WISCONSIN COURT OF APPEALS
DISTRICT II

CLEAN WISCONSIN, INC. and
PLEASANT LAKE MANAGEMENT
DISTRICT,

Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent-Appellant,

Appeal No. 2018AP000059

Circuit Court Case No.
2016CV002817, 2016CV002818
2016CV002819, 2016CV002820
2016CV002821, 2016CV002822
2016CV002823, 2016CV002824

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

Co-Appellants

ON APPEAL FROM FINAL ORDER OF THE DANE COUNTY CIRCUIT COURT, THE HONRABLE VALERIE L. BAILEY-RIHN, PRESIDING

CO-APPELLANT'S REPLY BRIEF

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INTRODUCTION

In their response brief, Petitioners Clean Wisconsin and Pleasant Lake Management District (Clean Wisconsin) describe the Intervenors as "lobbying groups representing the state's largest polluters and exploiters of water resources." Clean Wisconsin Response Brief (hereinafter CW Br.) at 3. Better, we think, is the description of these associations that was the basis for the circuit court granting them intervenor status:

> Intervenors' members own and operate businesses in nearly every category of agricultural, business, and industrial activity. Many of the Intervenors' members own and operate high capacity wells that are regulated by DNR, and many others are contemplating the construction of high capacity wells to support planned business development and expansion activities.

R. 83. (Br. Support Pet. to Intervene at p. 5.)

> Water is essential both for the agricultural and manufacturing sectors. Groundwater is often the only source of water for these operations. For example, it would be virtually impossible to grow adequate quality potatoes and vegetables in the central sands area without high capacity well irrigation.

Id. at 13.

Intervenor associations have member companies who were lawfully issued DNR permits that were subsequently invalidated by the circuit court. *Id.* at 14. At the time of their petition to intervene, Intervenor associations had over 60 members that were issued high capacity well permits under the DNR policies rejected by the circuit court. *Id.* at 14. If the circuit court decision is upheld, the loss of high capacity well permits, as well as the inability to obtain permits for expanding or establishing new operations, will cause economic harm to Intervenors' member companies, many of whom are small, family-run businesses.

ARGUMENT

I. The Well-Reasoned Attorney General Opinion is Persuasive; Possibly Presumptively Correct.

In February 2016, the Committee on Assembly Organization requested "a formal opinion of the attorney general relating to several questions surrounding 2011 Act 21 and the authority of [DNR] to apply conditions related to monitoring wells and cumulative impact analysis prior to the grant of a high-capacity well permit." App. 66. The attorney general issued its formal opinion (OAG-01-16) on May 10, 2016, that addresses the four issues in the Assembly request:

1. The interpretation of the Supreme Court's opinion in *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73 regarding high capacity well permitting and Act 21. The answer was that the *Lake Beulah* court did not consider Act 21.
2. Whether Wis. Stat. §§ 281.11-.12 gives DNR authority to impose monitoring well conditions or require cumulative impact evaluations for high capacity well permits. The answer was no.
3. Whether the legislature delegated public trust authority to DNR for conditioning high capacity well permits. The answer was no.
4. Whether there exists other explicit statutory authority permitting DNR to impose monitoring wells or cumulative impact conditions on high capacity well permits. The answer was no.

App. 71-93.

Intervenors assert that the opinion of the attorney general is persuasive as to the meaning of statutes at issue in this case. Int. Br. at 6. Clean Wisconsin argues, incorrectly, that there must be an express legislative "charge" given the attorney general to interpret specific statutes for its opinion to be persuasive. CW Br. at 17.

Clean Wisconsin relies on a finding in *State v. Beaver Dam Area Dev. Corp*., 2008 WI 90, 312 Wis. 2d 84, 752 N.W. 2d 295, that an express legislative charge for the attorney general to interpret the open meetings and public records statutes was relevant when concluding that the "interpretation advanced by the attorney general is of particular importance." *Id.* At ¶ 37. But there are various considerations the courts have found relevant when determining the persuasiveness of attorney general opinions. In *Shrill v. Wis. Rapids Sch. Dist.,* 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177, the Supreme Court found that:

> Statutory interpretation may be informed by executive branch interpretations of a statute. The opinions of the Wisconsin attorney general are especially helpful in deciphering the definition of 'record' in Wis. Stat. § 19.32(2).

Id. at ¶ 49.

As in *Shrill*, a specific question posed to the attorney general by the Assembly relates to the meaning of a word, here, "explicitly," as set forth in Wis. Stat. § 227.10 (2m). App. 67.

In addition, the court in *Shrill* found that:

> A well-reasoned attorney general's opinion interpreting a statute is, according to the court's rules of statutory interpretation, of persuasive value. Furthermore, a statutory interpretation by the attorney general 'is accorded even greater weight, and is regarded as presumptively correct, when the legislature later amends the statute but makes no changes in response to the attorney general's opinion.'

Id. at ¶ 126, citing *Staples v. Glienke,* 142 Wis. 2d 19, 28, 416 N.W.2d 920. (Ct. App. 1987). (Other internal citations omitted.)

Arguably, then, the attorney general opinion in this case should be afforded greater than persuasive weight, possibly considered presumptively correct, if the legislature subsequently modified relevant statutes without making amendments that would alter the attorney general's opinion. In that regard, 2017 Wis. Act 67, Section 26, created 227.10 (2p) of the statutes to read:

> No agency may promulgate a rule or take any other action that requires one or more lots to be merged with another lot, for any purpose, without the consent of the owners of the lots that are to be merged.

Overall, this was an eclectic regulatory reform bill making various changes to local government zoning authority, navigable water permits, inverse condemnation proceedings, and the right to display the flag of the United States. It was introduced on August 24, 2017, as AB 479, with this provision limiting state agencies' authorities. This provision immediately follows Wis. Stat. § 227.10 (2m). If the legislature had concerns with the attorney general opinion, this bill would likely have been considered a germane vehicle for modifications to Wis. Stat. § 227.10 (2m). To this point generally, there is no indication that the legislature had any concerns over the attorney general opinion as no bills were introduced, much less enacted, in the legislative session following the issuance of the opinion that would make changes in response to the attorney general opinion.

Clean Wisconsin also attempts to diminish the import of the attorney general opinion by claiming that "[p]rior to the AG opinion, there was no dispute that DNR had the constitutional and statutory mandate to protect waters of the state when acting on well applications." CW Br. at 17. In reality, DNR's high capacity well program was in a state of confusion prior to the attorney general

opinion. This project-stopping regulatory uncertainty created the need for an attorney general opinion. As stated in the Assembly request:

> This interpretation of Wisconsin law will help address confusion surrounding the authority of the DNR under Chapter 281 and the public trust doctrine to impose conditions on the issuance of high capacity well permits. These permit conditions have created a substantial backlog in permit requests, bringing the issuance of new permits to a standstill.

App. 67.

A June 17, 2017, affidavit filed with the circuit court in this case by Clean Wisconsin's counsel, Carl A. Sinderbrand, includes a February 8, 2016, letter from Sinderbrand to Attorney General Brad Schimel on behalf of Petitioner Pleasant Lake Management District. R. 115. In the letter, Sinderbrand urges the attorney general to not issue an opinion on Wis. Stat. § 227.10 (2m) in response to the Assembly request, suggesting Clean Wisconsin was aware of the numerous questions elected officials had relating to the program. He also acknowledges in the letter that "the effect of §227.10 (2m) has been raised in a number of DNR proceedings, including [three] cases" relating to DNR's authority. R. 115 at 4. Each of these cases involved either Petitioners Clean Wisconsin or Pleasant Lake Management District and were initiated prior to the attorney general opinion. Clean Wisconsin's claim there were no disputes on DNR high capacity well permit authority prior to the attorney general opinion is simply wrong. From the perspective of those being regulated, it was the attorney general opinion that brought certainty to the program.[1]

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[1] John Holevoet, Wisconsin Dairy Business Association (DBA), notes in his affidavit that "[w] hen the attorney general's opinion referenced in these consolidated cases was issued, 33 dairy farmers had well permit applications languishing in DNR's permit backlog. The delay caused by the backlog cost dairy farmers thousands of dollars in additional attorney, engineering, and construction costs. It also caused more than one DBA member to abandon his proposed project

The attorney general opinion was well reasoned and directly relevant to issues before this Court. It provided needed regulatory certainty to a vital DNR program. This Court should afford it, at a minimum, persuasive weight.

II. The Supreme Court Did Not Consider 2011 Wis. Act 21 in its *Lake Beulah* Decision.

The circuit court found, and Clean Wisconsin asserts, that the Wisconsin Supreme Court in *Lake Beulah* rejected DNR and Intervenors' arguments relating to the effect of 2011 Wis. Act 21; in particular, application of Wis. Stat. § 227.10 (2m). App. 10. CW Br. at 23-25.

However, all parties in *Lake Beulah* asserted Act 21 was not relevant to that case. *Lake Beulah,* 335 Wis. 2d 47, ¶ 39 n. 31. Moreover, the Supreme Court in a footnote stated that they "agree with the parties that 2011 Wisconsin Act 21 does not affect our analysis in this case. Therefore, we do not address this statutory change any further." *Id.* Nowhere in the body of the 48-page decision did the Supreme Court discuss Act 21 or its provisions.

Petitioner Pleasant Lake Management District concedes that the *Lake Beulah* court did not address the issues before this Court in the February 8, 2016, letter by their counsel, Carl Sinderbrand, to Attorney General Brad Schimel. Sinderbrand urges the attorney general not issue an opinion in response to the Assembly request because Wis. Stat. § 227.10(2m) was not addressed by the *Lake Beulah* court and was at issue in three pending cases.

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entirely. This backlog was greatly reduced because of DNR policies resulting from the attorney general opinion. R. 86.

> As you know, the Wisconsin Supreme Court issued a decision in 2011 in *Lake Beulah Management Dist.* v. *DNR* that upheld and reinforced DNR's duty to protect state waters under both the constitutional Public Trust Doctrine and pertinent state statutes. *The Court did not address the effect of Wis. Stat. § 227.10(2m)*, which had been enacted shortly before the decision but after the agency actions at issue in the case. Since that time, the effect of § 227.10(2m) has been raised in a number of DNR proceedings, including cases related to both high capacity wells and permits for the discharge of pollutants to waters of the state (e.g., New Chester Dairy, Kinnard Farms, Richfield Dairy).

R. 115 at 4. (Emphasis added.)

The attorney general nevertheless issued his opinion, and with respect to the Assembly's *Lake Beulah* question, found:

> I conclude the Court did not interpret and apply Wis. Stat § 227.10 (2m) when evaluating DNR's authority. Therefore, much of the court's reasoning in *Lake Beulah*, including the breadth of DNR's public trust authority discussed below, is no longer controlling.

App. at 78.

The issues before this Court have not been addressed by any Wisconsin appellate court or the Wisconsin Supreme Court.

III. The Legislature Did Not Delegate Public Trust Authorities to DNR that Would Allow it to Impose Conditions Not Set Forth in Wis. Stat § 281.34.

Clean Wisconsin states that "the fundamental issue in these cases is whether DNR has fulfilled its constitutional and statutory obligations to protect waters of the state." CW Br. at 17. We disagree. The question before this Court is whether the legislature explicitly delegated such authority to DNR that would allow it to impose conditions not set forth in Wis. Stat § 281.34. One cannot breach a duty they do not have. Likewise, Clean Wisconsin's extensive recitation of

DNR's evaluation of the permit applications at issue is only relevant to those conditions DNR has the legal authority to impose.

A. Legislative Public Trust Delegations Must Be Explicit, Leaving Nothing Implied.

Act 21 created Wis. Stat. § 227.10 (2m) prohibiting administrative agencies from imposing regulatory mandates not explicitly allowed by statute or administrative rule. There is no public trust exemption. Moreover, the court in C*ity of Madison v. Tolzman* held that any delegation of public trust authority must be held to an even higher standard of clarity and specificity than general statutory delegations.

> [S]uch delegation of [public trust] authority should be in clear and unmistakable language and cannot be implied from the language of a general statute delegating police powers to cities. C*ity of Madison v. Tolzman*, 7 Wis. 2d 570, 575, 97 N.W.2d 513 (1959).

In its request for an attorney general opinion, the Assembly underscored its authority as trustee when stating that "[i]t is the legislature's prerogative whether to delegate its public trust authorities, rather than agencies asserting delegation is implied in broad prefatory clauses." Citing *City of Madison*, the Assembly goes on to state that "[a] delegation of public trust authority requires 'clear and unmistakable language that cannot be implied'." App. 69. And "[t]his 'clear and unmistakable' standard is in essence the definition of the term 'explicit,' which is the requirement for a delegation under Wis. Stat. § 227.10(2m). Requiring any public trust delegation be explicit is consistent with the clear language of, and intent behind, Wis. Stat. § 227.10(2m)." App. 69.

The Assembly cites W*ebster's New College Dictionary* (4th Edition) that defines "explicit" as "clearly stated and leaving nothing implied." App. 69. Likewise, the attorney general found that "explicit" means "[f]ully and clearly expressed; leaving nothing implied," citing the American Heritage Dictionary of The English Language. App. 83. Discerning the plain meaning of the statutory text is consistent with basic canons of statutory interpretation. The plain meaning of the term "explicitly" requires that legislative delegation of public trust authorities relating to high capacity wells be fully and clearly expressed, leaving nothing implied.

The circuit court and Clean Wisconsin simply repackage as "explicit" the lower threshold for delegation allowed under prior law. They make Wis. Stat. § 227.10(2m) meaningless by finding broad delegations in prefatory statutory provisions.

B. Inconsistent with Act 21, The Circuit Court Finds Broad Delegated Authorities Arising from Statutory Preamble and Purpose Clauses.

The legal underpinning of the circuit court decision is that DNR has been delegated broad "explicit" public trust authorities with respect to high capacity wells under Wis. Stat. § 281.11 (Statement of policy and purpose), § 281.12 (General department powers and duties), and § 281.31 (Navigable waters protection law). Each of these provisions are general, prefatory clauses.

The circuit court found that Wis. Stat. § 281.11 "explicitly" states that "the purpose of the [sic] subchapter is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and *protection*

of all waters of the state, ground and surface, public and private." (emphasis theirs) App. 11. Similarly, the circuit court found that "Wis. Stat. § 281.12 explicitly grants the DNR authority to 'have general supervision and control over the waters of the state. It shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of the *chapter*…'" (emphasis theirs). App. 12. Finally, the circuit court found that Wis. Stat. § 281.31 "provides the explicit grant of authority to the DNR 'to make studies…for the protection of the state's water resources'." *Id.*

These provisions cited by the circuit court do not set forth any explicit delegation of constitutional public trust authorities for high capacity wells that is fully and clearly expressed, leaving nothing implied. The statements provide no guidelines or boundaries as to how DNR is to regulate high capacity wells. There is no explicit language that could be considered a legislative delegation of public trust authority to impose mandates on high capacity well owners outside of Wis. Stat. § 281.34. Finding such phantom authorities undermines the specific statutory program set forth at Wis. Stat. § 281.34.

The Assembly in its request for the attorney general opinion concluded that "Wis. Stat §§ 281.11 and 281.12 are statements of policy in general duties preambles to Wis. Stat. ch. 281. They do not contain the explicit authority required by Act 21 and Wis. Stat § 227.10 (2m), to regulate high capacity wells." App. 68.

The attorney general concurred.

> Interpreting Wis. Stat. §§281.11-.12 as explicit authority to impose a specific condition would bypass the strict limitation of agency authority set forth by the Legislature.

App. 85.

The Supreme Court in *Lake Beulah* might have anticipated Act 21 when "[f]inding no language expressly revoking or limiting the DNR's authority and general duty to protect and manage waters of the states, we conclude that the DNR retains such authority and general duty to consider whether a proposed high capacity well may impact waters of the state." *Lake Beulah,* 335 Wis. 2d 47, ¶ 42. Whether that statement was anticipatory or not, the court clearly concedes that it would be the legislature's prerogative to revoke or limit DNR's public trust authorities arising from Wis. Stat. §§ 281.11-.12. The legislature exercised that prerogative with Act 21.

The essence of this case is whether the legislature or the courts are best suited to balance legitimate but diverse interests in the waters of the state. We believe Wisconsin's constitution provides the legislature this authority to be effectuated through legislative enactments, as was done for high capacity wells in Wis. Stat § 281.34. Such a comprehensive regulatory scheme is best developed through legislative processes that cannot be duplicated in a courthouse.

CONCLUSION

The decision of the circuit court should be reversed.

DATED this 18th day of June, 2018.

Respectfully Submitted,

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Wisconsin Corn Growers Association

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for a non-party brief produced with a proportional serif font. The length of this brief, including footnotes, is 2,945 words.

/s/Robert I. Fassbender

Robert I. Fassbender

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy 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.

/s/ Robert I. Fassbender

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2018, I caused a copy of this motion to be served upon each of the following persons via U.S. Mail, First Class:

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