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May 13, 2019

VIA HAND-DELIVERY

Ms. Sheila Reiff
Clerk of Court, Wisconsin Supreme Court
110 East Main Street, Suite 215
Madison, WI 53701-1688

Re: *Clean Wisconsin, Inc. v. DNR*
Appeal No. 2018AP59

Dear Ms. Reiff:

Enclosed for filing in the above-referenced appeal, please find the original and nine copies of The Wisconsin Legislature's Response to the Department of Natural Resources' Motion to Modify Briefing Schedule. Please file stamp the additional copy and return it to the waiting messenger.

Along with a copy of this letter, copy of the same is being served upon counsel for the parties by U.S. Mail.

Thank you for your assistance with this filing.

Sincerely,

Eric M. McLeod

Enclosures
cc: (w/ encl.) (via U.S. Mail)
Robert I. Fassbender. Esq.
Gabe Johnson-Karp. Esq.
Jennifer L. Vandermeuse, Esq.
Tressie Kelleher Kamp
Carl A. Sinderbrand, Esq.
Evan Feinauer, Esq.
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SUPREME COURT OF WISCONSIN

Clean Wisconsin, Inc., and Pleasant Lake Management District,

Petitioners-Respondents,

v.

Wisconsin Department of Natural Resources,

Appeal No. 18 AP 0059

Respondent-Appellant,

Wisconsin Manufacturers & Commerce, Dairy Business Association, Midwest Food Processors Association, Wisconsin Potato & Vegetable Growers Association, Wisconsin Cheese Makers Association, Wisconsin Farm Bureau Federation, Wisconsin Paper Council and Wisconsin Corn Growers Association,

Intervenor-Co-Appellants.

On Certification by Wisconsin Court of Appeals,
District II, dated January 16, 2019

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

THE WISCONSIN LEGISLATURE'S RESPONSE TO DNR'S MOTION TO MODIFY BRIEFING SCHEDULE

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INTRODUCTION

DNR's request to switch sides in this pending appeal is troubling, but ultimately underscores the critical importance of intervention by the Legislature. While DNR now seeks to align itself with the parties that sued the agency over the issuance of the well permits, those permits were issued pursuant to the correct construction and application of Act 21—a statute passed by the Legislature for the purpose of ensuring that permitting decisions such as these are made according to clearly expressed standards, not ill-defined implicit authority. It is essential for the Legislature to intervene in this case to ensure that even if DNR—facilitated by DOJ—no longer wishes to defend its own decisions, the statutes that govern DNR's authority to make those decisions are still properly addressed.

The Legislature created DNR and the scope of DNR's power is based solely on the delegation or withdrawal of such power through legislative action. Perhaps it is not surprising that DNR now wishes to disregard the limits on its authority that have been imposed by the Legislature. Yet, by switching sides and aligning itself with the Petitioners, DNR would have the central issue in this case—the proper construction and application of Act 21—decided by default.

The Legislature has the constitutional authority to establish the rules by which administrative agencies, including DNR, must operate. The

Legislature must be permitted to effectively protect that constitutional authority through intervention in this case.

BACKGROUND

This appeal revolves around 2011 Wis. Act. 21. Act 21 confines agencies' authority to that "explicitly" conferred by the Legislature. Its emphasis on that point prevents agencies from making or implying their own authority—authority that could be used to improperly make public policy decisions.

To that end, Act 21 mandates that an agency cannot "implement or enforce any standard, requirement, or threshold" that is not "explicitly required or explicitly permitted by statute or by rule" that has been properly promulgated. Wis. Stat. § 227.10(2m). Act 21 also emphasizes that any statutory provisions "containing a statement ... of legislative intent, purpose, findings, or policy" and any provisions "describing [an] agency's general powers or duties" are not enough to "confer rule-making authority." Wis. Stat. § 227.11(2)(a)(1)–(2). Instead, an agency's rule-making authority is limited to that "explicitly conferred on the agency by the legislature." *Id.*

DNR sought to conform its high-capacity-well program to this new mandate by reviewing the environmental impact of proposed wells *only* where specifically authorized by statute. None of the eight wells at issue in

this case fit within any of the statutory criteria for environmental review. So consistent with Act 21's imperative, DNR approved the wells without conducting an additional environmental review beyond the statutory review requirements. The circuit court disagreed, however, and vacated the eight well approvals.

DNR appealed. Petitioners-Respondents maintain that DNR should have conducted a broader environmental impact review despite Act 21. And now, DNR itself seeks to make that same argument, stating in its motion: "the Department maintains that, in most meaningful respects, the judgment below should be affirmed." In other words, DNR has switched course and no longer wishes to defend its own decisions to issue the eight well permits at issue here.

ARGUMENT

Act 21's plain language unambiguously prohibited DNR from considering as part of the permit-approval process the environmental impact of the eight wells. Now DNR—through DOJ—seeks to argue that it can simply ignore this clear mandate in Act 21. Importantly, such an argument would appear to conflict with DOJ's duties under Wis. Stat. § 165.25.

Under Wis. Stat. § 165.25, DOJ "shall furnish all legal services required by ... the department of natural resources." Wis. Stat. §

165.25(4). But in furnishing those services, DOJ cannot exercise powers and duties beyond those prescribed by § 165.25. *State v. City of Oak Creek*, 2000 WI 9, ¶¶ 20, 34, 232 Wis. 2d 612, 605 N.W.2d 526 ("In Wisconsin, otherwise than in many if not most states, the powers of the attorney general are strictly limited. … Wisconsin Stat. § 165.25 sets forth the attorney general's powers and duties.").

On that note, this Court has recognized that "[a]lthough § 165.25(1) grants the attorney general the authority to represent the state as a party in civil cases in circuit court, that authority is not equivalent to authority to challenge the constitutionality of state statutes." *Id.* ¶ 34. By the same token, nothing in § 165.25 allows DOJ to represent an agency that seeks to (1) violate a statute, and (2) expand its authority beyond that conferred by the Legislature.

But even if DOJ were allowed to represent DNR in its bid to violate a statute and impermissibly expand its authority beyond the limits imposed by the Legislature, a glaring deficiency would arise here. No state party would be representing the underlying state action that led to this appeal: DNR's decision to issue the eight well permits. That deficiency underscores the importance of the Legislature's intervention.[1]

[1] Of course, even if DNR did not switch sides on appeal, Wis. Stat. § 803.09(2m) still gives the Legislature an absolute right to intervention.

At a minimum, the Legislature's intervention would allow for the continued representation of the proper legal interpretation of Act 21 that (1) DNR asserted below, and (2) supports the underlying state action. The Legislature intends to argue that Act 21 reflects and reinforces the Legislature's position vis-à-vis administrative agencies. As the source of agency authority, the Legislature has complete discretion to determine the extent of that authority. *Schmidt v. Dept. of Res. Dev.*, 39 Wis. 2d 46, 56, 158 N.W.2d 306 (1968) ("The very existence of the administrative agency . . . is dependent upon the will of the legislature; its . . . powers, duties and scope of authority are fixed and circumscribed by the legislature and subject to legislative change."). In passing Act 21, the Legislature ensured that executive-branch agencies do not impinge on the legislative branch's authority to determine public policy.

DNR followed Act 21 and lawfully issued the well permits. But now, not only does DNR want to switch sides, it also wants to prevent the Legislature from participating in this appeal. DNR claims the statute that allows for legislative intervention, Wis. Stat. § 803.09(2m), "conflicts" with the general statute discussing intervention in judicial review proceedings, § 227.53(1)(d). DNR is wrong.

A conflict occurs only when a provision in Chapter 227 "foreclose[s]" a procedure in Chapters 801 to 847. *State ex rel. Dep't of*

Nat. Res. v. Wis. Ct. App., Dist. IV, 2018 WI 25, ¶ 18, 380 Wis. 2d 354, 909 N.W.2d 114. Chapter 227 does not mention—let alone foreclose—intervention by the Legislature to address a legal issue. Similarly, while Wis. Stat. § 227.53(1)(d) addresses intervention "by other interested parties" in judicial review actions generally, Wis. Stat. § 803.09(2m) is specific to intervention by the Legislature in any action where a party challenges the construction, validity, or enforceability of a statute. While Wis. Stat. § 227.53(1)(d) imposes certain time requirements for intervention by other interested parties, Wis. Stat. § 803.09(2m) allows the Legislature to intervene "at any time[.]" Finally, unlike Wis. Stat. § 227.53(1)(d), under which a proposed intervening party must establish standing to participate, Wis. Stat. § 803.09(2m) automatically confers standing on the Legislature to intervene "as a matter of right" in those specific cases. Thus, even if these statutes were deemed to be in conflict, Wis. Stat. § 803.09(2m) is specific regarding intervention by the Legislature in this narrow category of actions and, therefore, trumps the more general Wis. Stat. § 227.53(1)(d). *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶ 19, 245 Wis. 2d 607, 629 N.W.2d 686.

In the end, an agency cannot determine the scope of its own authority. *See Schmidt*, 39 Wis. 2d at 56 (explaining that an agency's "powers, duties and scope of authority are fixed and circumscribed by the

legislature and subject to legislative change."). So regardless of whether DNR has the authority to argue against its own decision to issue the well permits, DNR itself does not have the final word on whether Act 21 nullifies its inherent authority. That is a question of law for this Court to decide. *See Tetra Tech EC, Inc. v. Wisc. Dep't of Revenue*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496, 914 N.W.2d 21 ("we will review an administrative agency's conclusions of law under the same standard we apply to a circuit court's conclusions of law—de novo."). And it is critically important that the Legislature participate in this appeal to address that question.

CONCLUSION

The Legislature requests that this Court deny DNR's motion to modify the briefing schedule but, in any event, the Court should grant the Legislature's petition for intervention pursuant to Wis. Stat. § 803.09(2m).

Dated this 13th day of May, 2019.

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By: 

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