded that DNR sometimes has a duty to consider environmental impact, but "only when it has evidence suggesting that waters of the state may be affected by a well." *Id.* ¶¶ 29–30.

A few months later, in January 2011, the Assembly introduced a bill (that eventually became Act 21) designed to confine agencies' authority to that "explicitly permitted by statute." 2011 Wis. Act. 21, § 1R (creating Wis. Stat. § 227.10(2m)). Governor Scott Walker, who initiated the bill, *see Assembly Bill 8*, Wis. State Legislature,

https://bit.ly/2jkg2F4, explained in a policy paper that agencies had been using their "general duties provisions" to "empower[ ] themselves" and to exceed "explicit legislative authority." Scott Walker Office of the Governor, *Regulatory Reform Info Paper* (Dec. 21, 2010), https://bit.ly/2HCDEmL. The Governor's "[s]olution" was to "send[ ] a clear signal" that "broad statement[s] of policies or general duties or powers provisions do not empower [agencies] to create rules not explicitly authorized." *Id.* The final Act 21, enacted on May 23, 2011, prohibits agencies from "implement[ing] or enforc[ing] any standard, requirement, or threshold . . . unless . . . explicitly permitted by statute or [ ] rule," Wis. Stat. § 227.10(2m), and establishes that any statutory provisions "containing a statement [ ] of legislative intent, purpose, [ ] or policy" and any provisions "describing [an] agency's general powers or duties" "do[ ] not confer rule-making authority . . . beyond . . . [that] explicitly conferred," *id.* § 227.11(2)(a)(1)–(2); *see* 2011 Wis. Act 21, §§ 1R, 3.

While Act 21 was working its way through the legislative process, the *Lake Beulah* case continued its way through the courts. The Wisconsin Supreme Court granted review of the case in November, briefing completed in December and January, and the case was argued in April, all before Act 21 was enacted in May. On May 31, just a month before the Supreme Court issued its opinion, one of the six *amici* in the case filed a letter with the Court raising Act 21. App. 94–99. All of the parties, including the Village,

responded that Act 21 did not "affect the DNR's authority in [the] case." *Lake Beulah*, 2011 WI 54, ¶ 39 n.31. DNR argued, among other things, that Act 21 applied only prospectively. App. 105–06.

The Wisconsin Supreme Court issued its opinion in *Lake Beulah* on July 6, 2011, largely adopting the Court of Appeals' reasoning. The Court held that "DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state," *id.* ¶¶ 3, 62, and that the duty is "triggered" by "evidence of potential harm" "to the waters of the state," *id.* ¶¶ 5, 63–64. According to the Court, DNR possessed this authority "through Wis. Stat. § 281.11 and § 281.12, [by which] the legislature ha[d] delegated the State's public trust duties to the DNR." *Id.* ¶ 34. The Court saw "nothing in either Wis. Stat. § 281.34 or § 281.35 that limits the DNR's authority to consider the environmental impacts of a proposed high capacity well," and found "no [other] language expressly revoking or limiting the DNR's authority and general duty to protect and manage waters of the state." *Id.* ¶¶ 41–42. As for Act 21, the Court dismissed it in a footnote, emphasizing that "[n]one of the parties argue[d] that [Act 21] affect[ed] [ ] DNR's authority in th[e] case." *Id.* ¶ 39 n.31. The Court offered no additional explanation, simply "agree[ing] with the parties that [ ] Act 21 does not affect [its] analysis." *Id.*

After the *Lake Beulah* decision, DNR began "screen[ing] all proposed high capacity wells for potential adverse

impacts." Legislative Council Memorandum, *supra*, at 4. DNR drew a distinction, however, between the *direct* impact of the well—for example, the expected "drawdown" on nearby lake or stream levels—and *cumulative* impact—that is, the well's impact in combination with "other existing and proposed withdrawals in the area." *Id.*; *see In the Matter of a Conditional High Capacity Well Approval for Two Potable Wells to be Located in the Town of Richfield, Adams County Issued to Milk Source Holdings, LLC*, Case Nos. IH-12-03, et al., 2014 WL 5605313, at *6, ¶¶ 37, 39 (Wis. Div. Hearings & Appeals Sept. 3, 2014) (hereinafter "*Richfield Dairy*"). DNR reasoned that neither Chapter 281 nor *Lake Beulah* authorized it to consider cumulative impacts. *Id.* at *5, ¶¶ 26, 28.

DNR's position prompted another legal challenge beginning in the fall of 2011. DNR had approved a medium well for a concentrated animal feeding operation in the Town of Richfield. *Id.* at *3–*4, ¶¶ 1, 16. Multiple petitioners challenged the approval based on the well's effect on Pleasant Lake, 2.5 miles away. *Id.* at *3–*4, ¶¶ 3, 17. The petitioners argued, among other things, that DNR failed to consider the well's cumulative impact in combination with other wells in the area. *Id.* at *2. DNR granted the petitioners' request for a contested case hearing and referred the case to an administrative law judge (ALJ). *Id.* at *4, ¶¶ 17, 21. The case was then extended for a number of years because Richfield Dairy submitted an amended application for a higher

pumping capacity, for which DNR issued a new approval in 2013. *Id.* at *4, ¶¶ 18–21.

On June 30, 2013, two years into the *Richfield Dairy* proceedings, the Legislature passed its biennial budget bill. 2013 Wis. Act 20. Section 2092g of that bill enacted Wis. Stat. § 281.34(5m), which bars any "person [from] challeng[ing] an approval, or an application for approval, of a high capacity well based on the lack of consideration of the cumulative environmental impacts of that high capacity well together with existing wells." *Id.* This section did not take effect until July 1, 2014. 2013 Wis. Act 20, § 9432(2L).

On September 3, 2014, the ALJ issued his opinion in the *Richfield Dairy* case. Relying heavily on *Lake Beulah*, the ALJ concluded that DNR was required to consider both individual and cumulative impacts of proposed wells. *Richfield Dairy*, at *11–*15, *19–20, ¶¶ 3–4, 8–10. As for the Richfield Dairy well, the ALJ held that the evidence (including cumulative-impact evidence) supported limiting the well to the original capacity Richfield Dairy sought, disallowing the higher capacity requested in its amended application. 2014 WL 5605313 at *18–*19. Neither DNR nor any other party sought judicial review.

After the *Richfield Dairy* decision, DNR began reviewing every high capacity well application for cumulative impacts, and its process for doing so developed over time. Some applications were delayed by concerns that a nearby water was "too impacted already for another well," while DNR

worked to develop a methodology for modeling cumulative impacts. *See*, *e.g.*, Laur 14; Lask 15.[2] In other cases, DNR staff produced a model to estimate the cumulative "depletion" from nearby wells, and then compared the estimated depletion to a rough level deemed "substantial." *See* R.142:2 (email discussing Lutz and Peplinski applications). DNR eventually began comparing the estimated cumulative impacts (based on modeling) to a lake or stream's "allowable depletion" level, which, for streams and rivers, DNR derived from a method developed "for the state of Michigan." (DNR also began "developing [its] own" similar methodology.) *See* Dero 17; R.142:4–5 (report on Frozene application). Sometimes DNR staff recommended denying an application outright where the estimated cumulative impact exceeded the "allowable depletion" level, *see* Dero 17, but in other cases, DNR staff recommended approving a well with a limited capacity, *see* R.142:4–5. Many applications were put "on hold" during this period. *See* Lutz 17, Creek 18, Pep 19, Laur 13, Dero 15. This evolving process reportedly caused some confusion among applicants, *see* Dero 16–17, and "created a substantial backlog in permit requests," App. 67.

To address the "backlog" of well applications and the "confusion" surrounding the process, the Wisconsin State

[2] The administrative record is included in the record before this Court at R.70–81 and R.132–34. DNR paginated the record by the corresponding well application (e.g., Lutz 3), so this Brief will use those page numbers to indicate which well the citation applies to.

Assembly, through the Committee on Assembly Organization, requested a formal opinion from the Attorney General on whether, in light of Act 21, DNR still had the authority under *Lake Beulah* to consider environmental impacts for wells outside the statutorily defined categories. App. 66–70.

The Attorney General issued his opinion on May 10, 2016, concluding that Act 21 "precluded" "any type of environmental review" for wells outside the "limit[ed] [ ] types of wells" specified in Sections 281.34 and 281.35 (outlined at *supra* pp. 6–9). *See* App. 71, 87–89. The Attorney General first considered whether *Lake Beulah* had "address[ed] the newly enacted Act 21," concluding that it did not. App. 72–78. Although the Wisconsin Supreme Court briefly mentioned (and dismissed) Act 21 in a footnote, the Court's only explanation was the parties' agreement that Act 21 did not "affect the DNR's authority *in [that] case*." App. 74 (quoting *Lake Beulah*, 335 Wis. 2d 47, ¶ 39 n.31). DNR had argued that Act 21 was prospective only, *see* App. 105–06, so the Court may have accepted that argument, App. 74–78. Given the lack of any analysis of Act 21, the Attorney General considered whether the new law undermined *Lake Beulah*'s reasoning going forward. App. 78–90. *Lake Beulah* had "rel[ied] on [DNR's] implied agency authority" in Sections 281.11 and 281.12, at a time before Act 21 when "explicit authority was not required." App. 83–84. But Act 21 "sought to regain and maintain control of . . . agency authority" by requiring "explicit authority" to impose requirements, and it

prohibited agencies from relying on "broad statements of policy or duty" as a source of authority. App. 84–85. Therefore, Act 21 governs, and *Lake Beulah* is no longer controlling. As for any constitutional component of *Lake Beulah* based on the public trust doctrine, the Attorney General reasoned that the "Legislature maintains the duty of trustee," whereas DNR "has only the level of public trust duty assigned to it by the Legislature." App. 92–93. Through Act 21, the Legislature "revert[ed]" any residual duty "back to [itself]," taking "responsib[ility] for making rules and statutes necessary to protect the waters of the state." App. 93.

DNR adopted the Attorney General opinion and began approving backlogged well applications, including all of the wells at issue in this case. *See* App. 1–2. Many of these backlogged applications (including all but the Derousseau well in this case) were for wells located in the Central Sands Region, an area covering "1.75 million acres in parts of Adams, Marathon, Marquette, Portage, Shawano, Waupaca, Waushara and Wood counties." *See* Wis. DNR, *Central Sands background and resources* (Oct. 10, 2017), https://bit.ly/2I2br8s.

On June 1, 2017, the Legislature addressed the Central Sands Region. 2017 Wis. Act 10, § 4 (codifying Wis. Stat. § 281.34(7m)). It authorized DNR to study certain watersheds "to determine whether existing and potential groundwater withdrawals are causing or are likely to cause a significant reduction of a[ny] navigable stream's or navigable

lake's rate of flow or water level." Wis. Stat. § 281.34(7m)(b). The law requires and provides financing for DNR to study three lakes in particular, including Pleasant Lake, *id.*, the lake at issue in *Richfield Dairy*. At the end of its evaluation, DNR may issue a formal recommendation to the Legislature proposing "special measures" to protect waters in the designated study area. *Id.* § 281.34(7m)(c). The recommendation must be accompanied by "a description of the extent . . . [to which] cumulative groundwater withdrawals . . . are expected to cause[ ] a significant reduction [in] . . . rate[s] of flow or water level[s]," the "concrete scientific information [DNR] used," and an "economic impact analysis," and DNR must carefully define the "geographical boundaries of the area to which the . . . special measures . . . should apply." *Id.* § 281.34(7m)(c). Before issuing its recommendation to the Legislature, DNR must hold a "public informational hearing to solicit comments" and must "give notice of the hearing to each person who owns land in the area that would be affected." *Id.* § 281.34(7m)(d). DNR must begin its evaluation within one year, and must issue its recommendation and draft "special measures" within three years after beginning its evaluation. *Id.* § 281.34(7m)(b), (e), (f).

C. Procedural Background

The eight well applications at issue in this case were all submitted between March 2014 and May 2015, and were

reviewed after the *Richfield Dairy* decision but before the Attorney General opinion. Lutz 1–9, Creek 1–6, Pep 2–7, Fro 1–6, Turz 1–5, Lask 1–5, Laur 1–3, Dero 1–6. Three of them (Turzinski, Laskowski, Lauritzen) were delayed by concerns about nearby waters, but no formal analysis was conducted before they were approved. *See* Turz 21–22, Lask 15–18, Laur 13–15. For one well (Frozene), DNR staff initially recommended approval with a limited capacity, R.142:3–5, but then delayed the application with further evaluation and discussion, Fro 53–66. For four of the applications (Lutz, Creekside,[3] Peplinski, Derousseau) DNR staff recommended denial based on some cumulative-impact analysis, Lutz 17, Creek 18, Pep 19, Dero 16–17; R.142:2 (email discussing Lutz and Peplinski applications);[4] R.142:6–7 (emails discussing Derousseau application), but the applications were ultimately placed "on hold" because "the Legislature [was] [ ] discussing legislation that [could] affect the review," R.142:2. After DNR adopted the Attorney General Opinion, it reopened the applications and reviewed them based solely on the explicit statutory criteria outlined above. *Supra* pp. 6–9.

During its review, DNR produced a map of the area surrounding each proposed well to identify other wells and

[3] The "Creekside" application is also referred to as the "Gordondale" or "Gordon" application. *E.g.*, Creek 18.

[4] Elsewhere, these materials also mention a "Pavelski" application, which is a separate well application that was not challenged in this case. *See* R.144–45, 147.

water resources nearby. *E.g.*, Lutz 15. It then evaluated the local aquifer and nearby municipal wells to determine if the anticipated "drawdown" would impact the "water supply of a public utility." Wis. Stat. § 281.34(5)(a); *supra* p. 5; *e.g.*, Lutz 19–21. DNR also conducted "engineering and hydrogeological review[s] to determine compliance with the well construction and pump installation requirements." *E.g.*, Lutz 10; *supra* p. 5.

DNR then carefully reviewed each application to determine whether an environmental review was statutorily required. It considered whether the proposed pumping capacity would cause a water loss of over 2 million gpd, triggering an automatic environmental review and heightened application requirements, *supra* pp. 6–7, and whether each well was within 1,200 feet of an outstanding or exceptional water or designated trout stream, *supra* pp. 7–8, would cause a 95% water loss, *supra* p. 9, or would significantly affect a spring, *supra* p. 12. *E.g.*, Lutz 20–21. In one case, DNR conducted an extensive investigation to determine whether certain wetlands near Pleasant Lake contained a "spring." Fro 19–65.

DNR ultimately approved the wells, concluding that they met all requirements and did not trigger an environmental review. Lutz 10–14, Creek 7–11, 25–29, Pep 8–12, Fro 7–11, Turz 12–16, Lask 6–10, Laur 4–8, Dero 7–11. As required, all of the approvals confirmed the well's location,

set the "approved pump capacity," and imposed construction and reporting conditions, among others. *E.g.*, Dero 7–11.

On October 28, 2016, Petitioners filed petitions for judicial review of all eight well approvals, R.1–8, which were then consolidated, R.66. The petitions challenged the approvals on the ground that DNR failed to consider "the individual and cumulative effects of [the] wells on waters of the state." *See*, *e.g.*, R.1:5–7.

DNR moved to dismiss "petitioner[s'] claims related to cumulative impacts" because they were "barred under Wis. Stat. § 281.34(5m)." R.49-1; *see also* R.50–64. Petitioners responded in two primary ways: first, that their petitions should not be dismissed because they also alleged that DNR failed to consider *individual* impacts, R.94:9–11, and second, that they did not challenge DNR's failure to "consider" cumulative impact—as in "th[ink]" or "deliberat[e]" about them—because DNR had "considered" them prior to the Attorney General opinion, but rather they challenged DNR's failure to "act[ ] upon" cumulative impact when approving the wells, R.94:11–16. DNR acknowledged that any challenge based on individual impacts would not be barred by Section 281.34(5m), but argued that the court should partially dismiss the claims to the extent that they challenged DNR's failure to consider cumulative impact. R.97:8–9. As for Petitioners' novel theory based on the word "consider," DNR responded that, in the context of Section 281.34(5m), "consider" means to "take into account" as part of the decision-

making process, and Petitioners clearly argued that DNR failed to "tak[e] into account the potential cumulative impacts of the wells." R.97:9–14.

The circuit court denied the motion to dismiss in its entirety. R.158:23–30. The court reasoned that any claims alleging a failure to consider *individual* impacts survived a motion to dismiss, R.158:25, and as to the cumulative-impact claims, the court "d[id] [not] know" how to characterize those claims or how to interpret the word "consider" in the statute, R.105, 158:25–29. The court concluded it did not "need to know" these things "[a]t this stage" because "there[ ] [was] enough [ ] to survive a motion to dismiss." R.158:27–28.

Both sides, along with intervenors and *amici*, then filed briefs on the merits. R.114, 118, 122, 131, 135. DNR argued that Act 21 precluded DNR from considering environmental impacts outside the defined categories in Sections 281.34 and 281.35, and that *Lake Beulah* is not controlling. *See* R.131:42–46. DNR also reprised its argument that Section 281.34(5m) "precludes Petitioners' challenge to the [approvals] based on a lack of consideration of . . . cumulative impacts." R.131:27–28.

The circuit court rejected DNR's arguments. It concluded that *Lake Beulah* had already addressed Act 21—in the cursory footnote, *supra* p. 14—and therefore its "reasoning [was] binding on th[e] Court." App. 9–10. The court also reasoned that "the Public Trust Doctrine is an affirmative duty to protect the waters of the state," and "if the

legislature did not delegate authority [to DNR] . . . there would be no protection." App. 11. As for Section 281.34(5m), the court decided it was "not in dispute" because "DNR did consider [cumulative] impacts . . . before the [Attorney General] Opinion was published." App. 2. The court then vacated all of the eight well approvals, remanding one for further analysis of environmental impact. App. 13.

STANDARD OF REVIEW

This case addresses the scope of DNR's authority to consider environmental impact, and therefore review is de novo. *Andersen v. DNR*, 2011 WI 19, ¶ 25, 332 Wis. 2d 41, 796 N.W.2d 1. The proper interpretation of Section 281.34(5m) is also reviewed de novo. *State v. Reyes Fuerte*, 2017 WI 104, ¶ 18, 378 Wis. 2d 504, 904 N.W.2d 773. "[D]ue weight shall be accorded the experience, technical competence, and specialized knowledge of [DNR], as well as [any] discretionary authority conferred upon it." Wis. Stat. § 227.57(10).

SUMMARY OF ARGUMENT

I.A. Act 21 clearly prohibits DNR from considering the environmental impact of the wells at issue here. Act 21 prevents agencies from "enforc[ing] any standard [or] requirement" that is not "explicitly permitted." Wis. Stat. § 227.10(2m). Chapter 281 requires environmental review for certain well-defined categories of high capacity wells, but does not authorize environmental review outside those categories.

None of the wells here fits into any of the statutory categories, so DNR would have violated Act 21 by "enforc[ing]" an environmental-review "requirement."

B. *Lake Beulah*, 2011 WI 54, is no longer controlling in light of Act 21. *Lake Beulah* concluded that DNR's "general" grant of authority in Sections 281.11 and 281.12 "to manage, protect, and maintain waters of the state" was sufficient to include, implicitly, the more specific authority to conduct environmental review. 2011 WI 54, ¶¶ 27–44. The Court relied heavily on its finding of no other statutory language "expressly revoking or limiting" DNR's general grant of authority. *Id.* ¶¶ 41–42. But Act 21 now does "expressly limit" DNR's general authority by providing that DNR may enforce only requirements that are "explicitly permitted."

The circuit court's reasons for disregarding the straightforward application of Act 21 are unavailing. Although Act 21 predated *Lake Beulah* by one month, the Act came well after (and most likely in response to) the Court of Appeals' decision with nearly identical reasoning. And while the Supreme Court mentioned Act 21 in a cursory footnote, the lack of any clear holding from the Court, along with the timing of the Act, the context in which it was raised to the Court, and the parties' brief responses (including an argument that the Act had no effect on the case at all), all suggest that the Court did not actually address Act 21's substance.

C. The public trust doctrine does not require DNR to conduct environmental review for every high capacity well.

1. The Constitution vests the public trust duty in the Legislature, which need not (but may) broadly delegate that responsibility (and its attendant powers) to DNR. *Lake Beulah* is not to the contrary. Rather, there the Court explained that agencies "have only those powers" given to them. 2011 WI 54, ¶ 23 (citation omitted). The Court concluded that the Legislature *had* delegated broad public trust authority to DNR through Sections 281.11 and 281.12, but it also acknowledged that other statutory language could "revoke" that delegation, which Act 21 has now done.

2. *Lake Beulah* aside, there is no defensible claim that the Legislature has violated its public trust duties by limiting DNR's delegated authority. The public trust doctrine imposes some broad outer bounds on the Legislature, but within those bounds, the Legislature has significant leeway to resolve complicated water issues systematically. For high capacity wells, the Legislature has carefully designed a graduated framework of environmental review, and it continues to review and make improvements to that scheme. Importantly, the Legislature recently authorized DNR to address the Central Sands region, where most of the wells challenged in this case are located.

II. Section 281.34(5m) prohibits any "person [from] challeng[ing] an approval . . . of a high capacity well based on the lack of consideration of the cumulative environmental

impacts of that high capacity well together with existing wells." Petitioners raised exactly that claim, and the circuit court vacated the approvals for failing to take cumulative environmental impacts into account. Petitioners' and the circuit court's strained interpretation of the word "consideration" is unreasonable.

ARGUMENT

I. DNR Lawfully Approved The Eight Wells

A. Act 21 Prohibits Environmental Review Except Where Specifically Authorized

1. Act 21 prohibits agencies from "implement[ing] or enforc[ing] any standard, requirement, or threshold" that is not "explicitly required or explicitly permitted by statute or by [ ] rule." Wis. Stat. § 227.10(2m).

Reviewing wells for environmental impact clearly involves "implement[ing] or enforc[ing] a[ ] standard, requirement, or threshold." The "standard" or "requirement" would be whatever level of impact on nearby waters DNR deems too much (up to and including a standard forbidding any impact above zero percent), and DNR would be "enforcing" it by denying applications for wells that crossed the line. Measuring impact consistently also requires DNR to "implement" some "threshold" metric, as the record here demonstrates. For example, DNR initially applied a threshold of "30% [cumulative] depletion" to certain well applications, R.142:2, and later "implemented" a model

"derived for the State of Michigan" to assign an "allowable depletion" level—in other words, a "threshold"—to individual waters, *see* Dero 17; R.142:4–5.

There is no question that, for wells outside a defined set of categories, environmental review is neither "explicitly required [n]or explicitly permitted by statute," Wis. Stat. § 227.10(2m); App. 87 (Attorney General opinion).[5] The statute requires environmental review only for large wells (water loss over 2 million gpd), Wis. Stat. § 281.35(4)(b), and for medium wells (between 100,000 gpd and 2 million gpd water loss) that are near "outstanding" or "exceptional" waters or trout streams, *id*. § 281.34(1)(am), (4)(a)(1), that "may have a significant environmental impact on a spring," *id*. § 281.34(4)(a)(3), or that will result in a "95 percent" "water loss," *id*. § 281.34(4)(a)(2). *Supra* pp. 6–9. The Supreme Court and Court of Appeals in *Lake Beulah* recognized that "[f]or the remaining wells, Wis. Stat. §§ 281.34 and 281.35 are silent as to whether the DNR may review or consider the well's potential environmental effects." *Lake Beulah*, 2010 WI App 85, ¶ 23; *see Lake Beulah*, 2011 WI 54, ¶¶ 40–41.

Environmental review is also not "explicitly required or [ ] permitted by . . . *rule*." Wis. Stat. § 227.10(2m) (emphasis added). Rather, consistent with Section 281.34(4), DNR

[5] Attorney General opinions that interpret new statutes "may be given persuasive effect." *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 41, 341 Wis. 2d 607, 815 N.W.2d 367.

regulations deem wells outside the defined categories to be "minor action[s]" that "do not require environmental analysis under [WEPA]." *See* Wis. Admin. Code § NR 150.20(1m)(h)–(i). Nor could DNR adopt a rule to allow environmental review outside the statutorily defined categories. Section 227.11(2)(a) confines agencies' rulemaking authority to that "explicitly conferred" by statute and provides that statutory provisions "containing a statement [ ] of legislative intent, purpose, [ ] or policy" or "describing [an] agency's general powers or duties" "do[ ] not confer rule-making authority." Wis. Stat. § 227.11(2)(a)(1)–(2); *see* App. 85–86. There is no statutory provision that "explicitly confer[s]" upon DNR the authority to require environmental review outside the defined categories. In any event, Section 227.11(2)(a)(3) makes clear that "[a] statutory provision containing a specific standard [or] requirement"—like the environmental review standards for certain categories of wells in Sections 281.34 and 281.35—"does not confer on the agency the authority to promulgate . . . a rule . . . that is more restrictive." Wis. Stat. § 227.11(2)(a)(3). So for several independent reasons, DNR cannot rely on Sections 281.34 and 281.35 to expand the categories of environmental review.

2. Given Act 21's clear mandate, DNR properly approved the wells at issue here without considering environmental impact. There is no dispute in this case that none of the wells fall into any of the statutory categories where environmental review is authorized and required.

Supra pp. 6–9; R.114 (Petitioners' brief, not asserting that any of the statutory categories applies); App. 1–15 (same for circuit court's order). Since environmental review is not "explicitly permitted" by "statute or rule" for any other wells, DNR cannot "enforce" any environmental impact "standard" or "requirement" without violating Act 21.

B. This Court Is Not Bound By *Lake Beulah*

The Wisconsin Supreme Court in *Lake Beulah* held that "DNR has the authority and a general duty to consider [environmental impact] when reviewing a[ny] high capacity well permit application." 2011 WI 54, ¶ 44. But Act 21 undermines the entire basis for this holding, and thus *Lake Beulah* is not controlling.

1. The Wisconsin Supreme Court held that DNR's "authority . . . to consider potential environmental harm" when reviewing high capacity wells came "through Wis. Stat. § 281.11 and § 281.12." *Id.* ¶¶ 34, 44. Section 281.11 "set[s] forth the purposes and policies of that subchapter," *id.* ¶ 28, stating that DNR "serve[s] as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state," Wis. Stat. § 281.11. And Section 281.12 "outlin[es] [ ] DNR's duties," *Lake Beulah*, 2011 WI 54, ¶ 28, providing it with "general supervision and control over the waters of the state," Wis. Stat. § 281.12(1). The Court explained that these two provisions "explicitly provide[ ] the DNR with the broad authority and a *general*

duty . . . to manage, protect, and maintain waters of the state." *Lake Beulah*, 2011 WI 54, ¶ 39 (emphasis added) (citing Wis. Stat. §§ 281.11, 281.12). The Court then found that this "broad" and "general" duty *implicitly* contained the more specific power to "consider the environmental impact of a proposed high capacity well." *Id.*; App. 82–83.

Because the specific power (conducting environmental review) was merely implied by the "general" grant of authority in Sections 281.11 and 281.12, the Court needed to examine whether any other statute expressly "*limit[ed]* the DNR's [environmental-review] authority . . . to only those wells for which minimum review standards are prescribed." *Lake Beulah*, 2011 WI 54, ¶ 40 (emphasis added). The Court analyzed Sections 281.34 and 281.35, which authorize environmental review only for certain "special categories," *id.*, as outlined above, *supra* pp. 6–9, but found "nothing in either [section] that limit[ed] the DNR's [general] authority." *Lake Beulah*, 2011 WI 54, ¶ 41. And "[f]inding no [other] language expressly revoking or limiting the DNR's authority and general duty to protect and manage waters of the state," the Court concluded that DNR "*retain[ed]* [the] authority . . . to consider whether a proposed high capacity well may impact waters of the state." *Id.* ¶ 42 (emphasis added); App. 82–83.

But now, of course, there is "language expressly . . . limiting the DNR's authority." *See* App. 83–84 (citation omitted). Act 21 clearly prohibits DNR from "enforc[ing] any [ ] requirement"—like an environmental-impact

requirement—that is not "explicitly permitted." Wis. Stat. § 227.10(2m); *supra* Part I.A.1. And there is nothing in Chapter 281 that "explicitly permit[s]" environmental review outside the defined categories. In other words, while *Lake Beulah* presumed that a general grant of authority could imply more specific powers, Act 21 overrode that presumption, replacing it with a prohibition: general grants of agency authority—no matter how explicit—cannot confer upon agencies specific, implied powers. So whether the general grant of authority in Sections 281.11 and 281.12 was sufficient to allow environmental impact review before Act 21, it is not now. Act 21 makes abundantly clear that the Legislature intends agencies to have only the authority explicitly granted to them, and that general purpose statutes—such as Sections 281.11 and 281.12—do not provide any independent authority.

2. Despite the clear conflict between the post–Act 21 regime and *Lake Beulah*'s rationale, the circuit court declined to consider Act 21's substantive effect for two reasons.

First, the circuit court believed that Act 21 is not controlling because its passage "predated" *Lake Beulah*. App. 10 n.3. But the Court of Appeals in *Lake Beulah* relied on nearly identical reasoning as the Wisconsin Supreme Court, *see* supra pp. 11–14, and the bill that became Act 21 was initiated shortly after the Court of Appeals' decision, *supra* p. 12. This fairly suggests that the goal of Act 21 was precisely to undercut the position that ultimately prevailed in that

litigation, regardless of whether it ultimately prevailed before or after the law's enactment. *See generally Verdoljak v. Mosinee Paper Corp.*, 200 Wis. 2d 624, 634–35, 547 N.W.2d 602 (1996) (recognizing that the Legislature can "overrule[ ]" court decisions); *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶ 51, 237 Wis. 2d 99, 613 N.W.2d 849 (Legislature may "abrogate common law").

Second, the circuit court concluded that the Wisconsin Supreme Court in *Lake Beulah* already "rejected" the relevance of Act 21. App. 9–10. Although *Lake Beulah* mentioned Act 21 in a cursory footnote, 2011 WI 54, ¶ 39 n.31, the context and history suggest that the Wisconsin Supreme Court did not address its substantive effect, so this Court is free to consider Act 21 anew. *See* App. 72–78. When the footnote is read in its context, this becomes clear.

To begin with, there is a distinct possibility that the Court declined to consider the substance of Act 21 simply because of how and when it was raised in the litigation: after argument, in a non-party letter. Indeed, only one *amicus*—of six in the case—raised Act 21, and all of the parties responded that Act 21 did not "affect the DNR's authority in [the] case." *Lake Beulah*, 2011 WI 54, ¶ 39 n.31. The Court dismissed Act 21 in a footnote without any substantive explanation: "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." *Id.* (emphasis added). Courts frequently decline to consider arguments presented by

an *amicus*, but not "urged by [any] party," so the Court may have given Act 21 only a passing glance or considered only the *amicus*' particular framing of the issue. *See*, *e.g.*, *Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995); *Bell v. Wolfish*, 441 U.S. 520, 531 n.13 (1979); *State v. Matasek*, 2014 WI 27, ¶ 6 n.4, 353 Wis. 2d 601, 846 N.W.2d 811; *Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, ¶ 47 n.22, 244 Wis. 2d 720, 628 N.W.2d 842; *Cty. of Barron v. LIRC*, 2010 WI App 149, ¶ 30, 330 Wis. 2d 203, 792 N.W.2d 584.

To the extent the Court actually considered Act 21 on its merits, it may have simply agreed with DNR that Act 21 applied only prospectively. App. 105–06; App. 74–78. Substantive legislation is "presumptively prospective unless the statutory language clearly reveals either expressly or by necessary implication an intent that the statute apply retroactively." *Lands' End, Inc. v. City of Dodgeville*, 2016 WI 64, ¶ 42, 370 Wis. 2d 500, 881 N.W.2d 702 (citation omitted). Act 21 is silent as to the initial applicability of Section 227.10(2m), so it is presumed to be prospective.

Another reason not to assume that the Wisconsin Supreme Court rejected Act 21's applicability to the environmental-review question is that Act 21 is facially relevant. Even if Sections 281.11 and 281.12 provide some general authority to DNR, they obviously are not explicit about environmental review of high capacity well permits; neither section says anything whatsoever about environmental review, much less environmental review for a

specific category of wells. And Section 227.10(2m) requires that the "standard" to be applied (here, environmental review) is itself "explicitly required or [ ] permitted." So it does not matter whether an agency has some general authority, even if that general authority is explicit. If an environmental review "standard" is not "explicitly required or [ ] permitted," DNR cannot "enforce" it. Wis. Stat. § 227.10(2m).

The circuit court believed that the Wisconsin Supreme Court already "rejected" the relevance of Act 21 by assuming, without sufficient justification, that *Lake Beulah* held that "Wis. Stat. ch. 281 *does explicitly confer authority upon the DNR to consider potential environmental harm*." App. 10 (quoting with added emphasis a sentence from *Lake Beulah*'s footnote 31); *see also* App. 10 n.3. But the sentence that the circuit court emphasized begins with, "*The DNR responds that* Wis. Stat. ch. 281 does explicitly confer authority . . ." *Lake Beulah*, 2011 WI 54, ¶ 39 n.31 (emphasis added). The Court was not adopting that view, but simply reporting one of DNR's arguments, as the Court often does in its opinions. Immediately after that sentence, the Court also described the Village's very different response. *Id.* The Court then stated that it "agree[d] with the parties *that Act 21 does not affect our analysis in this case,*" without providing any explanation for why Act 21 did not apply. *Id.* (emphasis added). Given that the extent of the Court's "agree[ment]" with the parties was that Act 21 "d[id] not affect [the Court's] analysis *in t[hat]*

case," *id*. (emphasis added), the Court might have accepted DNR's other argument that Act 21 was prospective only, or it might have simply rejected the *amicus*' Act 21 argument based on how it was presented, because it was presented too late in the litigation, or because it was not urged by any of the parties.

C. The Public Trust Doctrine Does Not Require Environmental Review For Every Well

Notwithstanding Act 21, the Petitioners argued, and the circuit court appeared to accept, that DNR is *constitutionally required*, under the public trust doctrine, to conduct environmental review of every high capacity well. *See* R.114:13–16; App. 11. But *Lake Beulah* never held that environmental review by DNR is a constitutional mandate; rather, *Lake Beulah* recognized that DNR's public trust authority depends entirely on the degree to which "the legislature has delegated *the State's* public trust duties to the DNR"—after all, "it is primarily the State's duty to protect and preserve [Wisconsin's] resources." *Lake Beulah*, 2011 WI 54, ¶¶ 33–34 (emphasis added). Through Act 21, the Legislature has now limited DNR's delegated public trust duties. *Supra* pp. 27–30, *infra* pp. 43–44. Contrary to what the circuit court believed, this limited delegation does not mean that "there w[ill] be no protection" of Wisconsin's water resources. App. 11. In fact, the Legislature has taken back "responsib[ility] for . . . protect[ing] the waters of the state,"

App. 93, and has fulfilled, and is continuing to fulfill, its public trust duties, albeit in a systematic rather than ad hoc way.

1. *Lake Beulah* Did Not Hold That DNR Is Constitutionally Required To Conduct Environmental Review Of All Wells

The public trust doctrine is rooted in Article IX, section 1 of the Wisconsin Constitution, which provides 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." Wis. Const. art. IX, § 1. The Wisconsin Supreme Court has interpreted this provision to impose a duty on the State "to promote navigation [and] to protect and preserve [Wisconsin's] waters for fishing, hunting, recreation, and scenic beauty." *Rock-Koshkonong Lake Dist. v. DNR*, 2013 WI 74, ¶ 87, 350 Wis. 2d 45, 833 N.W.2d 800 (citations omitted, emphasis removed).

Importantly, however, "[t]he primary authority to administer this [duty] rests with the legislature." *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983); *Hilton ex rel. Pages Homeowners' Ass'n v. DNR*, 2006 WI 84, ¶ 19, 293 Wis. 2d 1, 717 N.W.2d 166. The Legislature may delegate its public trust authority (or some portion thereof) to agencies to assist the Legislature in fulfilling its duty, *Lake Beulah*, 2011 WI 54, ¶ 33, but as "creatures of statute, [agencies] have 'only those powers'" given to them by statutory provisions, *id.* ¶ 23

(quoting *Brown Cty. v. Dep't of Health & Soc. Servs.*, 103 Wis. 2d 37, 43, 307 N.W.2d 247 (1981)); *see* App. 79–80.

The Wisconsin Supreme Court in *Lake Beulah* concluded that the Legislature had "delegated the State's public trust duties to the DNR in the context of its regulation of high capacity wells" "through Wis. Stat. § 281.11 and § 281.12." 2011 WI 54, ¶ 34. But the Court then considered whether any more specific statutory language "expressly revok[ed] or limit[ed] the DNR's authority . . . to protect and manage waters of the state." *Id.* ¶ 42. Although the Court "[found] no [such] language," *id.*, its recognition that a statute *could* "revok[e]" or "limit[ ]" DNR's delegated public-trust authority shows that the Court did not find the delegation to be constitutionally required.

The second reason this reading of *Lake Beulah* is unsound is that it cannot be reconciled with the Court's deliberate decision to leave open "[w]hether the DNR has the authority to consider the environmental impact of proposed wells with a capacity of less than 100,000 gpd." *Id.* ¶ 39 n.30. If the Constitution demands a full delegation of the Legislature's public trust authority to DNR, the Court could not have left that question open without drawing some constitutional distinction between wells below a 100,000-gpd capacity and those above.

So, in *Lake Beulah*, the public trust doctrine served as a source of authority for DNR only to extent that the Legislature had delegated it—and not as an independent

constitutional mandate on DNR. Through Act 21, the Legislature has "revok[ed]" part of its prior public trust delegation to DNR, thereby "limiting" DNR's public trust authority to those areas "explicitly required or explicitly permitted by statute."[6] Wis. Stat. § 227.10(2m); *see also* Wis. Stat. § 227.11(2)(a). In other words, the Legislature "revert[ed]" any residual public trust authority "to [itself]," taking back "responsib[ility] for making rules and statutes necessary to protect the waters of the state." App. 93.

2. The Legislature Has Fulfilled, And Continues To Fulfill, Its Constitutional Duty To Protect Wisconsin's Waters

In briefing below, Clean Wisconsin argued that without a total delegation of public trust authority to DNR, the Legislature would breach its constitutional duty. R.114:24–27. That is not so.

To begin with, recent precedent casts considerable doubt on Clean Wisconsin's assumptions about the scope of the public trust duty. The Supreme Court's (post–*Lake Beulah*) decision in *Rock-Koshkonong*, 2013 WI 74, suggests that the public trust doctrine does not even apply in this case. The Court there held that "[t]here is no constitutional foundation for public trust jurisdiction over land . . . that is

[6] Although Section 227.10(2m) also allows DNR to enforce requirements established in "rule[s] that ha[ve] been promulgated in accordance with th[e] subchapter," Wis. Stat. § 227.10(2m), Section 227.11(2)(a) prevents DNR from requiring environmental review by rule outside the statutorily defined categories. *Supra* p. 12.

not below the [ordinary high water mark] of a navigable lake or stream." *Id.* ¶ 86 (emphasis removed). The wells at issue here are clearly located on land far outside the ordinary high water mark of navigable waters. So there is good reason to think that this case does not even implicate the Legislature's public trust authority, as opposed to its conventional police powers. *Id.* ¶¶ 95–103 (discussion of police powers).

But even if the public trust doctrine applies, the Legislature has not violated it by limiting DNR's authority. Under the public trust doctrine, the "state holds the beds underlying navigable waters in trust for all of its citizens." *Muench v. Pub. Serv. Comm'n*, 261 Wis. 492, 501, 53 N.W.2d 514 (1952). The doctrine is most frequently invoked to resolve disputes between private parties, preventing claims of exclusive rights to Wisconsin's waters. *See*, *e.g.*, *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914). The doctrine also imposes a general duty on the Wisconsin Legislature—as the "trustee of navigable waters"—"to protect and preserve [those] waters." *Lake Beulah*, 2011 WI 54, ¶ 33 (citation omitted); *Rock-Koshkonong*, 2013 WI 74, ¶ 87. But, as with a standard trust, the trustee has "broad discretion" to "exercise reasonable care and judgment" in fulfilling its duties. *See In re Tr. Salimes*, 43 Wis. 2d 140, 145, 168 N.W.2d 157 (1969); *In re Filzen's Estate*, 252 Wis. 322, 326, 31 N.W.2d 520 (1948) (trustees must "act in good faith and from proper motives and within the bounds of a reasonable judgment"). And "the trustee of the public," even more so, "is necessarily

vested [with] a wide field of discretion in the carrying out of its duties[ ] and . . . determining the questions of legitimate general public policy in matters that affect the community as a whole." *Wagner v. City of Milwaukee*, 180 Wis. 640, 192 N.W. 994, 996 (1923).

That does not mean that the Legislature's discretion is unbounded. The Legislature cannot, for example, authorize "draining [a] lake" solely for the purpose of "convert[ing] the bed of the lake [into] private [property]." *Priewe v. Wis. State Land & Improvement Co.*, 103 Wis. 537, 79 N.W. 780, 781 (1899). Nor can the Legislature "change navigable waters into agricultural fields" in a way that "entirely destroy[s] [an] interstate ferry route." *In re Crawford Cty. Levee & Drainage Dist. No. 1*, 182 Wis. 404, 196 N.W. 874, 878 (1924).

The public trust doctrine does not, however, require the Legislature to prohibit all economic activity that would have any impact whatsoever on a lake or stream. The Legislature need not preserve all waters "in the same condition and contour as they existed prior to the advent of the white civilization in the territorial area of Wisconsin." *City of Milwaukee v. State*, 193 Wis. 423, 214 N.W. 820, 830 (1927). Rather, "[t]here must be a realistic and sane legal approach to this problem, namely a balancing of public need and convenience against the interference with the navigation involved." *State v. Pub. Serv. Comm'n*, 275 Wis. 112, 119, 81 N.W.2d 71 (1957) (citations omitted) (authorizing filling part of Lake Wingra in Madison to construct Vilas Park); *see also*

Town of Ashwaubenon v. Pub. Serv. Comm'n, 22 Wis. 2d 38, 49, 125 N.W.2d 647 (1963) ("One does not have to deny [ ] the trust doctrine . . . to determine that an intrusion upon the navigable waters is permissible."); *Hixon v. Pub. Serv. Comm'n*, 32 Wis. 2d 608, 618–19, 146 N.W.2d 577 (1966); *Bleck*, 114 Wis. 2d at 465.

The Legislature's graduated framework for environmental review falls well within the bounds set by the public trust doctrine. That framework is designed to identify those wells most likely to have a negative impact on Wisconsin's waters: the largest wells are always subject to environmental review, medium wells sometimes are, and the smallest wells are not. The criteria triggering environmental review for medium wells are also tailored to protect the environment: wells near outstanding or exceptional water resources or trout streams, Wis. Stat. § 281.34(1)(am), (4)(a)(1); wells "that may have a significant impact on a spring," *id.* § 281.34(4)(a)(3); and wells with a "water loss of more than 95 percent," *id.* § 281.34(4)(a)(2), all require environmental review. These are not narrow categories. Almost 20% of Wisconsin's rivers and streams are designated "outstanding" or "exceptional," and 30% are classified trout streams, and DNR can expand these lists. *Supra* p. 8. There are also hundreds of springs in Wisconsin. *Supra* p. 9.

Through Act 21—in addition to the Legislature's request for an Attorney General opinion about the effect of Act 21 on DNR's high capacity well program, *supra* p. 17—the

Legislature has made clear that, in its view, this graduated environmental-review framework is generally sufficient to protect Wisconsin's water resources from high capacity wells.

To the extent that framework is insufficient in some way—whether for certain categories of wells or regions of the State—the Legislature continues to review and update its regulation of high capacity wells. In the summer of 2017, the Legislature authorized DNR to study the Central Sands Region (where all but one of the wells in this case are located) and to provide specific legislative recommendations to address the unique water issues there. 2017 Wis. Act 10, § 4; *supra* pp. 19–20. This recent action demonstrates two things: first, that the Legislature takes its public trust duties seriously; and second, that the Legislature has decided that well-related water issues should be addressed systematically, rather than by DNR staff on a case-by-case basis, because the prior ad hoc approach had generated confusion and a "backlog" of well applications, App. 67; *supra* pp. 18–19. The Legislature can reasonably choose to resolve the difficult "balancing" that the public trust duty requires in a systematic way, rather than by delegating to a case-by-case decision-maker like DNR.

II. Section 281.34(5m) Bars Petitioners' Challenge Based On Cumulative Impact

In addition to limiting DNR's environmental review authority to the statutorily defined categories (and perhaps to reinforce that mandate), the Legislature also barred certain

challenges to well approvals based on cumulative environmental impacts. Section 281.34(5m) provides that "[n]o person may challenge an approval, or an application for approval, of a high capacity well based on the lack of consideration of the cumulative environmental impacts of that high capacity well together with existing wells." Wis. Stat. § 281.34(5m). This statute essentially limits the scope of judicial review of well approvals. "[T]he right of judicial review is entirely statutory," such that "orders of administrative agencies are not reviewable unless made so by the statutes." *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n*, 93 Wis. 2d 650, 657, 287 N.W.2d 737 (1980). Accordingly, the Legislature can, and has, "prescribe[d] [the] extent" of judicial review of well approvals. *See Clintonville Transfer Line v. Pub. Serv. Comm'n*, 248 Wis. 59, 75–76, 21 N.W.2d 5 (1945).

Petitioners raised precisely this forbidden challenge. In their petition for review, they complained that DNR "approv[ed] [the] wells without addressing . . . adverse individual or *cumulative* impacts to waters of the state," and argued that they were "directly injured because DNR did not address [such] individual and *cumulative* effects." *E.g.*, R.1:5 (emphases added). They asked the circuit court to "reverse[ ]" the approvals and to "[d]eclar[e] that DNR has the authority and duty to address the individual and *cumulative* effects of all high capacity wells on waters of the state." *E.g.*, R.1:7 (emphasis added). And in their briefing on the merits, they

continued to argue that "DNR's duties include protection from cumulative impacts," R.114:14, and that DNR "must consider [ ] cumulative impacts," R.114:25.

DNR moved to dismiss "petitioner[s'] claims related to" cumulative impact under Section 281.34(5m), R.49-1; *see also* R.50–64, but the circuit court denied the motion in part because Petitioners also alleged that DNR failed to consider *individual* environmental impacts, which DNR conceded would not be barred by Section 281.34(5m), R.158:25; *supra* p. 23. However, the circuit court ultimately vacated the well approvals because DNR had not considered *cumulative* impact—exactly the claim that Section 281.34(5m) forbids. The court concluded that all but one of the well applications "would have [been] denied" based on "cumulative impacts" but for DNR's interpretation of Act 21. App. 12–13. And for the one remaining well, the court "vacated and remanded back to the DNR for further evaluation of possible *cumulative* impacts." App. 13 (emphasis added).

The court reached this result through a strained interpretation of the word "consideration" in Section 281.34(5m). The Petitioners had argued that "consideration" means "careful thought [or] deliberation" at any time, divorced from any decision-making process. *See* R.94:12 (citing dictionary). Relying on this definition, they asserted that their challenge was not "based on a 'lack of consideration' of cumulative impacts"—as in, a failure to think about such impacts at any point in time—but was instead based on

DNR's failure to "act on" cumulative impact. *See* R.94:12. The court appears to have accepted this argument, stating that Section 281.34(5m) was "not in dispute" because "DNR did consider [cumulative] impact[ ]" "before the AG Opinion was published." App. 2; *see also* App. 12 ("cumulative impacts [ ] *were considered* by the DNR").

But, of course, the word "consider" also means "[t]o take into account," to "bear in mind," or to "think carefully about (something), *especially before making a decision*." "Consider," The American Heritage Dictionary, https://bit.ly/2HH3zWz (emphasis added). And Section 281.34(5m) is all about barring certain challenges to a particular *decision*, namely, a well approval. So, in context, Section 281.34(5m)'s prohibition on any "challenge . . . based on the lack of consideration of [ ] cumulative environmental impacts," Wis. Stat § 281.34(5m), clearly bars any claim that DNR failed to "take [cumulative impact] into account" as part of its decision to approve a well—exactly the claim Petitioners raise here and the circuit court accepted—and is not narrowly limited to claims that DNR never gave "careful thought" to cumulative impact.

Because the circuit court appears to have relied solely on the claim barred by Section 281.34(5m)—that DNR failed to consider cumulative impact—its judgment was invalid. *See Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶¶ 8–14, 273 Wis. 2d 76, 681 N.W.2d 190. Therefore, if this Court rejects Part I above and concludes that DNR does have the authority to consider environmental impact despite Act 21, this Court

should reverse the circuit court and remand with instructions to consider only Petitioners' claim that DNR failed to consider the *individual* impacts of the wells.

CONCLUSION

The decision of the circuit court should be reversed.

Dated: May 2, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,986 words.

Dated: May 2, 2018.

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RYAN J. WALSH
Chief Deputy Solicitor General

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I hereby certify that:

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Dated: May 2, 2018.

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