Nos. 16AP1688 & 16AP2502

In the Wisconsin Court of Appeals

DISTRICT II

CLEAN WISCONSIN, INC., LYNDA COCHART, AMY COCHART, ROGER DEJARDIN, SANDRA WINNEMUELLER AND CHAD COCHART,
PETITIONERS-RESPONDENTS,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
RESPONDENT-APPELLANT,

and

KINNARD FARMS, INC.,
INTERVENOR-CO-APPELLANT

On Appeal From The Dane County Circuit Court,
The Honorable John W. Markson, Presiding,
Case No. 15-cv-2633

OPENING BRIEF AND APPENDIX OF THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES

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ISSUES PRESENTED

1. Does DNR have authority to impose off-site groundwater-monitoring requirements and an animal-unit maximum on a WPDES permit?

The circuit court answered yes.

2. Did DNR retain discretion to decide whether to impose certain permit conditions after denying review of the ALJ's decision?

The circuit court answered no.

3. Was the circuit court competent to enter, and, if so, did it correctly enter an award of costs and fees to Petitioners?

The circuit court answered yes.

INTRODUCTION

For decades, Wisconsin courts struggled to determine whether a particular statute or rule conferred upon an agency "implicit" powers. This line of cases—which forced judges to read between the lines of clear text and dwell on questions of policy—produced widespread regulatory uncertainty and unpredictability. It also effectively made agencies a principal source of laws in the State, infringing on the constitutional role of the Legislature.

Those days ended with the enactment of Act 21 in 2011. Henceforth, "[n]o agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any [permit] issued by the agency, unless that standard, requirement, or threshold is *explicitly required* or *explicitly permitted* by statute or by a [valid] rule." Wis. Stat. § 227.10(2m) (emphases added). As the Attorney General has thoroughly explained, this provision reflects "the Legislature's deliberate decision to shift policymaking decisions away from state agencies and to the Legislature," notwithstanding that the "far-reaching" "consequences" of this shift "will, in some cases, eliminate arguably laudable policy choices of an agency." 4 Op. Wis. Att'y Gen. 17, 2017 WL 6811968, at *3 (Dec. 8, 2017).

The circuit court in this case entirely missed the significance of this law. Even though no statute or rule explicitly gives the Department of Natural Resources authority to require large dairy farms (through conditions on

a permit) to monitor off-site groundwater for pollutants or to set a limit on the number of animals that the farm may keep, the circuit court thought it enough that more than a dozen statutes and regulations—read together—fairly *implied* these powers. Not only did the court fail to account for Act 21, it also ignored this Court's holding that no state statute "expressly authorize[s] the DNR" to impose "off-site" conditions. *Maple Leaf Farms, Inc. v. DNR*, 2001 WI App 170, ¶ 13, 247 Wis. 2d 96, 633 N.W.2d 720. Nor does state law expressly empower DNR to regulate a dairy farm's number of animals through discharge permit conditions.

The merits question in this case goes to the nature of administrative power. It is recurring and important, and its resolution is necessary to guide lower-court judges. This Court should reverse, making clear that the unambiguous meaning of Act 21 is the law of Wisconsin.

ORAL ARGUMENT AND PUBLICATION

While oral argument is not necessary given that a straightforward application of Act 21 disposes of this case, a precedential opinion addressing Act 21 would be helpful for lower courts.

STATEMENT OF THE CASE

I. Legal Background

A. In 1970, Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a)(1);

Andersen v. DNR, 2011 WI 19, ¶ 33, 332 Wis. 2d 41, 796 N.W.2d 1. To achieve this goal, Congress empowered the Environmental Protection Agency (EPA) to administer the National Pollution Discharge Elimination System (NPDES), a permitting program for point sources of water pollution, including "solid waste" and "agricultural waste." *See* 33 U.S.C. §§ 1311, 1362(6); *Andersen*, 2011 WI 19, ¶ 33. A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged," including a ditch, well, or "concentrated animal feeding operation." 33 U.S.C. § 1362(14); *see also* Wis. Stat. § 283.01(12)(a). The Act provides that point sources may discharge pollutants into "waters of the United States" only if they have received an NPDES permit from EPA. *See* 33 U.S.C. § 1311(a). "NPDES permits impose limitations on the discharge of pollutants, and establish related monitoring and reporting requirements, in order to improve the cleanliness and safety of the Nation's waters." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U. S. 167, 174 (2000).

The Act also authorizes EPA to allow States to administer their own permitting programs, in lieu of the NPDES scheme, so long as those state programs meet certain federal requirements. 33 U.S.C. § 1342(b); *Andersen*, 2011 WI 19, ¶¶ 34–36. In 1974, EPA approved Wisconsin's permit program, the Wisconsin Pollution Discharge Elimination System (WPDES). EPA, *NPDES State Program Information*, *State Program Authority*, https://www.epa.gov/npdes/npdes-

state-program-information (last visited May 14, 2018); *see Andersen*, 2011 WI 19, ¶ 37. The Wisconsin Department of Natural Resources (DNR) administers the WPDES program, s*ee* Wis. Stat. § 283.001(2), which is subject to federal oversight, 33 U.S.C. § 1342(c), (d); *Andersen*, 2011 WI 19, ¶¶ 39–40; 40 C.F.R. § 123.63(a). One key difference between the NPDES and WPDES programs is that the WPDES covers discharges to groundwater. *Compare* 40 C.F.R. § 122.2 (explaining that "waters of the United States" do not include groundwater), *with* Wis. Stat. § 283.01(20) (defining "[w]aters of the state" to include groundwater).

B. An owner or operator of a point source may not discharge pollutants into waters of the State unless it does so under a lawful WPDES permit issued by DNR. Wis. Stat. §§ 283.31, 283.37. DNR may issue a "general permit applicable to a designated area of the state authorizing discharges from specified categories or classes of point sources located within that area" or, for sources not covered by a general permit, an individualized permit. Wis. Stat. §§ 283.35, 283.37. Once DNR receives a WPDES permit application, DNR must notify the public and receive public comment for a period of at least 30 days and must hold a public hearing on the permit if requested. Wis. Stat. §§ 283.39, 283.49.

All point-source permits must include several kinds of pollutant-discharge conditions "whenever applicable." Wis. Stat. § 283.31(3). Those include "[e]ffluent limitations" (or

"restriction[s] . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents," Wis. Stat. § 283.01(6)), and "[e]ffluent standards, effluents prohibitions and pretreatment standards," Wis. Stat. § 283.31(3)(a); *see also* Wis. Admin. Code § NR 205.065. The statute also directs DNR to "prescribe conditions for permits issued under this section to assure compliance with [the Section 283.31(3)] requirements," and specifically enumerates certain reporting and access requirements. Wis. Stat. § 283.31(4); *see also* Wis. Admin. Code § NR 205.07(1).

C. Under both federal and state law, "point sources" include large farms known as "concentrated animal feeding operation[s]" (CAFOs). 33 U.S.C. § 1362(14); Wis. Stat. § 283.01(12). Generally, Wisconsin law defines a CAFO as any animal-feeding operation with "1,000 animal units or more at any time" that "stores manure or process wastewater" in storage structures at or below "grade level," or that "land applies manure or process wastewater."[1] Wis. Admin. Code § NR 243.03(12); *see also* 40 C.F.R. § 122.23(b) (defining "Large CAFO" to include operations housing at least 700 mature dairy cows for at least 45 days in a 12-month period); *infra* p. 32 (defining animal unit).

In accordance with Section 283.31(3), DNR has promulgated "[s]tandard WPDES permit requirements for large CAFOs," found in Wis. Admin. Code § NR 243.13. This

[1] "Process wastewater" is "wastewater from the production area." Wis. Admin. Code § NR 243.03(53).

regulation applies different pollutant-discharge requirements to different categories of large CAFOs. For discharges to navigable waters from large dairy CAFOs, DNR imposes an effluent limitation based on the adequacy of the containment structure, providing that large dairy CAFOs "may not discharge" any pollutants (i.e., "manure or process wastewater pollutants") into "navigable waters from the production area." Wis. Admin. Code § NR 243.13(2).[2] The only circumstance in which a CAFO is not responsible for discharge of manure or process-wastewater pollutants to a navigable water is when rainfall has caused "an overflow of manure or process wastewater from a containment or storage structure," that structure is "properly designed, constructed and maintained," the "production area" meets certain "inspection, maintenance and record keeping requirements," *id.*, and the discharge does not result in noncompliance with groundwater and surface water quality standards, *id.* § NR 243.13(5).

As an additional condition of obtaining a WPDES permit, CAFOs must submit for DNR approval a "nutrient management plan . . . outlining the amounts, timing, locations, methods and other aspects regarding the land application of manure and process wastewater." Wis. Admin.

[2] The "production area" "includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas but not CAFO outdoor vegetated areas." Wis. Admin. Code § NR 243.03(54).

Code § NR 243.14(1). The plan "shall contain information necessary to document how the operation's land application activities will comply with [federal and DNR regulations] and the conditions of the operation's WPDES permit," including Section NR 243.13(2)'s restrictions on manure and process-wastewater discharge. *Id.* DNR's regulations mandate a comprehensive set of highly technical and specific requirements, including that "[m]anure or process wastewater may not pond" and that CAFOs may not apply them to "saturated soils" or spread them on "areas of a field with a depth to groundwater or bedrock of less than 24 inches" or "within 100 feet of a direct conduit to groundwater." *Id.* § NR 243.14(2)(b).

D. Once DNR grants a WPDES permit application, any permittee, applicant, affected State, or five or more affected persons may petition DNR for review of DNR's permitting decision and "the reasonableness of or necessity for any term or condition" of any permit. Wis. Stat. § 283.63(1). If DNR grants the petition, DNR (either itself or by appointment of an administrative law judge) must hold a public hearing on the issues raised in the petition and issue a decision within 90 days of the close of the hearing. *Id.* § 283.63(1)(b) & (d). Any person adversely affected by DNR's final decision may then petition for judicial review of that decision under Wis. Stat. § 227.52. *Id.* § 283.63(2). The nature and stages of the administrative-review process—and in particular when an

agency order constitutes DNR's "final decision"—are explained at length *infra* pp. 36–40.

II. Factual Background

A. Contested Case Hearing

Kinnard Farms, Inc., runs a large dairy in Kewaunee County. R.34:0226.[3] In 2012, Kinnard sought to expand its operation by adding a second site ("Site 2") and over 3,000 dairy cows. R.34:0226. But first it needed approval from DNR and a new WPDES permit, *see* Wis. Stat. §§ 283.31(4)(b), 283.59(1); R.34:0226–27, which it received on August 16, 2012, R.34:0045. The WPDES permit was effective September 1, 2012. R.34:0045–74.[4]

After DNR issued the permit, five affected individuals (the individual petitioners here) sought administrative review. R.34:0001–32; *see* Wis. Stat. § 283.63. Two of the petition's main claims were that the permit improperly failed to "require monitoring to evaluate impacts to groundwater and determine compliance with permit conditions," R.34:0013–17, and to set a "maximum number of animal units," R.34:0017–20.

DNR granted the petition and referred the matter to the Division of Hearings and Appeals, where Administrative Law

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[3] References to "R." are to the appellate record in 16AP2502, which is identical to the record in 16AP1688 up until R.58, at which point only the record in 16AP2502 continues to include events relating to costs and fees.

[4] References to the administrative record (R.34) are to the administrative record as contained in the files on the CD submitted to this Court and the pagination as it appears therein.

Judge (ALJ) Jeffrey Boldt presided over the hearing. R.34:0039–110. Kinnard moved for summary judgment, arguing that DNR lacked explicit authority to impose an animal-unit maximum and citing Wis. Stat. § 227.10(2m). R.34:0165–68. DNR agreed with Kinnard that "no law or statute requires [DNR] to articulate a maximum animal unit" number in WPDES permits. R.34:0181. The ALJ denied summary judgment, R.34:0405–12, concluding, among other things, that "disputed issues of fact" remained, R.34:0411.

On October 29, 2014, the ALJ issued its "findings of fact, conclusions of law and order." App.1–19. The ALJ determined that "a groundwater monitoring plan is essential" at Site 2, App.14, and that the permit was "unreasonable because it d[id] not specify the number of animal units allowed at the facility," App.15. In addition, the ALJ called for monitoring of "two or three representative off-site landspreading fields," but recognized that this "would require the voluntary participation of off-site property owners," App.14, and so required such monitoring only "if practicable," App.18. The ALJ further concluded that, since "the number of animal units corresponds directly to the amount of waste generated by a CAFO," "a cap on animal units [wa]s a good idea in this particular case because of concerns over Kinnard Farms' ability to comply with regulatory requirements." App.15. So the ALJ held that DNR should modify the permit "to reflect th[e] additional requirement" of an animal-unit maximum. App.15.

The ALJ left the rest up to DNR, ordering that DNR (1) modify the permit "to reflect a maximum number of animal units at the facility in addition to current storage requirements" and (2) "review and approve a plan for groundwater monitoring . . . at or near [Site 2]" "includ[ing] no less than six groundwater monitoring wells and, if practicable, at least two of which monitor groundwater quality impacts from off-site landspreading." App.18.

B. DNR's Review Of The ALJ's Decision

Kinnard timely petitioned the DNR Secretary for reconsideration of the ALJ's decision. *See* R.34:0718; Wis. Admin. Code § NR 2.20. On November 25, 2014, the Secretary denied review, explaining that these issues were "amenable to judicial review" and that therefore the issues "would most appropriately [be] decided by the courts of this state." App.20–21. Kinnard then filed a petition for judicial review in the Kewaunee County Circuit Court. R.34:6419–47. The Kewaunee County Circuit Court held that the ALJ's order was not final and therefore not judicially reviewable under Chapter 227. App.23–28.

DNR then sought clarification from the Wisconsin Department of Justice (DOJ) regarding the application of Act 21 to the ALJ's proposed permit conditions. *See* R.34:0731–41. After receiving clear guidance from DOJ that the conditions would be unlawful under Act 21 and advice that the Secretary should reconsider her decision under NR 2.20,

DNR issued its "Final Order regarding [Kinnard's] WPDES Permit" on September 11, 2015. App.29–36. DNR approved a proposed monitoring plan for Site 2, which did not include any off-site groundwater monitoring. App.30–32. The DNR Secretary then explained that DNR "may not amend the WPDES Permit to include conditions unless those conditions are explicitly required or explicitly permitted by statute or by rule," that animal-unit maximums and off-site groundwater monitoring are not "explicitly required or explicitly permitted by statute or by a rule," and therefore those conditions "will not be added" to the permit. App.35 (citing Wis. Stat. § 227.10(2m)). Styling her response as a "re-consideration" of her earlier denial of Kinnard's NR 2.20 petition, the Secretary explained that her order would "constitute the final agency action for all purposes under ch. 227 in this case." App.35.

C. Proceedings In The Circuit Court

On October 12, 2015, Clean Wisconsin, an interested environmental group, filed a petition for judicial review in Dane County Circuit Court. R.1. Likewise, the individual petitioners filed a petition for judicial review in Kewaunee County Circuit Court. Petition, *Cochart v. DNR*, 15-cv-0091 (Kewaunee Cty. Cir. Ct. Oct. 12, 2015). DNR moved to consolidate these cases in Dane County, R.10, which the Dane County Circuit Court granted, R.33.

The court held for Petitioners (Clean Wisconsin and the individual petitioners collectively). App.37–62. It first

determined that "[t]he ALJ's decision became DNR's decision when the DNR Secretary denied Kinnard's § NR 2.20 Petition for Review." App.43–48. The court explained that DNR had "by rule" "direct[ed] that the [ALJ's] decision be the final decision of the agency" "unless DNR petition[ed] for judicial review." App.43–45. Notwithstanding that another circuit court had concluded that the ALJ's decision was interlocutory and therefore not judicially reviewable, App.23–28, the court held that the ALJ's decision became the final decision of DNR because DNR had not petitioned for judicial review, App.45–47. The court next determined that "[t]he DNR Secretary's attempt to reverse [her] denial of Kinnard's § NR 2.20 Petition was untimely and beyond her authority." App.48–53.

On the merits, the court determined that DNR has authority to impose the ALJ's permit conditions under Act 21. App.53–61. The court explained that it must read Act 21 "in conjunction with other statutes" and that it "must consider Act 21 within the greater context of chapter 283," including the statement of purpose contained therein. App.54–55 (citing Wis. Stat. § 283.001(1)). The court held that an animal-unit maximum was the equivalent of an effluent limitation and a maximum level of discharge, and therefore DNR was explicitly authorized to impose such a maximum by Wis. Stat. § 283.31(3), (4) & (5). App.57 (mistakenly referring to Section 283.32). The court also purported to locate explicit authority for animal-unit maximums in the administrative code. App.58.

The court next held that DNR has explicit authority to impose off-site groundwater monitoring. App.59–61. The court cited Wis. Stat. § 283.31(4), which "requires DNR to establish permit conditions that assure compliance with [ ] effluent limitations." App.59–60. The court also held that DNR's nutrient-management-plan regulations explicitly authorize DNR to impose off-site groundwater monitoring because they "set out prohibited outcomes" and a permit "cannot ensure specific outcomes without fashioning site- and operation-specific conditions calculated to lead to the outcome." App.59–60.

D. Costs And Fees

On August 14, 2016, Clean Wisconsin and the individual petitioners filed a joint motion for costs and fees under Wis. Stat. § 814.245. R.45. On August 24, DNR filed a notice of appeal, R.52, and on August 26, Kinnard filed its own notice of appeal, R.53. After receiving briefing on the issue of costs and fees, R.51; R.62, the circuit court held a hearing on September 30, and stated that it would award costs and fees to Petitioners, R.63; App.63–82.

Before the circuit court issued any written order on costs and fees, the clerk of the circuit court transmitted the record on appeal to this Court, on October 5, 2016. *See* Record, *Clean Wis. v. DNR*, 16AP1688 (Wis. Ct. App. Oct. 5, 2016). DNR then filed specific objections to a proposed order, including that the court lost competency to enter any final

order once the record was transferred, and that no statute authorized the circuit court to impose interest on the State. R.65:1–3. The court later issued a written judgment granting Petitioners costs and fees. App.115–17.

DNR then appealed this judgment, R.69, and moved in this Court to consolidate the appeals. This Court granted the motion. *See* Order Consolidating Cases, *Clean Wis. v. DNR*, 16AP1688 & 16AP2502 (Wis. Ct. App. Jan. 24, 2017).

E. Post-Appeal Proceedings In Supreme Court

DNR selected District II for its appeals. Before briefing began, District IV transferred the cases to its own docket. Other Papers, *Clean Wis. v. DNR*, 16AP1688 (Wis. Ct. App. Aug. 31, 2016). DNR petitioned the Wisconsin Supreme Court for a supervisory writ, arguing that District IV's transfer order violated Wis. Stat. § 752.21(2). Petition, *DNR v. Wis. Ct. App. Dist. IV*, 16AP1980 (Wis. Oct. 13, 2016). The Court stayed briefing in this case pending its decision on the supervisory writ. Order, *DNR v. District IV*, 16AP1980 (Wis. Dec. 9, 2016).

On April 3, 2018, the Supreme Court issued its decision granting the writ and ordering District IV to return the case to District II's docket. *State ex rel. DNR v. Wis. Ct. App., Dist. IV*, 2018 WI 25, 380 Wis. 2d 354, 909 N.W.2d 114. Merits briefing then resumed. Transfer and Order, *Clean Wis. v. DNR*, 16AP1688 & 16AP2502 (Wis. Ct. App. Apr. 3, 2018).

F. New WPDES Permit And New Contested Case Hearing

While the Wisconsin Supreme Court considered whether to grant a supervisory writ, Kinnard's 2012 WPDES permit expired, *see* R.34:0045, and Kinnard applied for and received a new WPDES permit, effective February 1, 2018, App.133. The new permit (like the old permit) does not contain off-site groundwater-monitoring requirements or an animal-unit maximum. App.131–66. A group of citizens has petitioned for a contested-case hearing on the new permit, arguing that, in light of the circuit court's decision in this case, DNR must impose off-site groundwater-monitoring requirements and an animal-unit maximum on Kinnard's new permit. App.118–30. DNR plans to stay that contested-case hearing pending the outcome of this appeal.

STANDARD OF REVIEW

"When an appeal is taken from a circuit court order reviewing an agency decision, [appellate courts] review the decision of the agency, not the circuit court." *Hilton ex rel. Pages Homeowners' Ass'n v. DNR*, 2006 WI 84, ¶ 15, 293 Wis. 2d 1, 717 N.W.2d 166. The party seeking to overturn the agency decision bears the burden. *Bethards v. DWD*, 2017 WI App 37, ¶ 16, 376 Wis. 2d 347, 899 N.W.2d 364. This Court reviews questions regarding the scope of agency authority de novo. *Wis. Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶ 13, 270 Wis. 2d 318, 677 N.W.2d 612.

As to the costs-and-fees ruling, the question of "[w]hether a circuit court has lost competency is a question of law that [appellate courts] review independently." *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 7, 273 Wis. 2d 76, 681 N.W.2d 190. But this Court reviews a circuit court's decision regarding whether an agency's decision was substantially justified for an "erroneous exercise of discretion." *Stern by Mohr v. Wis. Dep't of Health and Family Servs.*, 212 Wis. 2d 393, 397–98, 569 N.W.2d 79 (Wis. Ct. App. 1997). Finally, whether the circuit court had authority to impose interest on DNR is a question of statutory interpretation that this Court reviews de novo. *See State v. Longcore*, 2001 WI App 15, ¶ 5, 240 Wis. 2d 429, 623 N.W.2d 201.

SUMMARY OF ARGUMENT

I. Although Kinnard's 2012 permit has expired, this Court should nevertheless decide the substantive question presented here: whether Act 21 prohibits DNR from imposing the conditions ordered by the circuit court. This question remains in live controversy before DNR (given the pending dispute over the new Kinnard permit), it is important, and lower courts would benefit from this Court's guidance.

Act 21 prohibits DNR from imposing these permit conditions. After Act 21, any permit condition that an agency wishes to impose must either be "explicitly required" or "explicitly permitted" by statute or rule. In this case, neither off-site groundwater monitoring nor animal-unit maximums

are explicitly required or explicitly permitted by either the Wisconsin Statutes or the Wisconsin Administrative Code.

II. Although this Court should answer the live Act 21 question presented, it should not resolve the moot issue of whether DNR complied with its rules in issuing the challenged order. That issue is not the source of a live controversy, it is unimportant, and it is unlikely to recur.

Regardless, Petitioners' procedural argument rests on several errors. DNR has no obligation to defend erroneous positions of law in litigation. In any event, because the ALJ's decision below was not final, DNR retained discretion to revisit the ALJ's conditions. The ALJ's decision could not become DNR's final decision because the ALJ's order was merely interlocutory, and thus DNR retained the authority to determine for itself what the permit conditions would be. Indeed, quasi-judicial agencies such as DNR always retain authority to reconsider decisions, especially when those decisions involve errors of law.

III. If this Court reaches the costs-and-fees question, it should vacate the circuit court's order on the ground that it did not have competency to enter a judgment on costs and fees after the clerk had transferred the record to this Court. In any event, the circuit court erroneously exercised its discretion when it determined that DNR's position was not substantially justified. Finally, the court erred when it imposed interest on the State in the absence of a statute permitting such an imposition.

ARGUMENT

I. Under Act 21, DNR Lacks Authority To Add An Off-Site Groundwater-Monitoring Requirement And An Animal-Unit Maximum To Kinnard's Permit

A. This Court Should Decide This Important, Recurring Act 21 Question, Over Which There Remains A Live Legal Controversy

Recent developments in this case raise questions of possible mootness. As explained above, Kinnard's 2012 permit, the subject of Petitioners' challenge here, has expired, and Kinnard now operates under a new permit, for which a new petition for a contested-case hearing is pending. *Supra* p. 16.

Under Wisconsin's doctrine of mootness, an "issue" in a case (and not necessarily the case itself)[5] "is moot when its resolution will have no practical effect on the underlying controversy" because developments in the case have "rendered" the issue "purely academic." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425. "Generally, moot issues will not be considered by an appellate court." *Id.* Yet a court may—indeed, "should"—decide a technically moot issue when (1) the question has "great public importance"; (2) it implicates a statute's constitutionality; (3) "a decision is needed to guide the trial courts"; or (4) "the situation is likely to be repeated but seems

[5] For this reason, DNR addresses in Part II the mootness doctrine's application to this case's distinct procedural issues. *Infra* pp. 35–36.

to evade review because it is resolved before the completion of the appellate process." *State ex rel. Milwaukee Cty. Pers. Review Bd. v. Clarke*, 2006 WI App 186, ¶ 31, 296 Wis. 2d 210, 723 N.W.2d 141.

For at least three independent reasons, this Court should decide the substantive Act 21 question. First and most straightforwardly, whether Act 21 forbids DNR from imposing the permit conditions that Petitioners seek—"the underlying controversy" here—is very much a live question. While the question of the *2012* permit's validity is now academic, whether DNR should impose the off-site groundwater-monitoring and animal-unit-maximum conditions on Kinnard remains in dispute between DNR and concerned-citizen petitioners. Indeed, this identical issue is presently set for yet another contested-case hearing—a hearing that DNR plans to stay precisely so that this Court can settle these important legal questions. Second and third, even if this Court concludes that the Act 21 issue is moot, it easily meets two of the mootness doctrine's exceptions. In light of the significance of Act 21 and the fact that no precedential decision has yet construed it, the issue plainly "has great public importance," and "a decision is needed to guide" judges, who have so far disagreed over Act 21's effect. *Compare* App.53–62, *with* App.167–72.[6]

[6] It is also possible that this issue will recur yet evade review. WPDES permits last a maximum of five years, Wis. Stat. § 283.53(1),

B. Act 21 Forbids DNR From Imposing The Permit Conditions Ordered By The Circuit Court

On the merits, this case raises important questions of administrative law. "It is axiomatic that because the legislature creates administrative agencies as part of the executive branch, such agencies have only those powers" that the Legislature has delegated to them. *Cranes and Doves*, 2004 WI 40, ¶ 14 (citation omitted). Hence, "[t]he nature and scope of an agency's powers are issues of statutory interpretation." *Id.* ¶ 6. And as in any other statutory context, where the Legislature has *expressly* provided for something, it is the role of courts to give effect to the enacted language. *See id.*; *see also State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶¶ 49–50, 271 Wis. 2d 633, 681 N.W.2d 110. Questions of *implicit* agency authority, on the other hand, are another matter. In the first decision to "determine the scope of an administrative agency's implied power under a statute," the Wisconsin Supreme Court adopted a broad standard that "a power which is not expressed [may] be reasonably implied from the express terms of the statute." *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 358–59, 190 N.W.2d 529 (1971), *vacated on other grounds by* 408 U.S. 915 (1972).

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while litigating a case from DNR up through the appellate courts often can take longer, as this case shows. *See Clarke*, 2006 WI App 186, ¶ 31.

One particularly illustrative case from the "implied power" era, in which courts would infer from general statutory language agency authority to impose requirements not explicitly authorized by any statute or rule, is *Maple Leaf*. That case involved a question of DNR's statutory authority to impose permit conditions regulating off-site manure spreading by CAFOs. *Maple Leaf*, 2001 WI App 170, ¶¶ 1–2. This Court began by recognizing that Chapter 283 of the Wisconsin Statutes "does not expressly authorize the DNR to regulate off-site manure applications; therefore, we must determine whether such regulatory power is fairly implied from the language of the statute." *Id.* ¶ 13. This Court concluded that Chapter 283's statement of purpose contained a "broad grant of power" to DNR that "clearly and unambiguously empowers the DNR to regulate where groundwater may be affected by the discharge of pollutants." *Id.* ¶ 15 (citing Wis. Stat. § 283.001(1)–(2)). The opinion then "harmonized" this purportedly "clear[ ] and unambiguous[ ]" delegation with the provisions of Section 283.31 and held that DNR had authority to regulate "landspreading of manure off-site [as] a discharge to waters of the state by Maple Leaf." *Id.* ¶¶ 21, 23, 27. Notably, this Court rejected arguments by Maple Leaf and its *amici* (1) that an agency cannot rely on a statutory statement of purpose as a source of regulatory authority, *id.* ¶ 15 n.7; and (2) that in the absence of express statutory authorization, DNR must first promulgate a rule explicitly providing for that permit condition, *id.* ¶ 30.

It was against this backdrop that Wisconsin adopted Act 21, "completely and fundamentally alter[ing]" the State's judicially developed framework. 4 Op. Wis. Att'y Gen. 17, 2017 WL 6408797, at *2 (Dec. 8, 2017). Most relevant here, Act 21 discarded the court-devised presumption against implied delegations and replaced it with a flat prohibition. *See State v. Whitman*, 196 Wis. 472, 220 N.W. 929, 942 (1928). It did this through two principal provisions. The first, which is the focus of this case, prohibits agencies from "implement[ing] or enforc[ing] any standard, requirement, or threshold, including as a term or condition of any license[7] issued by the agency, unless that standard, requirement, or threshold is *explicitly* required or *explicitly* permitted by statute or by a rule that has been promulgated in accordance with this subchapter." 2011 Wis. Act 21, § 1r (codified at Wis. Stat. § 227.10(2m)) (emphases added). Second, Act 21 provides that "[a] statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature." *Id.* § 3 (codified at Wis. Stat. § 227.11(2)(a)2). The same rule applies to "statement[s] or declaration[s] of legislative intent, purpose, findings, or policy." *Id.* (codified at Wis. Stat. § 227.11(2)(a)1).

[7] This includes an "agency permit." Wis. Stat. § 227.01.

Act 21 unambiguously provides that, when seeking to impose permit conditions, agencies can no longer infer authority from general language. This follows from the plain meaning of the term "explicit." *See Kalal*, 2004 WI 58, ¶ 45 (citation omitted). "Explicit" means "[d]istinctly expressing all that is meant; leaving nothing merely implied or suggested; express." 5 *Oxford English Dictionary* 572 (2d ed. 1989). "Implicit," on the other hand, means "[i]mplied though not plainly expressed; naturally or necessarily involved in, or capable of being inferred from, something else." 7 *Oxford English Dictionary* 724 (2d ed. 1989); *see also id.* at 725 (definition of "imply"). These definitions make clear that if a statute or rule has not conferred a power to impose licensing requirements expressly and specifically, then, under Act 21, it has not conferred the power at all—*even if* the power is "naturally or necessarily involved in," or a logical consequence of, a general grant of authority.

This new regime has important implications for the choice between administrative adjudication and administrative rulemaking.[8] While an agency can no longer read statutes as a source of implicit powers to be wielded case-by-case after Act 21, it *can* potentially adopt rules—provided that it has explicit authority to do so, *see* Wis. Stat.

[8] *See Administrative Adjudication*, Black's Law Dictionary (10th ed. 2014) ("The process used by an administrative agency to issue regulations through an adversary proceeding," which might result in a permit, license, or order; "[c]f. Rulemaking.").

§ 227.11(1)—interpreting statutory language. For example, DNR can promulgate regulations interpreting what are "conditions . . . to assure compliance with the requirements of sub. (3)," which addresses "effluent limitations." Wis. Stat. § 283.31(3)–(4). In this way, Act 21 preserves agency flexibility to interpret the Legislature's general directives, while also promoting predictability, since rules (like statutes) put regulated entities on notice

Although there are no controlling judicial decisions construing these provisions, the Attorney General has issued two comprehensive analyses of Act 21's seismic effect on Wisconsin administrative law. The Attorney General explained that Sections 227.10(2m) and 227.11(2)(a) straightforwardly "prevent agencies from relying on any supposed inherent or implicit authority" and reflect "the Legislature's deliberate decision to shift policymaking decisions away from state agencies and to the Legislature." 4 Op. Wis. Att'y Gen. 17, 2017 WL 6408797, at *3 (Dec. 8, 2017); *see also* 1 Op. Wis. Att'y Gen. 16, 2016 WL 2771698 (May 10, 2016); *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 106, 327 Wis. 2d 572, 786 N.W.2d 177 ("[A] well-reasoned [Attorney General] opinion is of persuasive value when a court later addresses the meaning of the same statute.").

1. DNR Lacks Explicit Authority To Impose Off-Site Groundwater-Monitoring Requirements On WPDES Permits

No statute or rule "explicitly requires" or "explicitly permits" DNR to impose off-site groundwater-monitoring requirements on WPDES permits. *See* Wis. Stat. § 227.10(1m). Rather, all of the statutes and rules that Petitioners and the circuit court cite fall into one of two general categories: (1) those that cannot be read to grant either explicit *or* implicit authority to impose off-site groundwater-monitoring requirements, and (2) those that conceivably could confer only *implicit* authority for imposing off-site groundwater-monitoring requirements. The first category is quite easily disposed of: there is no possible universe in which they confer authority on DNR, even by implication, because they do not relate to groundwater monitoring at all. Those in the second category fare no better, because implicit agency authority—even authority to carry out an action "naturally or necessarily involved in," or a logical consequence of, explicit authority, *supra* p. 24—no longer exists after Act 21.

1. *Chapter 283.* Whether Chapter 283 of the Wisconsin Statutes "expressly authorize[s] the DNR" to impose permit conditions "regulat[ing] off-site manure applications" is a settled question. *Maple Leaf*, 2001 WI App 170, ¶ 13. This Court held, in a published opinion, that it "does not." *Id.* Because imposing off-site groundwater-monitoring

requirements on manure applications is a lesser-included power within "regulat[ing] off-site manure applications," *id.*, Act 21—read together with *Maple Leaf*—makes clear that DNR lacks this authority, absent a valid, explicit rule providing otherwise. That should end the statutory inquiry.

Yet even without the benefit of *Maple Leaf*, it would be clear that Chapter 283 does not confer upon DNR explicit authority to impose on WPDES permits off-site groundwater-monitoring requirements not authorized by rule. To begin, Chapter 283's policy statement does not actually grant DNR any authority. It explains that the purpose of the WPDES program is to protect waters from pollution and "to grant [DNR] all authority necessary to establish, administer, and maintain a state pollutant discharge elimination system to effectuate [this] policy." Wis. Stat. § 283.001(2). This language simply describes a general statutory goal—a goal that Chapter 283's *other*, specific provisions presumably pursue. After Act 21, it is only these later statutory sections that could do the work of conferring agency power. *See id.* § 227.10(2m); *see also id.* § 227.11(2)(a).

Yet none of the provisions of Section 283.31, which provides for WPDES permit conditions, explicitly requires or permits off-site groundwater-monitoring requirements. Subsection 283.31(3) states that DNR may issue a WPDES permit "upon condition that [ ] discharges will meet all . . . applicable . . . [e]ffluent limitations[,] [s]tandards of performance for new sources[,] [e]ffluent standards, effluents

prohibitions and pretreatment standards[,]" "[g]roundwater protection standards," and "[a]ny more stringent limitations, including those" necessary to comply with either federal law, a "continuing planning process," or "an approved areawide waste treatment management plan." Wis. Stat. § 283.31(3). Subsection (3) falls into the first category of statutory provisions described *supra* p. 26: for the most part, it describes numerical standards or limitations that DNR might set on a particular pollutant (e.g., "for Pollutant A, no more discharge than X"). But a monitoring requirement is not a numerical standard or limitation. To illustrate, although an off-site groundwater-monitoring requirement might aid in DNR's enforcement of an "effluent limitation," the monitoring requirement is not itself an effluent limitation, because it is not a "restriction . . . on quantities, rates, and concentrations of [discharged pollutants]." Wis. Stat. § 283.01(6); *compare* Wis. Admin. Code § NR 217.13. Nor are off-site groundwater-monitoring requirements "groundwater protection standards" because although they might help protect groundwater, they are not themselves "[e]nforcement standard[s] . . . expressing the concentration of a substance in groundwater." Wis. Stat. § 160.01(2).

Subsection 283.31(4), which requires DNR to "prescribe conditions for permits issued under this section to assure compliance with the requirements of sub. (3)," also does not vest DNR with authority to impose off-site groundwater-monitoring requirements on a WPDES permit. To begin with,

even without Act 21, this provision certainly would not confer authority to impose any condition that *would not* help "assure compliance" with Subsection (3). In a separate rule (that Petitioners do not challenge), DNR has determined the Subsection (3) limitations "applicable" to large dairy CAFOs. These limitations include, for purposes of state law, a technology-based effluent limitation forbidding any discharge of manure or wastewater to navigable waters "from the production area," located *on site*. *See supra* p. 7 & n.2; Wis. Admin. Code § NR 243.13(2).[9] In any event, broad grants of power like that contained in the first sentence of Subsection (4) no longer authorize DNR to impose ad hoc permit conditions not explicitly permitted or required by a valid rule. *See supra* p. 24. Thus, even if one concludes that off-site groundwater-monitoring requirements are "naturally or necessarily involved in," or a logical consequence of, Subsection (4), DNR cannot impose those requirements after Act 21—at least absent a valid rule that explicitly specified that permit condition, *supra* pp. 24–25.

2. *Chapter NR 205.* Chapter NR 205, which contains general WPDES permit requirements and applies to "all point source discharges of pollutants," Wis. Admin. Code § NR

[9] Although there might be another Subsection (3) limitation applicable to CAFOs from federal regulations, *see* Wis. Stat. § 283.31(3)(d)2.; 40 C.F.R. § 412.31(b), that limitation, even if applicable, is insufficient to require or permit off-site *groundwater* monitoring for the same reasons that Wisconsin's nutrient-management-plan regulation is insufficient, *see infra* pp. 30–31.

205.02, also does not help Petitioners. Section NR 205.065 requires DNR to set effluent limitations, but as explained *supra* pp. 27–28, an off-site groundwater-monitoring requirement is not an effluent limitation. Section NR 205.07 provides that DNR must include in every WPDES permit the requirements provided in Subsection 283.31(4)(a)–(f) as well as other record-keeping and reporting requirements, duties to mitigate damages, and other like requirements. Wis. Admin. Code § NR 205.07(1); *see also id.* § NR 205.07(3) (listing permissive conditions). But none of these requirements calls for off-site groundwater monitoring. *See id.*; *see also* Wis. Stat. § 283.31(4)(a)–(f).

Section NR 205.066 requires DNR to determine, "on a case-by-case basis," the frequency at which a permittee must conduct monitoring "for each effluent limitation in a permit." Wis. Admin. Code § NR 205.066(1). But the only effluent limitation "applicable" to large dairy CAFOs under state law governs exclusively *on-site* discharges. *Supra* p. 7 & n.2. DNR's regulations impose no effluent limitations on off-site landspreading fields.[10]

3. *Chapter NR 243.* The far more relevant Chapter NR 243, which collects DNR's regulations of WPDES permitting for CAFOs specifically, likewise does not confer authority to require off-site groundwater monitoring. Chapter NR 243

[10] Instead, they require only that a CAFO's landspreading practices comply with the CAFO's nutrient-management plan and federal and DNR regulations. *See supra* pp. 7–8.

explicitly permits DNR to impose only production-area groundwater monitoring; it contains no explicit provisions relating to *off-site* groundwater monitoring at all. Sections NR 243.15 and 243.16, governing "proposed" and "previously constructed" "facilities or systems," state that DNR may impose on-site groundwater monitoring for manure and wastewater "storage or containment facilities," among other on-site facilities. Wis. Admin. Code §§ NR 243.15(3)(c), (7) & 243.16(3) (requiring groundwater-monitoring systems *only* at or around the storage or containment facility). They do not at all contemplate off-site monitoring of manure-landspreading fields. And the inclusion of the former suggests the exclusion of the latter. *See Cranes and Doves*, 2004 WI 40, ¶ 17 n.11.

The ALJ and circuit court both discerned authority for DNR to impose off-site groundwater monitoring from statutes and regulations that do not explicitly require or permit off-site groundwater monitoring. App.13–14, 59–60. But as explained, all of these statutory and regulatory sections only implicitly address off-site groundwater-monitoring authority, and implicit authority is not good enough after Act 21. And while DNR has exercised its rulemaking authority to require only on-site monitoring, Petitioners do not challenge those rules as insufficiently comprehensive.

2. DNR Lacks Explicit Authority To Impose Animal-Unit Maximums On WPDES Permits

1. *Chapter 283.* As with off-site groundwater-monitoring requirements, Chapter 283 does not explicitly require or explicitly permit animal-unit maximums. An "animal unit" is simply a "unit of measure used to determine the total number of single animal types or combination of animal types . . . that are at an animal feeding operation." Wis. Admin. Code § NR 243.03(5). An animal-unit maximum is not an effluent limitation, effluents prohibition, groundwater protection standard, a standard of performance for new sources, or the like. *See* Wis. Stat. § 283.31(3).

And while the broad language of Subsection (4)—that DNR "shall impose conditions . . . to ensure compliance with" Subsection (3)—may previously have granted implicit authority to DNR to impose animal-unit maximums, it does no longer. *See supra* p. 24. In any event, the only Subsection (3) requirement "applicable" to large dairy CAFOs under state law is a technology-based effluent limitation of "no[ ] discharge" from the production area. *Supra* p. 7. So long as the CAFO maintains an adequate amount of on-site waste storage to comply with this rule, there is no limit to the number of animals a CAFO can have.

Finally, an animal-unit maximum is not a maximum level of discharge. *See* Wis. Stat. § 283.31(5). A "discharge" is "any addition of any pollutant to the waters of this state

from any point source." Wis. Stat. § 283.01(4)–(5). The term "pollutant," in turn, includes "biological materials" and "agricultural waste," but it does not include animals. *Id.* § 283.01(13). Thus, to set a maximum number of animal units is not to set a maximum level of discharge.

2. *Chapter NR 205.* None of the general requirements contained in Chapter NR 205 explicitly requires or explicitly permits animal-unit maximums. As explained above, an animal-unit maximum is not an effluent limitation. Wis. Admin. Code § NR 205.065. Nor does an animal-unit maximum serve to monitor for each effluent limitation. *Id.* § NR 205.066.

3. *Chapter NR 243.* No provision of the more specific Chapter NR 243 explicitly requires or explicitly permits animal-unit maximums. For example, while Section NR 243.14 imposes certain requirements on CAFOs' nutrient-management plans, it does not at all address animal-unit maximums. Animal units are mentioned only once, in a provision exempting from emergency liquid-manure permissions those emergencies caused by a lack of adequate storage due to an increase in animal units. Wis. Admin. Code § NR 243.14(7)(d)2. Likewise, in Section NR 243.15, the only mention of a maximum number of animals is a requirement that the CAFO have adequate liquid-manure storage "based on the maximum animals present at [the] operation for the period of time liquid manure . . . [is] to be stored." Wis. Admin. Code § NR 243.15(3)(k). This is not a limit on the

number of animals a CAFO can have, but simply a requirement that, however many animals the farmer chooses to keep, the CAFO have adequate storage for the manure produced.

Neither the ALJ nor the circuit court could identify any statutory or regulatory provisions explicitly providing for an animal-unit maximum. The ALJ cited no authority, explicit or otherwise, for DNR to impose animal-unit maximums. Indeed, the ALJ admitted that "[n]o applicable rule or statute requires a WPDES permit to specify a number of animal units at a CAFO facility." App.12. Likewise, the circuit court could identify no explicit authority in the administrative code for DNR to set an animal-unit maximum, the purpose of which would be to do indirectly what the express provisions on waste storage do directly. The analysis should have ended there.

II. Petitioners' Procedural Argument—That DNR Could Not, Under Its Rules, Omit The ALJ's Conditions From Kinnard's Permit—Is Moot And Meritless

Petitioners also raise a highly technical and fact-bound procedural challenge to DNR's 2015 decision not to impose the illegal conditions on Kinnard's permit. The theory is that because DNR allegedly "did not follow its own procedures in this case and did not act in the time prescribed by law," *see* R.37:7, DNR lacked authority to overturn the ALJ's decision and so, in the circuit court's words, "[i]ts attempt to do so . . .

is void," App.53. This theory falters at every step, including at the threshold.

A. Whether DNR Complied With Its Own Rules In Issuing The 2015 Order Is Moot, Unimportant, And Unlikely To Recur

1. As explained *supra* pp. 19–20, under Wisconsin's doctrine of mootness, an "issue" in a case "is moot when its resolution will have no practical effect on the underlying controversy." *Litscher*, 2000 WI App 61, ¶ 3. "[M]oot issues will not be considered by an appellate court" unless at least one of four exceptions applies. *Clarke*, 2006 WI App 186, ¶ 31; *supra* pp. 19–20.

2. Whether DNR complied with its own procedures when considering the 2012 permit is a moot issue. Any resolution of this arcane dispute over agency rules will have no practical effect on the underlying controversy. First, answering this question will have no effect whatsoever on DNR's position on the substantive Act 21 questions raised by this lawsuit. In any event, Kinnard's 2015 permit has expired. As of February 1, 2018, Kinnard operates under a new WPDES permit, and a new petition for a contested-case hearing is pending on that permit. App.118–65. So whether DNR followed its rules in issuing a final decision on the 2012 permit is "purely academic." *Litscher*, 2000 WI App 61, ¶ 3.

None of the mootness doctrine's exceptions applies. The issue is plainly not one of great public importance. It pivots entirely on the unusual procedural history of this case and

calls for a close reading of obscure agency rules that DNR is itself free to change. The issue also does not turn on the constitutionality of any statute. No decision is needed to guide the trial courts, and the issue is unlikely to recur.

A further reason not to address this issue is that it is ultimately a distraction. All agree that it does not bear on jurisdiction. And no one disputes that the Secretary's order, the target of Petitioners' challenge, is a final agency action reviewable under Section 227.52. Even if one assumes that DNR lacked authority under its own rules to "reverse the ALJ decision," App.53, it does not at all follow (and no law provides) that DNR is now compelled to *defend* the ALJ's conclusions in this properly initiated litigation. Viewed through the lens of Petitioners' premises, DNR's position is, at worst, a mere confession of error. *See, e.g.*, Brief for Respondent at 9–10, *Lucia v. SEC*, No. 17-130 (U.S. Nov. 2017), *available at* https://goo.gl/rko4FD (reflecting the federal Department of Justice's confession of error on behalf of an administrative agency). As the circuit court begrudgingly acknowledged, even if Petitioners are right on procedure, their argument does not answer DNR's independent and "ultimate[ ]" response: that, whatever its internal rules provide, "it simply cannot implement [the ALJ's] decision because [that] would be unlawful." App.53.

B. DNR's 2015 Order Complied With Agency Rules

1. DNR's administrative-review procedure begins when an aggrieved party files a contested-case petition. *See* Wis. Stat. § 283.63(1). If, as here, "5 or more persons" object to the agency's issuance of a permit, they "may secure a review by the department" by filing a petition with the Secretary. *Id.* That petition can trigger a contested-case hearing, and the DNR Secretary then determines whether to keep the case within DNR or whether to set in motion the appointment of a hearing examiner—or ALJ—from the Division of Hearings and Appeals to preside over the hearing. *Id.* § 283.63(1)(b); *id.* § 227.43(1)(b). If an ALJ presides, then, at the conclusion of the hearing, the ALJ "[m]ake[s] or recommend[s] findings of fact, conclusions of law and decisions." *Id.* § 227.46(1)(h). Those findings and conclusions constitute the "final decision of . . . [the] hearing examiner" within the meaning of Section 227.47(1), as well as the "final decision rendered after a contested case hearing" described in NR 2.20.

Whether and under what circumstances the "final decision" of an *ALJ* becomes the final decision of the *agency* is an entirely separate question, which the Legislature has appointed DNR to answer. The default rule is that an ALJ's contested-case decision is not the final decision of the agency, but "an agency may by rule or in a particular case may by order . . . [d]irect that the hearing examiner's decision be the

final decision of the agency." Wis. Stat. § 227.46(3)(a).[11] In accordance with that statute, DNR has by rule provided that after a contested-case hearing, "[*u*]*nless the department petitions for judicial review as provided in s. 227.46(8)*, the [ALJ's] decision shall be the final decision of the department, but may be reviewed in the manner described in s. NR 2.20." Wis. Admin. Code § NR 2.155(1) (emphasis added).

Critically, an ALJ's decision cannot become the final decision of DNR under NR 2.155 until it is judicially reviewable. Section NR 2.155 implicitly makes the judicial reviewability of an agency order necessary to its becoming "the final decision of the department."[12] The opening clause conveys this point: "*Unless the department petitions for judicial review as provided in s. 227.46(8)*"—the statute read to impose a "final order" requirement—"the [ALJ's] decision shall be the final decision of the department . . . ." Wis. Admin. Code § NR 2.155(1) (emphasis added). To read this rule as capable of converting non-final orders into "final decision[s] of the department," one would need to construe the "unless" clause as awkwardly forcing DNR to file jurisdictionally improper petitions for review (i.e., to

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[11] Alternatively, the agency can simply "direct that the record be certified to it" without any "proposed decision" or direct the hearing examiner to prepare a proposed decision that the agency might later adopt "as the final decision in the case." Wis. Stat. § 227.46(3)(b)–(c); *id.* § 227.46(2).

[12] Necessary, but not always sufficient: even if the order is judicially reviewable, it is not the final decision of the agency if DNR files for judicial review. *See* Wis. Admin. Code § NR 2.155(1).

challenge unreviewable, non-final orders) simply to preclude the possibility that those orders would later be taken to represent DNR's "final decision." The better reading of the rule—indeed, the only reasonable one—is that the "unless" clause's description of the event's occurrence (the filing of a petition) contemplates that that event can in fact *properly* occur. In other words, where DNR cannot plausibly petition for judicial review of an ALJ's order because it is interlocutory, the order cannot possibly represent the final decision of DNR. *See Kalal*, 2004 WI 58, ¶ 46.

A decision is not "final for purposes of judicial review" unless it satisfies Section 227.52 as interpreted by *Sierra Club* and its forebears. *Sierra Club v. DNR*, 2007 WI App 181, ¶ 13, 304 Wis. 2d 614, 736 N.W.2d 918; *see also Pasch v. DOR*, 58 Wis. 2d 346, 353, 206 N.W.2d 157 (1973). Section 227.52 states that "[a]dministrative decisions which adversely affect the substantial interests of any person . . . are subject to review as provided in this chapter." Wis. Stat. § 227.52; *see also id.* § 227.53(1). Although this text does not explicitly "require that an administrative decision be 'final' in order to be subject to judicial review," *Sierra Club*, 2007 WI App 181, ¶ 13, the Wisconsin Supreme Court has long determined that, to be judicially reviewable, an agency action must be "final, in the sense that [it] determine[s] the further legal rights of the person seeking review," *Waste Mgmt. of Wis., Inc. v. DNR*, 128 Wis. 2d 59, 90, 381 N.W.2d 318 (1986).

This distinction between final and non-final decisions of an agency tracks the line separating final and interlocutory orders of a court. *See Pasch*, 58 Wis. 2d at 354. In both contexts, the analysis "focus[es] on [the order's] substance and not its form or label." *Sierra Club*, 2007 WI App 181, ¶ 14. An order is final when it "directly affects the legal rights, duties, or privileges of a person." *Id.* ¶ 15 (citation omitted). Conversely, an agency's decision is interlocutory, and not final, "where the substantial rights of the parties . . . remain undetermined and the cause is retained for further action." *Id.* (citation omitted). Put differently, an interlocutory order "leaves [matters] open for future determination." *Emp'rs Mut. Liab. Ins. Co. v. Indus. Comm'n*, 230 Wis. 670, 284 N.W. 548, 553 (1939).

Like a court that retains discretion over an interlocutory order, *see, e.g.*, *In re Commitment of Krueger*, 2001 WI App 76, ¶ 13, 242 Wis. 2d 793, 626 N.W.2d 83, DNR retains complete discretion to alter judicially unreviewable orders that do not constitute its final decisions. For one thing, nothing in the statutes requires DNR to adopt an ALJ's contested-case decision. Indeed, quite the opposite is true: the default rule is that an ALJ's contested-case decision is *not* the decision of the agency, and only becomes so if the agency, in its discretion, chooses to adopt it. Wis. Stat. § 227.46(3)(a). This makes sense, because it is the agency, not the ALJ, on whom the statutes place the responsibility for holding a hearing and making a final decision. *See Andersen v. DNR*,

2010 WI App 64, ¶ 21, 324 Wis. 2d 828, 783 N.W.2d 877, *rev'd on other grounds by* 2011 WI 9 (discussing Wis. Stat. § 283.63). ALJs can preside over contested cases arising under Section 283.63 only if the DNR Secretary, in her discretion, chooses to refer the case to the Division of Hearings and Appeals. *Supra* p. 37.

Moreover, even if the ALJ's decision were somehow the decision of DNR, DNR, as a quasi-judicial body, "ha[s] inherent authority to reconsider its decision[s]." *Schoen v. Bd. of Fire & Police Comm'rs of Milwaukee*, 2015 WI App 95, ¶ 20, 366 Wis. 2d 279, 873 N.W.2d 232. "It is a fundamental and basic principle of administrative agency law that an administrative agency has the power to reconsider its own decisions since the power to decide carries with it the power to reconsider." *Id.* (citation omitted). It would be particularly "unreasonable to conclude that the [agency] is powerless to correct an error of its own making when it realizes it has misapplied the very law the legislature has established." *Id.* ¶ 21. Notably, the *Schoen* court did not state that the agency's authority to reconsider its decision turns on how much time has passed since the initial decision.

The circuit court's contrary conclusion, that the Secretary lacked authority to revise the ALJ's order, App.43–53, rests on several errors. First, it wrongly reads Section NR 2.155 to "render[ ] the ALJ's decision final once the Secretary denied review." App.43–49. As explained *supra* pp. 38–39, that provision covers only judicially reviewable orders; it does

not apply to interlocutory orders of an ALJ. For the same reason, the circuit court's reliance on the statute providing for rehearings, App.50–51, is misplaced, because that too applies only to "final decision[s]." Wis. Stat. § 227.49(1).

2. Applied here, these principles show that the ALJ's order did not constitute the final decision of DNR and that, consequently, DNR retained discretion over the permit conditions. First, as the circuit court for Kewaunee County squarely held, the ALJ's order was not final because it was not a judicially reviewable final agency action. *See* App.23–28. It did not settle "the legal rights, duties, or privileges" of the litigants, which "remain[ed] undetermined." *Sierra Club*, 2007 WI App 181, ¶ 15 (citation omitted). In particular, the ALJ ordered that certain sections of the permit "be modified [by DNR] to reflect a maximum number of animal units at the facility" and directed DNR to "review and approve a plan for groundwater monitoring" including "no less than six groundwater monitoring wells, and if practicable, at least two of which monitor groundwater quality impacts from off-site landspreading." App.18. The question of what the final permit would look like, and whether that permit would satisfy the ALJ's order, remained "open for future determination." *Emp'rs Mut.*, 284 N.W. at 553; *see Sierra Club*, 2007 WI App 181, ¶ 19 (non-final order "d[id] not fully resolve the modifications to be made" to the permit, instead "requir[ing] further DNR action"). Because the order was not a final agency action reviewable under Section 227.52, it could not

have become the final decision of DNR under Section NR 2.155, but instead was subject to further revision by DNR, the statutory "reviewing department." *Andersen*, 2010 WI App 64, ¶ 21; *see supra* p. 40.[13] Here, the Secretary exercised that "reviewing" authority after receiving and considering DOJ's legal advice. App.33–36.

III. The Circuit Court's Judgment Awarding Costs And Fees Is *Ultra Vires* And Erroneous

Before turning to the substance of the costs-and-fees order, DNR notes that whether this Court should address the issues presented in this second appeal (16AP2502) will depend on how this Court resolves the questions presented in the first appeal (16AP1688). If, for example, this Court were to agree with DNR that the agency lacked and still lacks authority to impose the ALJ's permit conditions, or if this Court were to determine that the case should be vacated and remanded on mootness grounds in light of the new permit, then Petitioners no longer would be prevailing parties and would not be entitled to costs and fees. *See* App.117 (conditioning costs and fees on Petitioners prevailing on appeal). If, however, this Court addresses the main merits

[13] While the circuit court faulted DNR for stating in a different case before a different circuit court that "'[t]he [ALJ's] Decision became the DNR's decision pursuant to Wis. Stats. § 227.46(3) and Wisconsin Administrative Code § NR 2.155(1),'" App.47 (quoting R.34:6577), DNR's unreasoned position on this issue in a different case is plainly not binding. *See State v. Petty*, 201 Wis. 2d 337, 348, 548 N.W.2d 817 (1996) (setting forth the elements of equitable judicial estoppel, none of which is present here).

question and affirms the circuit court, then this Court should determine whether the circuit court appropriately awarded Petitioners costs and fees with interest. But even then, this Court should first decide whether the circuit court had competency to issue a final judgment for costs and fees after the clerk had transmitted the record to this Court. If the circuit court did not have competency, then this Court should vacate the costs-and-fees order.

A. The Circuit Court Lacked Competency To Award Costs And Fees After The Record Was Transmitted On Appeal

Once a party appeals a circuit court's decision, Wisconsin law constrains the court's competency over the case pending appeal. Wis. Stat. § 808.075. Relevant here, in appeals taken under any statute other than Section 809.30, "the circuit court retains the power to act on all issues until the record has been transmitted to the court of appeals. Thereafter, the circuit court may act only as provided" in Subsections 808.075(1) and (4). *Id.* § 808.075(3). Subsections (1) and (4) do not provide the circuit court with authority to award costs and fees under Section 814.245. *Id.* § 808.075(1), (4). If a circuit court enters a judgment without competency, that judgment is invalid. *See Mikrut*, 2004 WI 79, ¶ 14.

Application of those principles here is straightforward. DNR filed its notice of appeal in this case on August 24, 2016. R.52. This Court received the record on appeal on October 5, 2016. Record, *Clean Wis. v. DNR*, 16AP1688 (Wis. Ct. App.

Oct. 5, 2016). At that moment, the circuit court lost competency to act under Section 807.075. Nonetheless, the circuit court issued its judgment awarding costs and fees on November 23, 2016. App.115–17. Because that judgment issued after the court had transmitted the record, the circuit court lacked competency to issue it. Hence the costs-and-fees order should be vacated.

The circuit court below held that it did have competency to enter judgment on November 23 because it had made an earlier oral ruling on September 30 holding that Petitioners were entitled to costs and fees. App.107–08, 110–11. But oral rulings are not final until they are "reduced to writing." *State v. Malone*, 136 Wis. 2d 250, 257, 401 N.W.2d 563 (1987). Because the court's oral ruling was not reduced to writing until after the record on appeal had been transmitted, the court lacked authority to issue its order on costs and fees.

B. Even If The Circuit Court Had Competency, The Costs-And-Fees Order Was Improper

Under Section 814.245, a court "shall" award costs and fees to prevailing parties "unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust." Wis. Stat. § 814.245. When a case involves more than one issue, "the court shall take into account the relative importance of each issue" and "provide for partial awards of costs" according to its importance determination. *Id.* § 814.245(4).

To assess whether an agency's position was "substantially justified," the circuit court must determine whether the agency's position had "a reasonable basis in law and fact." Wis. Stat. § 814.245(2)(e). "To satisfy its burden the government must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced." *Sheely v. DHSS*, 150 Wis. 2d 320, 337–38, 442 N.W.2d 1 (1989) (citation omitted). To determine whether the agency had a "reasonable basis" for its position, the court must determine whether the position has "some arguable merit." *Behnke v. DHSS*, 146 Wis. 2d 178, 183, 430 N.W.2d 600 (Wis. Ct. App. 1988). In other words, the position must "lend[ ] itself to legitimate legal debate and difference of opinion viewed from the standpoint of reasonable advocacy." *Id.* at 184. That the agency has lost in the circuit court does not determine whether the agency's position was substantially justified. *Sheely*, 150 Wis. 2d at 337–38. Nor is the fact that the agency is "advancing a novel but credible extension or interpretation of the law grounds for finding [its] position lacking substantial justification." *Id.* at 338 (citation omitted).

The circuit court thoroughly misapplied this standard to both issues. On the Act 21 issue, the court simply incorporated its decision on the merits, treating DNR's loss as dispositive of the issue. App.73–74. This was well-established error. *See Sheely*, 150 Wis. 2d at 338. On the

procedural issue, the court failed to consider whether DNR's position could "lend[ ] itself to legitimate legal debate," and instead determined that, because the agency did not cite a precedent for its position, its position could not be substantially justified. App.71. But even if lack of on-point authorities makes DNR's argument a "a novel" one, that is not "grounds for finding [it] lacking substantial justification" so long as the theory is "credible." *Sheely*, 150 Wis. 2d at 338 (citation omitted). DNR's position is not only credible; it is correct. *See supra* pp. 36–43. Because the circuit court failed to apply the proper legal standard, and because, even if it had, awarding costs and fees to Petitioners would have been inappropriate, the court erroneously exercised its discretion. *See 118th St. Kenosha, LLC v. DOT*, 2014 WI 125, ¶ 18, 359 Wis. 2d 30, 856 N.W.2d 486.

Finally, the circuit court also abused its discretion by ordering the State to pay interest on the costs and fees. App.116. "Neither costs *nor interest* may be recovered against the state unless expressly authorized by statute." *Holton & Hunkel Greenhouse Co. v. State*, 274 Wis. 337, 345, 80 N.W.2d 371 (1957) (emphasis added).[14] No statute "expressly authorize[s]" imposition of interest against the State in cases arising under Section 227.52. While Section 814.245 provides

[14] There may be limited exceptions to this rule in cases regarding interest on sums for certain damages, but no damages are at issue here. *See City of Milwaukee v. Firemen's Relief Ass'n of City of Milwaukee*, 42 Wis. 2d 23, 41, 165 N.W.2d 384 (1969).

for the recovery of costs and fees, it does not provide for the recovery of interest. And while the circuit court cited Subsection 815.05(8) as support for ordering the recovery of interest against the State, that statute prescribes the procedures for executions on judgments in civil cases, providing that, between the entry of a money judgment and its execution, the judgment debtor is liable for any interest that accrues. *See* Wis. Stat. § 815.05(8). But this case does not involve an effective (non-stayed) judgment, much less an execution upon such a judgment. *See* App.116–17.

CONCLUSION

The decisions of the circuit court should be reversed.

Dated: May 16, 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 10,099 words.

Dated: May 16, 2018.

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RYAN J. WALSH
Chief Deputy Solicitor General

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I hereby certify that:

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I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: May 16, 2018.

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