STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case Nos. 16AP1688 and 16AP2502

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

***AMICUS CURIAE* BRIEF BY WISCONSIN MANUFACTURERS AND COMMERCE, INC., MIDWEST FOOD PRODUCTS ASSOCIATION, WISCONSIN CHEESE MAKERS ASSOCIATION, DAIRY BUSINESS ASSOCIATION, INC., WISCONSIN POTATO AND VEGETABLE GROWERS ASSOCIATION, AND WISCONSIN FARM BUREAU FEDERATION**

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

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INTEREST OF THE AMICI

Amici, on behalf of their members, have an interest in assuring that Wisconsin agencies strictly follow the procedures and limits set forth in Wisconsin Statutes Chapter 227, and for this Case, the requirement of Wis. Stat. § 227.10(2m) that agencies regulate only when explicitly authorized by the legislature to do so.

INTRODUCTION

It has been reported that Judge Henry J. Friendly told Justice Frankfurter of "his professional experience that indicated the federal administrative agencies 'did not combine the celerity of Mercury, the wisdom of Minerva, and the purity of Diana' to quite the extent professor Frankfurter had taught him."[1] Fifty-seven years later, Chief Justice Roberts articulated the problem more directly – "the danger posed by the growing power of the administrative state cannot be dismissed."[2]

Despite these well-grounded fears over the ever-expanding power and reach of administrative agencies, Wisconsin courts have on occasion bestowed Wisconsin agencies with unbridled implied authorities with the hope that they will exercise their rule with wisdom and purity. In *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res*., 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, for example, with respect to high capacity well permits, the Wisconsin Supreme Court found in a statutory preamble that Wisconsin Department of Natural Resources (DNR) had the broad authority and general duty to protect the waters of the state. This authority and duty was not moored to any concrete

[1] Arthur J. Keefe, Daniel A. Rezneck & Arthur S. Miller, *The Federal Administrative Agencies: The Need for Better Definition of Standards*. Henry J. Friendly, Judge, United States Court of Appeals for the Second Circuit.
[2] *City of Arlington v. FCC,* 133 S.Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).

legislative foundation. The result was bureaucratic paralysis within DNR that created regulatory uncertainty and delays for businesses needing water for agricultural and industrial production. It cost Wisconsin jobs. Certainly, these were all unintended consequences.

Justice William O. Douglas believed that a "constant legislative reappraisal of statutes as construed by the courts… is a healthy practice."[3] Such reappraisal was undertaken by the Wisconsin legislature as it relates to implied agency authorities, particularly arising from prefatory statutory clauses. Through 2011 Wis. Act 21 (Act 21), the legislature directed the courts to change course on the level of legislative clarity needed to empower unelected regulators. Our elected officials took back their preeminent power to legislate by requiring agencies have *explicit* legislative delegation of authority.

Act 21 created Wis. Stat. § 227.10 (2m) prohibiting administrative agencies from imposing regulatory mandates not explicitly required or allowed by statute or administrative rule. Wis. Stat. §§ 227.11 (2)(a)1. and 2. provide that statutory preambles are not to be used as a regulatory wildcard by agencies (or courts) where explicit statutory authority does not exist. And, Wis. Stat. § 227.11 (2)(a)3. made it clear that statutory standards, requirements and thresholds are ceilings - not floors - to an agency's authority.

This case involves two wastewater permit conditions – off-site groundwater monitoring wells and animal unit limits – that do not comport with Act 21's clear directives.

[3] Overruled? Legislative Overrides, Pluralism, and Contemporary Court-Congress Relations, Jacob Barnes, pp. 1, (2004).

STANDARD OF REVIEW

The Wisconsin Supreme Court in *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, 373 Wis. 2d 287, 890 N.W2d 598 (2018), could not be clearer – "We have also decided to end our practice of deferring to administrative agencies' conclusions of law." *Tetra Tech* ¶ 108.

However, pursuant to Wis. Stat. § 227.57(10), the Court stated they "will give 'due weight' to the experience, technical competence, and specialized knowledge of an administrative agency as we consider its arguments." *Tetra Tech*, 2018 WI 75, ¶108. But giving "due weight" to an agency's expertise is not deference, and not to be confused with "due weight deference." On this, the Court notes that "[t]oday, we restore the principle of 'due weight' to its original form by removing the patina of 'deference' with which our cases have covered it." *Tetra Tech*, 2018 WI 75, ¶71.

The "persuasiveness" of the agency's perspective under Wis. Stat. § 227.57(10) necessarily presumes there is an agency perspective on the issue before the court. Here, there is none.

When Kinnard petitioned the DNR Secretary for reconsideration of ALJ Boldt's decision, the Secretary denied review on the grounds the issues would best be addressed in the courts. DNR Br. at 11.

ALJ Boldt made no reference to any Act 21 provisions that limit agency authority. In fact, he imposed animal unit limits despite his conclusion that "no applicable rule or statute requires a WPDES permit to specify a number of animal units at a CAFO facility." App. 12. ¶63. His conclusions relating to DNR authority are irrelevant as nothing in his analysis touches upon the issue before this court, which is whether DNR has "explicit" authority required under Wis. Stat. § 227.10 (2m).

ARGUMENT

I Court Decisions Finding "Fairly" or "Reasonably" Implied Agency Authorities Create Overly Broad Regulatory Powers and Regulatory Uncertainty.

["A]dministrative agencies are creations of the Legislature and are responsible to it. Consequently the legislature may withdraw powers which have been granted, prescribed the procedure through which granted powers are to be exercised, and if necessary wipe out the agency entirely." *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 507, 220 N.W. 929, 941 (1928). The court recognized in *Whitman* the necessity for the legislature to "fix limits" in which the agency may operate. *Whitman*, 220 N.W. 929, 941. And that "every such agency must conform precisely into the statute which grants the power. . ." *Whitman*, 220 N.W. 929, 942. But over the years the courts have unmoored agencies authorities from fixed legislative foundations by finding fairly or reasonably implied authorities, often arising from general prefatory clauses in the statutes.

In *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 354, 190 N.W.2d 529, 532 (1971), *vacated on other grounds by* 408 U.S. 915 (1972), the Wisconsin Supreme Court stated that "agencies have only such powers as expressly granted to them or necessarily implied." *Id.* But looking to other jurisdictions, the Court then found that "a power which is not expressed [may] be reasonably implied from the express terms of the statute." *Id*.

In 1981, the Wisconsin Supreme Court reaffirmed that implied powers not be "necessarily implied" when articulating that "an administrative agency has only those powers as are expressly conferred upon it or which may be fairly implied from the statutes." *Brown Cty.*

v. Dep't of Health and Soc. Servs., 103 Wis. 2d 37, 48, 307 N.W.2d 247, 250 (1981).

So, the courts drifted from a requirement that agencies have a "fixed" legislative foundation in which they "must conform precisely," to finding authorities if "necessarily implied," and finally, to the standard that authorities need only be "reasonably" or "fairly" implied.

A defining moment on implied authorities was *Lake Beulah.* "We conclude that, through Wis. Stat.. § 281.11 and § 281.12, the legislature has delegated the State's public trust duties to the DNR in the context of its regulation of high capacity wells and their potential effect on navigable waters such as Lake Beulah." *Lake Beulah,* ¶34.

Invariably, unlimited powers come with unintelligible standards without needed guidelines for the regulators or the regulated community. For example, the court in *Lake Beulah* directed DNR to "consider the environmental impact of a proposed high capacity well when presented with sufficient concrete, scientific evidence of potential harm to waters of the state. The DNR should use both its expertise in water resources management and its discretion to determine whether its duty as the trustee of the public trust resources is implicated by a proposed high capacity well permit application." *Lake Beulah,* ¶63.

Rather than bringing clarity to Wisconsin's high capacity well program, the *Lake Beulah* decision created regulatory uncertainty. DNR management attempted to set forth workable standards to comply with the *Lake Beulah* directive that their staff could apply in the field. The document titled "DNR Reviews Following the *Lake Beulah* Supreme Court Decision," set forth guidance for more extensive environmental reviews "on a more comprehensive range of waters of the state" than required under the existing program. *Id*. They directed DNR staff to "consider the combined effects of all wells on the property

when evaluating potential impacts." *Id*. DNR was setting forth requirements that applied to all applicants that would have the force of law. In other words, the two-page guidance document was an unlawful rule. See Wis. Stat. § 227.10(1) and § 227.01(13). To promulgate these requirements legally would take several years. The program came to a halt causing significant backlogs as DNR attempted to comply with conflicting legal requirements.

This regulatory uncertainty had a detrimental impact on Wisconsin businesses needing high capacity well permits for agricultural and industrial production. One company provided a notice to their suppliers stating that because of the *Lake Beulah* decision, "growers' ability to obtain permits for new or replacement high-capacity irrigation wells is in doubt." Exhibit B. As a result, they had to "immediately suspend future investment in Wisconsin irrigated agricultural lands and purchases of related agricultural equipment." *Id*. The dairy industry faced similar problems. [4]

This background is relevant to this case because the *Lake Beulah* scenario is the likely result if the Petitioners convince this Court that the ad hoc requirements for animal unit limits and off-site monitoring wells can and should be imposed on a case-by-case basis. Policies that have such broad implications to an entire industry should be set by the legislature not the courts or ALJs. Fortunately, Act 21 prohibits administrative agencies from imposing such regulatory mandates that not are explicitly required or allowed.

[4] John Holevoet, Wisconsin Dairy Business Association (DBA), "The delay caused by the [high capacity permit] 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 entirely." Exhibit C.

II The Term "Explicit" Was Purposefully Chosen by The Legislature to Prohibit Ad Hoc Regulatory Mandates Such as an Animal Unit Limit.

Wis. Stat. § 227.10(2m) provides:

> No agency may implement or enforce any standard, requirement, or threshold, including a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter. . . .

Because the court "'assume[s] that the legislature's intent is expressed in the statutory language,' statutory interpretation begins with the language of the statute." And "[i]f the meaning of the statute is plain, and therefore unambiguous, our inquiry goes no further and we apply the statute according to our ascertainment of its plain meaning." *Sheboygan County Dep't of Health & Human Servs. v. Tanya M.B.*, 2010 WI 55, ¶ 27, 325 Wis. 2d 524 (citing *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶ 44-45, 271 Wis. 2d 633, 681 N.W.2d 110).

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

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

Given the meaning of explicit, DNR's authority to impose animal unit limits must be clearly stated in the statutes or rules, and notably, *not* implied.

We agree with ALJ Boldt's conclusion that "no applicable rule or statute requires a WPDES permit to specify a number of animal units at a CAFO facility." App.12, ¶63 He thought it "does provide a useful longer-term management tool." App.12, ¶65. He notes the Petitioners also found the quota "a good idea," and that it will provide "clarity and transparency." App.15.

Petitioners assert that ALJ Boldt determined that "an animal unit limit was necessary to assure compliance with the 180-day storage effluent limitation in NR 243.15(3)(k). Pet. Br. 24. But being "useful" or providing "clarity and transparency" is not equivalent to assuring compliance. Nowhere in his findings of fact, conclusions of law and order does ALJ Boldt conclude the animal unit limit is necessary to assure compliance with any statutory regulatory provisions. In fact, he specifically notes that there is no applicable rule or statute requiring such a condition.

NR 243.15(3)(k) allows for an important exception when calculating design volume. "Liquid manure that is not directed to any facility or structure covered by the operation's WPDES permit may be subtracted from the design volume calculation." Requiring an animal unit limit deprives Kinnard Farms the ability to exercise its legal right under this section to divert manure off-site, which in turn, would allow additional animal units without breaching the 180-day requirement. Clearly, a limit on cows is not necessary to assure compliance with the 180-day storage requirement.

In addition, NR 423.15 sets forth facility design requirements for CAFO facilities. ALJ Boldt acknowledged that the authority for these design regulations arises from Wis. Stat. § 281.41. App. 4, ¶11. These requirements for approval plans apply to proposed "sewerage systems" that are defined to mean "all structures, conduits and pipelines by which sewage is collected and disposed of." Wis. Stat. § 281.41 (14). Because cows are not structures, conduits or pipelines, this section of the statute provides no authority for limits on animal units.

There are also some policy considerations beyond the lack of legal authority of concern to the amici organizations that relate to ALJ Boldt's conclusion that animal unit limit is a useful "management tool."

From our perspective, DNR's job is to provide effluent limits, not to manage our facilities. We understand our processes better than DNR and have the technical expertise to assure compliance with those standards without limits on production.

III DNR Lacks Explicit Authority to Impose Off-Site Groundwater Monitoring Requirements in Wastewater Permits.

The only requirements in statute or rule that explicitly permit the installation of monitoring systems relating to groundwater contamination is set forth at NR 243.15(3)(c) regarding "leakage collection or monitoring." Under this provision, DNR "may require the installation of a . . . monitoring system" with consideration of the proximity of the facility to areas that "are susceptible to groundwater contamination." NR 243.15(3)(c)2.a.

The attorney general, in OAG–04–16 (Dec. 8, 2017), set forth a three-stepped analytical inquiry that would apply here to determine whether the NR 245 design requirements relating to monitor groundwater monitoring systems contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in Wis. Stat § 281.41. ¶16.

This analysis focuses on Wis. Stat §227.11(2)(a)3., also created by Act 21, that provides:

> A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

First, one must determine whether both the rule and the statute contain a "specific standard, requirement, or threshold" governing the same subject matter conduct. ¶17. Here, Wis. Stat § 281.41 governs

plan approvals for "sewerage systems." ALJ Boldt acknowledge that NR 243.15 design requirements arise from the sewerage system design plan requirements at Wis. Stat § 281.41.

Second, the inquiry requires a comparison of the two standards to determine if the rule is "more restrictive" than the statute. Wis. Stat. § 281.41 applies to "sewerage systems" that are defined to mean "all structures, conduits and pipelines for which sewage is collected and disposed." Wis. Stat § 281.41. Monitoring wells are not structures, conduits, or pipelines in which sewage is collected or disposed of. Thus, the requirement relating to groundwater monitoring systems in NR 243.15 is more restrictive as it requires costly monitoring wells not required for Wis. Stat § 281.41 systems.

The third step if the rule is more restrictive than the statute is to assess whether the rule is otherwise explicitly required or permitted. The answer is no.

In *Maple Leaf Farms, Inc. v. DNR*, 2001 WI App 170, 247 Wis. 2d 96, 633 N.W.2d 720, Maple Leaf raises a single issue: "the DNR**'s** authority to regulate the land application of manure on off-site croplands." *Maple Leaf,* 247 Wis. 2d 100. The Court found that Wis. Stat. ch. 283 does not expressly authorize DNR to regulate off-site manure applications. *Maple Leaf,* 247 Wis. 2d 104. That should end the inquiry. There are no explicit authorities relating to off-site manure application, and by implication, off-site monitoring wells.

Petitioners assert other provisions provide implied authorities for the imposition of off-site monitoring wells. As with the animal unit limit, they assert Wis. Stat. § 283.31(4)'s language relating to assuring compliance. This broad statement is not explicit authority. Should off-site groundwater monitoring wells be a policy objective, it should be enacted by the legislative as were the six enumerated conditions

specified by the legislature to be included in a WPDES permit. See Wis. Stat § 283.31(4)(a)-(f).

It is also noting that a 15-year DNR veteran acknowledged that "he is unaware of any CAFOs that has been required by the WPDES permit program to install background wells and collect groundwater data." App.9, ¶50. There are hundreds of CAFO facilities with WPDES permits, none of which required off-site monitoring wells to assure compliance. ALJ Boldt's rationale for requiring off-site monitoring wells appears to be more of an economic consideration rather than a compliance necessity. He found a UW-Oshkosh geology professor "was convincing that an effective groundwater monitoring system can be initiated for as little as $50,000." Cost is not relevant to a determination whether a provision is necessary to assure compliance.

CONCLUSION

This Court should reverse the circuit court's decision.

DATED this 16th day of July, 2018.

Respectfully Submitted,

By:_____

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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 2,950 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 16th day of July, 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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