SUPREME COURT OF WISCONSIN

Clean Wisconsin, Inc. and Pleasant Lake Management District,

Petitioners-Respondents,

v.

Wisconsin Department of Natural Resources,

Respondent-Appellant,

Appeal No.
18 AP 000059

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

Intervenors-Co-Appellants.

On 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 SUPPLEMENTAL MEMORANDUM CONCERNING INTERVENTION

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In deciding the motion to intervene filed by the Wisconsin Legislature, the Court has requested the parties to file memoranda addressing the correct legal standard for the motion and whether the Legislature meets that standard. As shown below, WIS. STAT. §§ 809.13 and 803.09(2m) provide the legal standard for intervention on appeal in this case. Further, the Wisconsin Legislature has shown that it is entitled to intervene in this appeal, as it meets the requirements of WIS. STAT. § 803.09(2m).

Background

This appeal revolves around 2011 Wis. Act. 21. Act 21 confines agency authority to that "explicitly" conferred by the Legislature. Act 21's 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 a 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.

Petitioners filed petitions for judicial review of all eight well approvals pursuant to chapter 227 of the Wisconsin

Statutes, arguing that DNR failed to consider the individual and cumulative effects of the wells on waters of the State. After the circuit court denied DNR's motion to dismiss the petition, the parties briefed the merits. The circuit court held that under *Lake Beluah Management District v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, DNR has broad authority to protect the waters of the State, and if DNR was not delegated such authority there would be no such protection. Because DNR did not consider "cumulative" impacts of the wells, the circuit court vacated all eight well approvals and remanded for further analysis of environmental impact.

DNR appealed and on January 16, 2019, the Court of Appeals certified the appeal to this Court. On April 9, the Court accepted certification. On April 25, the Legislature moved to intervene in this appeal pursuant to WIS. STAT. §§ 809.13 and 809.63, asserting the right to intervene under WIS. STAT. § 803.09(2m) and § 803.09(2). DNR—which has since switched

sides—opposes intervention, arguing that WIS. STAT. § 227.53(1)(d) governs intervention here.

On May 30, this Court ordered the parties and the Legislature to file memoranda addressing "the interplay of" WIS. STAT. § 803.09(2m) and WIS. STAT. § 803.09(2) with WIS. STAT. § 227.53(1)(d) "on the correct legal standard for an intervention motion on these facts, and whether [the Legislature] meets that legal standard." This memorandum addresses these issues.

Argument

I. Wis. Stat. § 809.13 and § 803.09(2m) Provide the Standard for Intervention on Appeal and the Wisconsin Legislature Meets That Standard.

The Court's first question is "the correct legal standard for the Wisconsin Legislature's motion to intervene." The motion for intervention on appeal is governed by WIS. STAT. § 809.13, which provides:

> A person who is not a party to an appeal may file in the court of appeals a petition to intervene in the appeal. A party may file a response to the petition within 11 days after service of the petition. The court may grant the petition upon a showing that the petitioner's interest meets the requirements of s. 803.09(1) , (2), or (2m).

(Emphasis added). Intervention may be granted in this case if the Wisconsin Legislature demonstrates that its interests meet the requirements of WIS. STAT. § 803.09(2m).

In answer to the Court's second question: the Wisconsin Legislature does meet the standard for intervention on appeal, WIS. STAT. § 809.13, as it demonstrates that it has an interest meeting the requirements of WIS. STAT. § 803.09(2m). The Legislature has a right to intervene when a party to a case challenges the construction of a statute:

> When a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense, the assembly, the senate, and the legislature may intervene as set forth under s. 13.365 at any time in the action as a matter of right by serving a motion upon the parties as provided in s. 801.14.

(Emphasis added.)[1] WIS. STAT. § 13.365 gives the Legislature the right to intervene in the subset of cases defined in Wis. Stat. § 803.09(2m):

> Pursuant to s. 803.09 (2m), when a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense:
>
> . . .
>
> (3) The joint committee on legislative organization may intervene at any time in the action on behalf of the legislature. The joint committee on legislative organization may obtain legal counsel other than from the department of justice, with the cost of representation paid from the appropriation under s. 20.765 (1) (a) or (b), as determined by the cochairpersons, to represent the legislature in any action in which the joint committee on legislative organization intervenes.

(Emphasis added.)

[1] WIS. STAT. § 809.13 discusses intervention in the Court of Appeals. It also applies in the Supreme Court, as WIS. STAT. § 809.63 explains that when this Court "takes jurisdiction of an appeal or other proceeding, the rules governing procedures in the court of appeals are applicable to proceedings in the supreme court."

Here, a party to an action has challenged the construction of a statute. In its brief in the Court of Appeals, Clean Wisconsin's primary argument was that DNR's "interpretation of Wis. Stat. § 227.10(2m) is grossly flawed [and] defies basic canons of statutory construction[.]" Br. of Pet'rs-Resp'ts at 22. Indeed, the second paragraph in the "ISSUE" section in the Court of Appeals certification order establishes that the parties dispute the construction, scope, and application of 2011 Wis. Act 21, which created WIS. STAT. § 227.10(2m). *See* Certification by Wisconsin Court of Appeals, Appeal No. 2018AP59, dated Jan. 16, 2019.

Because this case presents a dispute over the construction of WIS. STAT. § 227.10(2m), the Legislature "may intervene [in this appeal] as set forth under s. 13.365 at any time in the action as a matter of right . . . ." WIS. STAT. § 803.09(2m) (emphasis added).

II. Chapter 227 Does Not Address or Govern Intervention on Appeal.

DNR and Clean Wisconsin, however, claim that because this is an appeal from a circuit court's decision in a chapter 227 judicial review proceeding, a motion for intervention on appeal is governed by chapter 227. They are wrong. Chapter 227 does not address intervention on appeal.

WIS. STAT. § 227.58 generally provides for appeals from circuit court judgments issued on chapter 227 review. However, it says nothing further on procedures in the appellate courts in chapter 227 actions. Chapter 227 has no bearing on this Court's determination of the motion to intervene. Rather, by not addressing appeal procedures, chapter 227 recognizes that appeals are governed by chapters 808 and 809 of the Wisconsin Statutes.

Indeed, the 1983 Judicial Council Note to Wis. Stat. § 227.58 explains: "This section is further amended to eliminate the superfluous provision that the appeal is taken in the manner of other civil appeals. Civil appeal procedures are governed by

chs. 808 and 809." (Emphasis added). Thus, WIS. STAT. § 809.13 is the sole statute governing intervention in this appeal. The Legislature meets Wis. Stat. § 803.09(2m), meaning it can intervene here as a matter of right. This Court can grant the Legislature's petition on that ground alone and need not analyze this issue any further.

And for purposes of chapter 227 review proceedings in the circuit court, the civil procedure rules govern the proceeding absent a conflicting provision of chapter 227. The Court has explained that because "chs. 801 to 847 apply to special proceedings," those chapters apply "to ch. 227 judicial reviews, unless foreclosed by different procedure prescribed by ch. 227." *State ex rel. Town of Delavan v. Circuit Court for Walworth Cty.*, 167 Wis. 2d 719, 725, 482 N.W.2d 899 (1992). Chapter 227 does not address appeal procedures beyond generally allowing appeals under WIS. STAT. § 227.58, thus leaving it to chapters 808 and 809 to specify appellate procedure including the current motion

to intervene. Nothing in chapter 227 forecloses intervention on appeal under WIS. STAT. § 809.13.

A. Wis. Stat. § 227.53(1)(d) Addresses Intervention in the Circuit Court – Not on Appeal.

DNR and Clean Wisconsin presumably will argue that intervention on appeal is governed by WIS. STAT. § 227.53(1)(d).[2] That is not true. Section 227.53(1)(d) provides that in a judicial review proceeding in the circuit court, an "interested" person may petition to intervene in the proceeding by filing a motion five days before the hearing on the intervention motion. *See Citizens' Util. Bd. v. Pub. Serv. Comm'n of Wisconsin*, 2003 WI App 206, ¶ 16, 267 Wis. 2d 414, 671 N.W.2d 11.

However, that statute does not address procedures on appeal from the circuit court's judgment in the judicial review proceeding. It therefore does not govern the Wisconsin

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[2] Wis. Stat. § 227.53(1)(d) statute provides:

> [T]he agency and all parties to the proceeding before it shall have the right to participate in the proceedings for review. The court may permit other interested persons to intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition.

Legislature's motion to intervene in this appeal. It is simply not addressed to that context.

WIS. STAT. § 227.53(1)(d) provides certain procedures for intervention in a circuit court review proceeding. It permits "interested persons" to petition to intervene.[3] That is consistent with the general procedural statute concerning intervention, WIS. STAT. § 803.09, which permits parties to intervene under certain circumstances. Section 227.53(1)(d) provides generally for intervention, whereas, as noted above, section 803.09(2m) specifically provides for intervention by the Legislature. Section 803.09(2m) is applied on appeal via WIS. STAT. § 809.13, which

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[3] Those parties do not need to be "aggrieved" by the agency decision to intervene in judicial review proceedings in the circuit court. Being a "person aggrieved" is a requirement for filing a petition for judicial review itself. WIS. STAT. § 227.53(1). But it is not a requirement for filing a petition to intervene. To file a petition to intervene, the proposed intervenor need only be an "other interested person[]." WIS. STAT. § 227.53(1)(d). "Other interested persons" is undefined. This Court "may use a dictionary to establish the common meaning of an undefined statutory term." *State v. McKellips*, 2016 WI 51, ¶ 32, 369 Wis. 2d 437, 881 N.W.2d 258. The dictionary definition of the term "interested" is: "Concerned, affected; having an interest, concern, or share in something." The Compact Edition of the Oxford English Dictionary (2d ed. 1998 reprint) 864. With that definition, the phrase "other interested persons" is a broader universe of persons than a "person aggrieved," which is statutorily defined as one "whose substantial interests are adversely affected by a determination of an agency." WIS. STAT. § 227.01(9).

permits intervention by a party who meets the requirements of WIS. STAT. § 803.09.

B. There is No Conflict Between WIS. STAT. §§ 809.13 and 803.09(2m) and § 227.53(1)(d).

These statutes are in harmony; there is no conflict between them. *State v. Grandberry*, 2018 WI 29, ¶ 21, 380 Wis. 2d 541, 910 N.W.2d 214 ("In order for two statutes to be in conflict, it must be impossible to comply with both."); *Johnson v. Masters*, 2013 WI 43, ¶ 13, 347 Wis. 2d 238, 830 N.W.2d 647 ("Under the ordinary rules of statutory interpretation statutes should be reasonably construed to avoid conflict. When two statutes conflict, a court is to harmonize them."); *Donaldson v. Bd. of Comm'rs of Rock-Koshkonong Lake Dist.*, 2004 WI 67, ¶ 19, 272 Wis. 2d 146, 680 N.W.2d 762 ("In construing statutes that are seemingly in conflict, it is our duty to attempt to harmonize them, if it is possible, in a way which will give each full force and effect."); *State v. Reyes Fuerte*, 2017 WI 104, ¶ 29, 378 Wis. 2d 504, 904 N.W.2d 773 ("Where multiple statutes are at issue, this

court seeks to harmonize them through a reasonable construction that gives effect to all provisions.")

If there were a conflict between WIS. STAT. § 227.53(1)(d) and WIS. STAT. § 803.09(2m) (which there is not), WIS. STAT. § 803.09(2m) is the "specific" statute that controls the issue in this case. *Belding v. Demoulin*, 2014 WI 8, ¶¶ 16-17, 352 Wis. 2d 359, 843 N.W.2d 373 ("In the event of 'a conflict between a general and a specific statute, the latter controls.' ")

Wis. Stat. § 803.09(2m) is a specific statute governing the motion to intervene by the Legislature. Only three parties may invoke it: the Assembly, the Senate, or the Legislature. And those parties may invoke it only if a party to an action presents one of three purely legal issues: a challenge to (1) "the constitutionality of a statute, facially or as applied," (2) "a statute as violating or preempted by federal law," or (3) "the construction or validity of a statute."

This statute permits these legislative bodies to intervene when there are challenges to laws – a subject in which the

Legislature is inherently interested. The intervention standard of WIS. STAT. § 803.09(2m) thus permits intervention by a specific subset of the broad universe of "interested persons" who are permitted to intervene in judicial review proceedings by WIS. STAT. § 227.53(1)(d). Thus, the two statutes are in harmony.

Chapter 227 does not address intervention on appeal and therefore there is no conflict between the procedures of WIS. STAT. §§ 809.13 and 803.09 and WIS. STAT. § 227.53(1)(d). *See State ex rel. Town of Delavan v. Circuit Court for Walworth Cty.*, 167 Wis. 2d 719, 731, 482 N.W.2d 899 (1992) (The courts have applied "various civil procedure statutes . . . to ch. 227 judicial reviews as long as there is no conflict between the civil procedure statute and ch. 227."); *Baker v. Dep't of Health Servs.*, 2012 WI App 71, ¶ 11, 342 Wis. 2d 174, 816 N.W.2d 337 (Citing *Delavan*: "As § 801.58(7) does not conflict with any provision in ch. 227, it applies to ch. 227 administrative reviews."); *see also State ex rel. Dep't of Nat. Res. v. Wisconsin Court of Appeals, Dist. IV*, 2018 WI 25, ¶ 20, 380 Wis. 2d 354, 909 N.W.2d 114 (Holding that WIS.

STAT. "§ 801.50 applies to judicial review of an agency decision" and finding that it "does not contradict a relevant chapter 227 provision.")

Because chapter 227 applies to judicial review proceedings in circuit court and does not address procedures on appeal, and, in any event, it generally permits intervention by "interested persons" in circuit court review proceedings, WIS. STAT. § 803.09(2m) and WIS. STAT. § 809.13 present no conflict with WIS. STAT. § 227.53(1)(d) in this case. Permitting the Legislature to intervene in this appeal does not run afoul of chapter 227. Contrast *Wagner v. State Med. Examining Bd.*, 181 Wis. 2d 633, 642, 511 N.W.2d 874 (1994) (default judgment provision of civil procedure statutes is in conflict with the scope of chapter 227 review; chapter 227 review requires the circuit court judge to make certain determinations even if no response is filed).

Finally, WIS. STAT. § 803.09(2m)'s text and structure show that the Legislature intended for intervention as of right to apply

to a motion by the Legislature to intervene in judicial review proceedings:

- The statute provides that it applies "at any time";
- The statute uses the phrase "as a matter of right"; and
- The statute applies to any challenge to the construction or validity of any statute.

Conclusion

The Wisconsin Legislature respectfully requests the Court to grant its motion to intervene as of right under WIS. STAT. § 809.13 and § 803.09(2m).

Dated this 19th day of June, 2019.

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EXHIBIT A

WISCONSIN COURT OF APPEALS
DISTRICT II

CLEAN WISCONSIN, INC. and
PLEASANT LAKE MANAGEMENT
DISTRICT,

Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent-Appellant,

WISCONSIN MANUFACTURERS & COMMERCE,
DAIRY BUSINESS ASSOCIATION, MIDWEST
FOOD PROCESSORS ASSOCIATION, WISCONSIN
POTATO & VEGETABLE GROWERS ASSOCIATION,
WISCONSIN CHEESE MAKERS ASSOCIATION,
WISCONSING FARM BUREAU FEDERATION,
WISCONSIN PAPER COUNSEL and
WISCONSIN CORN GROWERS ASSOCIATION,

Intervenors-Co-Appellant.

Appeal No. 2018AP000059

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

PETITIONERS-RESPONDENTS' BRIEF AND APPENDIX

Appeal of a Final Order of the Dane County Circuit Court,
The Honorable Valerie L. Bailey-Rihn, presiding

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June 1, 2018

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ISSUES PRESENTED

The Department of Natural Resources' ("DNR") phrasing of the issues presented mischaracterizes the issues and arguments raised by the Petitions for Review and argued before the Circuit Court, and is further colored by DNR's partial quotation of the pertinent statutes. A more accurate and unbiased phrasing of the issues is as follows:

1. Whether Wis. Stat. § 227.10(2m) prohibits DNR from denying or conditioning approval of high capacity well applications as necessary to protect Public Trust waters and other waters of the state.

Answered by the Circuit Court: No.

2. Whether any of the cases are barred by Wis. Stat. § 281.34(5m), which prohibits any person from challenging a high capacity well approval based on lack of consideration of cumulative environmental impacts of the proposed well together with existing wells.

Answered by the Circuit Court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate here. The issues presented are significant. Additionally, the DNR and Attorney General modified and presented alternative arguments during the course of briefing in the Circuit Court and may do the same in their reply brief.

The Court's opinion should be published. The issues raised by the co-appellants in their briefs are novel. First, they ask this Court to overrule *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 53, 335 Wis. 2d 47, 799 N.W.2d 73 ("*Lake Beulah*"), based on: a) a pre-existing statute, Wis. Stat. § 227.10(2m); and b) an unprecedented, constrained interpretation of the constitutional Public Trust Doctrine that would undermine its very purpose and historical application. Publication of the Court's opinion will help to provide clarity on these issues of statewide importance.

INTRODUCTION

Wisconsin's lakes and streams belong to the public. The State holds these waters in trust to be protected for the benefit of the public. This "Public Trust Doctrine" ("PTD") has existed since the territorial Northwest Ordinance of 1787, and was incorporated into our Constitution at statehood. Wis. Const., Art. 9, § 1.

For over 100 years, our Supreme Court has repeatedly, unanimously held that the PTD broadly protects public rights in, *inter alia*, boating, fishing, swimming, and scenic beauty. The Court also has characterized the trust as an "active" trust, requiring the state to affirmatively protect and enhance the public's right to enjoy

our waters. In *Lake Beulah*, the Court reinforced these principles, unanimously holding that Department of Natural Resources ("DNR"), as the designated trustee, has the constitutional and statutory authority and duty to consider impacts to waters of the state when evaluating applications for proposed high capacity wells.

Since June 2016, the PTD has been under siege from the very institution that is constitutionally mandated to administer it. DNR, enabled by the Attorney General ("AG"), has turned a blind eye to adverse impacts to public waters when it acts on high capacity well applications. In the cases before this Court, DNR has ignored its own anticipated, often calculated impacts to already-impaired waters, ensuring that the ongoing degradation and loss of Public Trust waters will worsen. DNR's derogation of its constitutional and statutory duty directly and materially impairs the public's ability to exercise the rights the PTD has long been recognized to protect.

DNR, in collaboration with lobbying groups representing the state's largest polluters and exploiters of water resources (collectively "WMC"), offered arguments urging the Circuit Court to ignore *Lake Beulah*, or alternatively that *Lake Beulah* has been overruled by statute or subsequent case law. The Circuit Court correctly rejected those arguments as indefensible. On appeal, DNR and WMC reiterate their statutory arguments.

This Court should end this misguided episode in DNR's history, and require DNR to restore and follow its constitutional, statutory, and judicial mandate to protect Public Trust waters when acting on well applications.

STATEMENT OF THE CASE

DNR offers a lengthy recitation of the background of this case, comprising more than half its brief. Its narrative, however, is colored by its selective use of partial quotes from key cases (including *Lake Beulah*).

Additionally, DNR's factual background, though verbose, is both distorted and ignores essential facts. For example, DNR ignores the underlying facts relating to the well applications at issue, including its own scientific analyses and staff recommendations to condition approval or deny applications due to unacceptable adverse impacts to public waters. It also erroneously asserts that a "backlog" of well applications was created by having to perform cumulative impacts analyses and associated uncertainties. DNR Br. at 16-17. As discussed in greater detail below, the backlog was created by DNR management's unwillingness to condition or deny applications as recommended by staff scientists, instead opting to put them on hold in the hopes that the legislature would amend the statutes. That amendment never happened. Instead, DNR obtained an AG advisory opinion that provided cover for DNR to approve applications that would cause unacceptable, adverse impacts to public waters.

Respondents, Clean Wisconsin, Inc. and Pleasant Lake Management District (collectively "CWI"), therefore offer a more succinct yet complete statement of the background to these cases.

A. High Capacity Well Regulatory Program

CWI generally agrees with DNR's description of the framework of the high capacity well statutes. Withdrawals of groundwater, whether for drinking water, agriculture, or other commercial purposes, are governed by Wis. Stat. ch. 281. The statutes create three categories of wells, based on the volume of withdrawal: 1) small wells with a withdrawal capacity of less than 100,000 gallons per day (gpd) (70 gallons per minute); 2) "high capacity" wells, with a withdrawal capacity of more than 100,000 gpd[1]; and 3) high capacity wells with a withdrawal water loss of more than 2 million gpd. *See* Wis. Stat. §§ 281.34 and 281.35.[2] These cases focuses on the second category of wells, which are regulated primarily under § 281.34.

A proposed well (or collection of wells on the same property) with a capacity to withdraw more than 100,000 gpd requires DNR approval. The criteria for approval include consideration of whether the well interferes with an existing public water supply well. Wis. Stat. § 281.34(5)(a). Additional environmental review is required for three categories of wells: 1) wells located in a "groundwater protection area," *i.e.*, within 1,200 feet of a designated outstanding resource water ("ORW"), exceptional resource water (ERW")[3], or classified trout stream; 2) wells with a water loss of more than 95% of the water withdrawn (*e.g.*, bottling plants); and 3)

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[1] DNR's brief refers to this second category as "medium" wells, a term not used in the statutes.

[2] There also are separate statutory requirements associated with high capacity wells in the Great Lakes basin, not applicable to these cases. *See, e.g.*, Wis. Stat. §§ 281.343 and 281.346.

[3] ORW/ERWs are designated by rule as Wisconsin's most unique and valuable water resources, and are subject to special regulatory protections. Wis. Admin. Code §§ NR 102.10 and 102.11.

wells that may have a significant impact on a large spring (a surface water discharge of at least one cubic foot per second 80% of the time). § 281.34(4). DNR also has limited statutory authority to impose certain conditions in approvals to ensure that those identified resources are protected. § 281.34(5)(b)-(d).

B. Judicial Decisions Affecting the High Capacity Well Program

1. *Lake Beulah*

The seminal case regarding DNR's authority and duties when acting on a high capacity well application is *Lake Beulah*. The Lake Beulah Management District had petitioned for judicial review challenging the approval of a high capacity well for the Village of East Troy. Since the proposed well would not adversely impact a public water supply well and did not meet any of the criteria for additional environmental review in § 281.34(4), DNR approved the well. The petitioner argued that DNR should have considered potential impacts to nearby Lake Beulah, even though the well was not within 1,200 feet and the lake was not a groundwater protection area resource. DNR agreed that it had a statutorily delegated, constitutional duty to protect navigable waters from adverse impacts from proposed high capacity wells, but the duty to consider such impacts was triggered only if there were concrete scientific evidence of potential impacts before the agency at the time of its review. The Village argued that DNR's authority was constrained by § 281.34, which did not address impacts to navigable waters unless the well was in a special category in § 281.34(4).

The principal issue before the Supreme Court was DNR's authority to protect navigable waters under the Public Trust Doctrine. Article IX, § 1 of the Wisconsin Constitution is the wellspring of the PTD and states in pertinent part:

> [T]he river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

In evaluating the scope of DNR's authority, the Court drew from nearly 100 years of unanimous Public Trust decisions, which have recognized that the PTD requires the state to actively "protect and preserve its waters for fishing, hunting, recreation, and scenic beauty." *Lake Beulah*, ¶ 32 (quoted source omitted). The Court also reiterated that the legislature has delegated this public trust duty to DNR: "The duties of the DNR are comprehensive, and its role in protecting state waters is clearly dominant." *Id.*, ¶ 33 (quoted source omitted). As a result of its lengthy analysis of both the history of PTD case law and the statutes pertinent to high capacity wells, the Court unanimously held as follows:

> We conclude that, pursuant to Wis. Stat. § 281.11, § 281.12, § 281.34, and § 281.35 (2005-06), along with the legislature's delegation of the State's public trust duties, the **DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state**....
>
> We further hold that to comply with this general duty, **the DNR must 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 trustee of public trust resources is implicated by a proposed high capacity well permit application, such that **it must consider the environmental impact of the well or in some cases deny a permit application or include conditions in a well permit.**

Id., ¶¶ 3-4 and 62-63 (footnotes omitted; emphasis added).

2. *Richfield Dairy*

A second case pertinent to DNR's authority and duties regarding high capacity wells was an administrative decision in a contested case hearing: *In the Matter of a Conditional High Capacity Well Approval for Two Potable Wells to be Located in the Town of Richfield, Adams County Issued to Milk Source Holdings, LLC*, Case Nos. IH-12-03, *et al.* (September 3, 2014) ("*Richfield Dairy*"). Pleasant Lake Management District (one of the Respondents here) and others challenged DNR's approval of high capacity wells for Richfield Dairy, a proposed mega-dairy known as a "confined animal feeding operation," or "CAFO." The petitioners asserted that the wells should not have been authorized at the approved pumping capacity because of the projected impact, in conjunction with other existing wells, on Pleasant Lake and several nearby trout streams and wetlands. DNR argued that it had no duty or authority to consider the cumulative impacts of a proposed well with existing wells, even though its own staff testified that DNR could not protect Public Trust resources unless it both considered and addressed cumulative impacts.

After a two-week evidentiary hearing at which multiple scientists and regulators testified, the administrative law judge agreed with petitioners, holding:

> To fulfill its obligations under Wis. Stat. §§ 281.11, 281.12, 281.34 and 281.35, its public trust duties, the *Lake Beulah* ... decision and to protect public waters both surface and groundwater the Department must consider cumulative impacts to prevent "potential harm to waters of the state." Numerous water resources experts testified that one could not properly evaluate the "concrete scientific evidence" (as required by *Lake Beulah*) without considering existing and reasonably anticipated cumulative impacts...."

Richfield Dairy at 3. R.App. 203. The ALJ's decision further states:

> The Department of Natural Resources took an unreasonably limited view of its authority to regulate high capacity well permit applications to reach the conclusion that it lacks the authority to consider cumulative impacts in connection with its review of high capacity wells.... [I]t was incumbent upon the Department to consider "the concrete, scientific evidence of potential harm to waters of the state" caused by this high capacity well application and existing and reasonably anticipated cumulative impacts. *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73. As numerous experts on all sides testified in the instant case, **to properly consider the concrete scientific evidence one has to consider the cumulative impacts of groundwater withdrawals upon surface waters and springs consistent with the DNR's clear legal duty** to "protect, maintain and improve the quality and management of the waters of the State, ground and surface, public and private." *Id.*

Richfield Dairy at 14 (emphasis added). R.App. 214. After reviewing the evidence, the judge imposed more restrictive limits on the authorized pumping capacity of the approved well. No party appealed.

C. DNR Response to *Lake Beulah* and *Richfield Dairy*

In 2011, as a result of the *Lake Beulah* decision, DNR began evaluating environmental impacts of proposed wells as part of its review of high capacity well applications. In 2014, DNR added review of cumulative impacts based on *Richfield Dairy*, as a reasonable and necessary step to satisfy its Public Trust duties. It also would take action based on those reviews, such as including conditions to monitor impacts or setting pumping limits lower than sought in the application. For those applications for which DNR scientists identified adverse impacts that rendered the applications unapprovable, however, DNR did not deny the application. Rather, it withheld any decision, creating the appearance of a backlog of well applications. *See, e.g.*, R.App. 226, 227. In the cases at bar, several of the applications date back to 2014. App. 26, 36, 41, 56, 61.

DNR's Public Trust reviews continued until June 2016. In May 2016, the AG issued an opinion stating that DNR did not have the authority to consider cumulative impacts of proposed and existing high capacity wells on Public Trust resources, or to include in its permit decisions conditions necessary to protect those resources. OAG-01-16; App. 71 (the AG Opinion"). DNR immediately adopted the AG Opinion, and it ceased evaluating environmental impacts of proposed wells except for the narrow categories described in § 281.34(5)(b)-(d) (*i.e.*, wells in groundwater protection areas, with 95% water loss, or affecting large springs). http://dnr.wi.gov/topic/wells/HighCapacity.html. For those applications that DNR previously deemed unapprovable due to anticipated adverse impacts to Public Trust waters, it began issuing unconditional approvals in September 2016. App. 26-65.

D. Facts Specific to the Cases at Bar

The eight well approvals at issue here were applied for after the *Richfield Dairy* decision but before the AG's advisory opinion. For each of those applications, DNR staff undertook some consideration of environmental impacts. As discussed below, and as shown in Exhibit B to each of the Petitions, those evaluations varied from raising questions about potential impacts to nearby lakes and streams to detailed modeling and calculations of both individual and cumulative impacts on Public Trust resources. R.App. 226-37. The adverse impacts led to DNR management withholding action on the applications, even when DNR's scientists proposed denial. *See, e.g.*, R.App. 226, 227, 234.

After adopting the AG Opinion, DNR contacted the well applicants to ask whether they wanted DNR to act on their applications. In several of those instances, DNR acknowledged that the well would compromise its protection of Public Trust resources, but indicated that based on the new policy it would approve the well as requested, without conditions. *Id.*

On September 30, 2016, DNR issued approximately twenty new well approvals, most of which were in the Central Sands.[4] The locations of these wells in the Central Sands is significant, as that area already is home to the highest concentration of high capacity wells in the state; and its lakes and streams already have been severely damaged by associated reductions in lake levels and stream flows.

Several salient facts are repeated in the records of each of the eight cases at bar, including the following:

1. There was concrete, scientific evidence that triggered DNR's duty to consider and potentially act on adverse impacts to Public Trust waters, as dictated by *Lake Beulah.*

2. DNR scientists identified potential adverse impacts that would compromise public rights in navigable waters.

3. DNR management withheld any action on the application until after issuance of the AG Opinion.

4. DNR contacted the well applicant after its adoption of the AG Opinion, advising the applicant that it could now approve the proposed well.

[4] The Central Sands" is comprised of parts of six counties in central Wisconsin, east of the Wisconsin River, extending approximately from Portage to Stevens Point. Its geology is dominated by sandy soils and a single groundwater aquifer with a shallow water table. Its "seepage" lakes and streams are predominantly fed by groundwater, contributing to high water quality and temperatures conducive to trout and other game fish.

5. DNR approved the well without conditions, despite the evidence of potential or anticipated adverse effects on Public Trust waters.

DNR argues that the adverse impacts are all associated with cumulative impacts in conjunction with existing wells, and therefore are exempted from any judicial scrutiny under Wis. Stat. § 281.34(5m). That argument is factually inaccurate based on undisputed evidence in the record, including the following:

1. Case Nos. 16-CV-2817, 2818 and 2819 (Lutz, Gordon, Peplinski)

DNR evaluated adverse impacts associated with applications for four proposed wells in Portage County. Each proposed well (none of which existed at the time) would impact multiple Public Trust waters, including Stoltenberg Creek – a designated ERW and Class I trout stream[5] – and several nearby lakes. The record reflects a substantial investigation and evaluation of potential impacts to Stoltenberg Creek, the Tomorrow River, and Lake Emily, including hydrologic modeling and fisheries evaluation. R.App. 226.

DNR determined that Stoltenberg Creek in particular had already suffered a "substantial" depletion of over 30% of stream flow from existing wells, and that each proposed well would further deplete the creek by nearly 3% (collectively almost 9%). A DNR email dated May 11, 2015, stated that it was "not yet clear" whether this depletion would be significant . *Id.* That same email also stated that

[5] Trout streams are classified based on their ability to maintain a sustainable population without stocking, and are specially regulated to maintain temperature, dissolved oxygen, flow, and other attributes necessary "to ensure adequate protection and proper management of this unique resource." Wis. Admin. Code § NR 1.02(7)

DNR was going to place the application "on-hold" because of potential legislation that would affect cumulative impact review. On September 30, 2016 (the date of well approval), the same DNR scientist stated: "As part of the review process I did some groundwater flow modeling that showed that the cumulative impacts from pumping on Stoltenberg Creek were substantial." R.App. 227.

2. Case No. 16-CV-2820 (Frozene)

The well in this case is in close proximity to Pleasant Lake, and affects several of the same resources impacted by the proposed well in *Richfield Dairy*. The affected streams are all Class I trout streams and designated as either ERWs or ORWs.[6] Although the application requested authority to pump 38.9 million gallons **per month**, DNR modeled the impact based on a "conditioned rate" of one inch per week, equating to 36.3 million gallons **per year**. R.App. 228. Even at this substantially reduced rate, DNR staff calculated a 1.3 inch drawdown in the Chafee Creek calcareous fen[7] from the proposed well alone, further noting that a 1-1.5 inch drawdown could cause a loss of about 10% of the fen area and adversely alter the type of wetland. R.App. 229. DNR further noted that the 1.7-inch modeled drawdown at Pleasant Lake, coupled with the calculated drawdown for the not-yet-

[6] Wis. Stat. § 281.34(5)(b) requires additional evaluation and potential conditions for wells within 1,200 feet of an ERW, ORW, or classified trout stream. Several of the well applicants identified their wells as being 1,250 or 1,300 feet from such protected waters. There is no indication that DNR ever verified these estimated distances, or considered whether the difference between 1,200 feet and the identified distance was hydrologically meaningful to protection of the affected Public Trust resources.

[7] Calcareous fens are rare and sensitive wetland resources, whose flora are dependent on water rich in calcium. Wetland law accords special consideration and protection to calcareous fens. *See, e.g.*, Wis. Stat. § 281.36(3g)(d)7.

constructed Richfield Dairy well, "would reach the level the ALJ considered a significant impact for the lake (more than 2.5-3 inches)." R.App. 230. Notwithstanding these impacts, DNR unconditionally approved the well for more than 7.5 times the pumping rate considered in its modeling and evaluation.

3. Case No. 16-CV-2821 (Turzinski)

The application for this well states that it is 1,300 feet from Buena Vista Creek, an ERW and trout stream. On April 20, 2015, a DNR scientist observed that the proposed well is near the headwaters of the creek, and that the application "should be evaluated to what, if any, impacts to the headwaters can be expected." R.App. 232. The record includes no evidence of any such evaluation.

4. Case No. 16-CV-2822 (Laskowski)

The applied-for well is in close proximity to two Class I trout streams. The DNR scientist stated that it "is too close to the headwaters of Ditch 4, especially near reproduction area for trout." R.App. 233.[8] He noted that the ditch is already heavily used by cranberry operations,[9] and stated that "[t]he stream is too impacted already for another well." *Id.* DNR ignored this opinion, conducted no further evaluation, and approved the well without conditions.

[8] Many trout streams are identified as "ditches" due to historic channelization.

[9] Cranberries typically are grown in marshes and bogs. Heavy water use is during harvesting, when the bogs are flooded by stream diversion to float the fruit to the surface. *See, e.g.*, www.wiscran.org/media/1347/cranproduction08.pdf.

5. Case No. 16-CV-2823 (Lauritzen)

The proposed well is a fourth well on the same property. (All wells on the same property are treated as one well under Wis. Stat. § 281.34(1)(b), *i.e.*, not as a cumulative impact.) In October 2014, the DNR scientist stated that he was "concerned that the combined impact from the 4 wells will add to a significant adverse impact to the temperature and fish community of Radley Creek" (a Class 1 trout stream and ORW). R.App. 234. He then requested information on how much impact is projected from this set of wells and existing wells. Although there is no such response in the record, a subsequent DNR email indicates that DNR had placed the application "on hold" "due to predicted impacts to Radley Creek...." *Id.* The same email stated that the well may be approvable despite its adverse impacts under the AG Opinion. *Id.* It was approved without conditions a week later.

6. Case No. 16-CV-2824 (Derousseau)

This is the only challenged well outside the Central Sands, located near Rice Lake in Barron County. DNR's hydrogeologist initially expressed concern due to the proposed well's proximity to the wetlands and headwaters of Roux Creek, a Class II trout stream, as initial modeling showed "unacceptable impact to Roux Creek." R.App. 236. DNR staff undertook substantial evaluation, including site visits and additional monitoring. DNR's hydrogeologist then wrote:

> My assessment of the surface water/groundwater resources surrounding the property just east of Rice Lake concluded that the combination of existing irrigation wells with the proposed irrigation well in the sand/gravel aquifer would have a direct impact on the surrounding wetlands and the headwaters of Roux Creek, a class II trout stream.... I have informed the applicant's consultant that

> they can either voluntarily withdraw their application or the WDNR can issue a formal denial.

R.App. 237.

After the AG Opinion, DNR offered to revisit the application, which had been placed on hold. It was approved without conditions.

ARGUMENT

I. THIS COURT MUST REVIEW THE CIRCUIT COURT DECISION UNDER THE *DE NOVO* STANDARD OF REVIEW.

DNR and WMC agree that the issues before this Court are subject to *de novo* review, *i.e.*, no deference is afforded either party's legal interpretations. DNR Br. at 24; WMC Br. at 6. DNR then inconsistently suggests that it is entitled to "due weight" based on its experience, technical competence or specialized knowledge and expertise. DNR Br. at 24. However, the principal issue here involves the interpretation of § 227.10(2m), which applies to all state agencies and does not require any unique experience or expertise. The second issue, relating to § 281.34(5m), is a novel issue that also requires no technical expertise or experience. Moreover, this case raises an issue of DNR's statutory authority, for which courts afford no deference to the agency's interpretation. *See, e.g., Grafft v. DNR*, 2000 WI App 187, ¶ 4, 238 Wis. 2d 750, 618 N.W.2d 897.

WMC also argues that the AG's opinion in this matter should be treated as persuasive. WMC Br. at 6. The case they cite for this proposition, *Voice of Wis. Rapids v. Wis. Rapids Pub. Sch. Dist.*, 2015 WI App 53, 364 Wis. 2d 429, 867 N.W.2d 825, is inapposite. The Court of Appeals considered the AG's opinion in

that case to be significant only because "[t]he legislature has expressly charged the state attorney general with interpreting the open meetings and public records statutes." *Id.* at ¶ 11. No such charge has been given to the AG when it comes to the PTD or any of the statutes relevant to this matter and, accordingly, the AG Opinion is accorded no deference here. Moreover, as discussed below, the AG Opinion is unpersuasive and entitled to no deference because, *inter alia*: a) it attempts to overrule *Lake Beulah*, based on a flawed discussion that ignores significant language confirming that DNR has "explicit" authority to protect Public Trust waters (also ignored in Appellants' briefs to this Court); and b) it applied the wrong standards of statutory analysis.

II. DNR HAS VIOLATED ITS PARAMOUNT DUTY TO PROTECT WATERS OF THE STATE.

Although the issues on appeal focus on Wis. Stat. § 227.10(2m) and the AG Opinion, the fundamental issue in these cases is whether DNR has fulfilled its constitutional and statutory obligations to protect waters of the State. Prior 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.

The Supreme Court repeatedly has held: "When considering actions that affect navigable waters in the state, one must start with the public trust doctrine, rooted in in Article IX, Section 1 of the Wisconsin Constitution." *Hilton ex rel. Pages Homeowners' Ass'n v. DNR*, 2006 WI 84, ¶ 18, 293 Wis. 2d 1, 717 N.W.2d 166, quoted in *Lake Beulah*, ¶ 30. Accordingly, this analysis requires review of the

AG Opinion and § 227.10(2m) in the context of existing constitutional, statutory and jurisprudential law.

A. DNR Is the Trustee of Public Trust Waters, with the Duty to Protect Waters of the State when Considering and Acting on High-Capacity Well Applications.

The Wisconsin Supreme Court and Court of Appeals repeatedly have held that DNR is the trustee of state waters under the Public Trust Doctrine, and charged with protecting those public water resources. *See, e.g., ABKA Ltd. P'ship v. Wis. Dep't of Natural Res.*, 2002 WI 106, ¶ 12, 255 Wis. 2d 486, 648 N.W.2d 854; *State v. Town of Linn*, 205 Wis. 2d 426, 444-45, 556 N.W.2d 394 (Ct. App. 1996), *rev. den.* 207 Wis. 2d 287 (1996); *Borsellino v. DNR*, 2000 WI App 27, ¶ 18, 232 Wis. 2d 430, 443-44, 605 N.W.2d 255. In *Borsellino*, the court referred to DNR as "trustee under the public trust doctrine ...." *Id.*, ¶ 19.

DNR's Public Trust obligations are broad and comprehensive. Nearly forty years ago, the Supreme Court stated:

> In furtherance of **the state's affirmative obligation as trustee of navigable waters**, the legislature has delegated substantial authority over water management matters to the DNR. The **duties of the DNR are comprehensive**, and its role in protecting state waters is clearly dominant....

Wis. Environmental Decade, Inc. v. DNR, 85 Wis. 2d 518, 527, 271 N.W.2d 69 (1978) (footnote omitted; emphasis added).

The courts frequently have reiterated the importance of protecting the Public Trust, and that DNR's authority must be construed liberally to protect those waters. See, e.g., *Muench v. Public Service Comm.*, 261 Wis. at 512; *State v. Bleck*, 114

Wis. 2d 454, 465, 338 N.W.2d 492 (1983); *Hilton*, 2006 WI 84, ¶¶ 18-20; *Town of Linn*, 205 Wis. 2d at 442-43.

DNR's Public Trust duties include protection from cumulative impacts. As the Supreme Court stated in *Hixon v. PSC*, 32 Wis. 2d 608, 632-33, 146 N.W.2d 577 (1966):

> A little fill here and there my seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist. Our navigable waters are a precious natural heritage; once gone, they disappear forever.

In *Lake Beulah*, the Supreme Court did not alter or expand DNR's Public Trust responsibilities. Rather, it addressed how DNR's existing statutory and constitutionally-based trust responsibilities apply to the high capacity well program. Relying on a long history and plethora of Public Trust case law, the Court held unequivocally that: a) DNR has the statutory and constitutional authority and duty to consider impacts to Public Trust resources; and b) whether DNR's duty has been triggered is determined on a case by case basis.

> We conclude that, pursuant to Wis. Stat. § 281.11, § 281.12, § 281.34, and § 281.35 (2005-06), along with the legislature's delegation of the State's public trust duties, the DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state. Upon what evidence, and under what circumstances, the DNR's general duty is implicated by a proposed high capacity well is a highly fact specific matter that depends on what information is presented to the DNR decision makers ....

2011 WI 54, ¶ 3 (footnotes omitted).

In *Lake Beulah*, the Village/well applicant argued that DNR may not consider impacts to Public Trust resources because that authority is not found in §§ 281.34 and 281.35. *Id.*, ¶ 29. DNR argued that it had broad authority to consider

impacts to those water resources, and that its authority derives from both the Public Trust Doctrine and ch. 281. *Id.*, ¶¶ 27-28.

The Supreme Court adopted the broad authority and duty as articulated by DNR. It characterized the statutory scheme for high capacity wells as combining DNR's "overarching authority and duty to manage and preserve waters of the state" with certain specific requirements. *Id.*, ¶ 35. The Court specifically relied upon Wis. Stat. §§ 281.11 and 281.12. Wisconsin Stat. § 281.11 provides in pertinent part:

> The department shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private.... The purpose of this 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. To the end that these vital purposes may be accomplished, this subchapter and all rules and orders promulgated under this subchapter **shall be liberally construed in favor of the policy objectives** set forth in this subchapter....

(Emphasis added.) Similarly, Wis. Stat. § 281.12(1) provides in pertinent part:

> The department shall 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 this chapter....

The Court made clear that these statutes constitute a substantive delegation of the State's constitutional trustee duties to DNR:

> [W]e 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. The Court also relied upon other statutes and a wealth of precedential cases to conclude that DNR's duty is grounded in the Constitution. *Id.*, ¶ 3 fn. 6 and ¶ 33 (quoting *WED v. DNR*, 85 Wis. 2d at 527).

The Court concluded, consistent with prior cases, that DNR has a "broad authority and a general duty" to "manage, protect, and maintain waters of the state." *Id.*, ¶ 39 (footnotes omitted). It expressly rejected the Village's argument that § 281.34 limits DNR's authority: "To the contrary, there is nothing in either Wis. Stat. § 281.34 or § 281.35 that limits the DNR's authority to consider the environmental impacts of a proposed high capacity well." *Id.*, ¶ 41.

B. DNR Has Violated Its Duty to Protect Public Trust Waters.

There can be no dispute that in these cases, DNR did not perform its Public Trust responsibilities to protect our lakes and streams. In each case, DNR had scientific evidence, typically generated by its own scientists, that triggered its duty to protect surface waters under *Lake Beulah*, Wis. Stat. ch. 281, and the Wisconsin Constitution. Additionally, these cases involved impacts to ERWs, ORWs, and trout streams.

In some cases, DNR staff specifically recommended further investigation because of the risk to Public Trust waters, but there is no evidence that DNR undertook the evaluation required to protect those waters. R.App. 232, 234 (Turzinski and Lauritzen). In other cases, DNR conducted a detailed investigation and concluded that the affected streams were already too compromised for another well. R.App. 226-27, 233. (Lutz, Gordon, Peplinski, Laskowski). In the

Derousseau case, the hydrogeologist specifically recommended denial of the application due to unacceptable impacts. R.App. 237. In Frozene, DNR's scientists acknowledged that even at a fraction of the approved capacity, the proposed well would exceed a prior determination of adverse impacts on Pleasant Lake and would substantially impact a calcareous fen. R.App. 230.

Despite these acknowledged adverse impacts to sensitive, highly valued Public Trust waters, DNR approved each well without any pertinent conditions.

III. APPELLANTS' INTERPRETATION OF WIS. STAT. § 227.10(2m) IS GROSSLY FLAWED, DEFIES BASIC CANONS OF STATUTORY CONSTRUCTION, AND CONTRAVENES OVER ONE HUNDRED YEARS OF PUBLIC TRUST JURISPRUDENCE.

In each of these cases, DNR decided to ignore its Public Trust responsibilities solely based on the AG Opinion, which in turn relied exclusively upon a novel, misguided interpretation of § 227.10(2m) to overrule *Lake Beulah*. Before the Circuit Court, DNR virtually abandoned this approach, instead arguing that *Lake Beulah* was implicitly overruled by *Rock-Koshkonong Lake Dist. v. State*, 2013 WI 74, 350 Wis. 2d 45, 833 N.W.2d 800. The Circuit Court correctly rejected that new argument (as well as arguments based on § 227.10(2m) and the AG Opinion), and DNR has not pursued it on appeal.[10] Instead, DNR and WMC return to § 227.10(2m), essentially offering an embellished version of the AG Opinion. Their arguments remain unpersuasive.

[10] DNR makes a passing reference to *Rock-Koshkonong* but advances no argument. DNR Br. at 39-40. CWI therefore does not offer any response at this time. Should DNR or WMC attempt to resurrect that argument in its reply brief, CWI will request an opportunity to respond.

DNR argues that it is prohibited from protecting Public Trust resources when acting on high capacity well applications by § 227.10(2m) for two interrelated reasons: a) there is no explicit authority for such review and action under § 281.34 (an argument expressly rejected in *Lake Beulah*); and b) *Lake Beulah* has been superseded by § 227.10(2m). WMC argues that § 227.10(2m) fundamentally and dramatically changed the scope of administrative decision-making, adopting a narrow definition of "explicit" that would essentially eliminate any agency judgment or discretion in the decision-making process. We first address the ruling in *Lake Beulah*, because it is dispositive of the application of § 227.10(2m).

A. *Lake Beulah* Addressed Wis. Stat. § 227.10(2m), Consistent with DNR's Constitutional and Statutory Requirements to Protect State Waters.

DNR/WMC argue that *Lake Beulah* did not address § 227.10(2m) and therefore is not relevant to that section's application to DNR's authority over high capacity wells. DNR reaches that conclusion by selectively quoting one line in *Lake Beulah*, repeatedly mislabeling the Court's consideration as "cursory," and speculating that the Court did not address the statute because it "presumed" that § 227.10(2m) would only apply prospectively. DNR Br. at 34.

Section 227.10(2m) was created by 2011 Act 21, which made substantial changes to the rulemaking provisions in Subchapter II of Wis. Stat. ch. 227, the Administrative Procedures Act. That subsection states in pertinent part:

> No agency may implement or enforce any standard, requirement, or threshold, including as 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 rule that has been promulgated in accordance with this subchapter ....

DNR/WMC acknowledge that the effect of § 227.10(2m) was raised in *Lake Beulah*: it was raised by WMC, which argued that it was no more than a codification of existing law. They also acknowledge that the Supreme Court touched on the effect of that statute in footnote 31. However, DNR repeatedly dismisses the Court's consideration as "cursory" and speculates as to various reasons why the Court may have held that § 227.10(2m) did not apply (other than the reason stated by the Court). DNR Br. at 33-36.

DNR/WMC err, in part, by ignoring the entirety of the relevant paragraph in footnote 31, which states:

> None of the parties argues that the amendments to Wis. stat. ch. 227 in 2011 Wisconsin act 21 affect the DNR's authority in this case. **The DNR responds that Wis. Stat. ch. 281 does explicitly confer authority upon the DNR to consider potential environmental harm presented by a proposed high capacity well. The conservancies agree.** The Village maintains that the DNR lacks such authority under Wis. Stat ch. 281 but states that "Wis. Stat. § 227.10(2m) does not change the law as it relates to the authority of the [DNR] to issue high capacity well approvals under Wis. Stat. § 281.34." **We agree with the parties** that 2011 Wis. Act 21 does not affect our analysis in this case. Therefore we do not address this statutory change any further.

2011 WI 54, fn. 31 (emphasis added).

Contrary to DNR/WMC's argument, the Supreme Court did not give this statute cursory attention; nor did it consider the statute only in the context of the facts before it. It also was not silent as to its reasoning, as suggested by DNR's speculation as to possible motives. Rather, the Court addressed § 227.10(2m) on its merits.

In *Lake Beulah*, DNR and the petitioners argued that § 227.10(2m) does not affect the outcome because ch. 281 "does explicitly confer authority upon DNR to consider proposed environmental harm ...."; *i.e.*, DNR's authority under ch. 281 satisfies the "explicit" language in § 227.10(2m). *Id.*, fn. 31. While the Village disputed that DNR had any authority to consider environmental impacts – an argument rejected by the Court – it agreed that § 227.10(2m) did not affect the statutory analysis. The Court determined not to engage in more elaborate analysis because it expressly agreed with DNR and the other parties.

Moreover, the Supreme Court's analysis in footnote 31 is consistent with and reinforced by its analysis of DNR's authority in the text of the decision. After reviewing both the constitutional and statutory underpinnings of DNR's authority to regulate high capacity wells, the Court stated:

> We conclude that, through Wis. Stat. ch. 281, **the legislature has explicitly provided the DNR** with broad authority and a general duty, in part through its delegation of the State's public trust obligations, to manage, protect, and maintain waters of the state.... Specifically, for all proposed high capacity wells, **the legislature has expressly granted the DNR** the authority and general duty to review all permit applications and to decide whether to issue the permit, to issue the permit with conditions, or to deny the application.... The high capacity well permitting framework along with the DNR's authority and general duty to preserve waters of the state provides the DNR with the discretion to undertake the review it deems necessary for all proposed high capacity wells, including the authority and a general duty to consider the environmental impact of a proposed high capacity well on waters of the state.

Lake Beulah, ¶ 39 (footnotes and citations omitted; emphasis added.) The Court further held that "the meaning of these provisions is clear ..." *Id.*, ¶ 44. DNR/WMC's argument grossly mischaracterizes *Lake Beulah*.

B. Wis. Stat. § 227.10(2m) Does Not Prohibit Agencies from Exercising Discretion or the DNR from Fulfilling Its Statutory and Constitutional Mandates.

This Court is bound by *Lake Beulah* and need not reevaluate whether § 227.10(2m) affects DNR's high capacity well authority. However, DNR/WMC's arguments regarding the meaning and effect of § 227.10(2m) also must be rejected independently of *Lake Beulah*.

DNR's limited argument is that DNR has no explicit authority in § 281.34 to consider or act on adverse environmental impacts to Public Trust waters unless the well falls within the categories in § 281.34(4). However, the Supreme Court in *Lake Beulah* did not rely exclusively on § 281.34. It held that DNR has that "explicit" authority through the Public Trust provision in the Constitution, together with §§ 281.11, .12, .34 and .35. *Lake Beulah*, ¶¶ 3, 39, and 62. DNR ignores this clear holding.

WMC argues that § 227.10(2m) radically changed administrative decision-making to overrule *Lake Beulah*, relying on a restrictive interpretation of "explicit." Additionally, it relies on citations and quotations that have no value as legislative history, including citation to a circuit court decision in an unrelated case, in violation of Wis. Stat. § 809.23(3).

1. The Court Must Liberally Construe DNR's Authority in Favor of Protecting Waters of the State.

In evaluating the effect of § 227.10(2m) on statutes relating to DNR water management programs, two principles are significant. First, DNR's authority to

protect state waters is statutorily required to be liberally construed in favor of such protection. Wisconsin Stat. § 281.11 specifically states that "this subchapter and all rules and orders promulgated under this subchapter **shall be liberally construed** in favor of the policy objectives set forth in this subchapter...." (Emphasis added.) Wisconsin Stat. § 281.12(1) further states that DNR "shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter...."

Under basic canons of statutory construction, these specific statutes govern over § 227.10(2m), which is a general statute applying to all state agencies. *See, e.g., Belding v. Demoulin*, 2014 WI 8, ¶ 17, 352 Wis. 2d 359, 843 N.W.2d 373. The Court therefore must "liberally construe" DNR's statutory authority to "protect, maintain and improve" water quality and management, including groundwater. WMC's failure to address this statutory language is inexplicable.

2. Chapter 281 Provides DNR Explicit Authority, Consistent with Wis. Stat. § 227.10(2m).

WMC begins its argument by narrowly defining "explicit," citing statements by the governor and one legislator in support of this interpretation. WMC Br. at 10-16. WMC then dismisses § 281.11 as only a policy and purpose statement, and § 281.12 as a general grant of authority, suggesting that these statutes (as well as § 281.31) are "preambles" that do not convey sufficiently "explicit" authority. WMC Br. at 19-21. WMC is wrong for several reasons.

WMC defines "explicit" as "clearly stated and leaving nothing to be implied." WMC Br. at 10. It then argues that this term precludes an agency from acting on the basis of "general" authority, suggesting (without expressly stating) that "general" means "implied."

There is nothing that supports this definitional leap. On the contrary, WMC's quoted definition is consistent with other dictionary definitions, which focus on clarity of expression, not breadth of scope. For example, the American Heritage Dictionary (2nd Coll. Ed.) at 478 defines "explicit" as:

> **1.a.** Expressed with clarity and precision. **b.** Clearly defined or formulated. **2.** Forthright and unreserved in expression ...."

There is nothing in § 227.10(2m), the definition of "explicit," or Wisconsin case law that supports WMC's conclusion that a conveyance of general authority is an insufficient basis to regulate. To the contrary, the Court in *Lake Beulah* expressly held that the legislature had "explicitly" provided DNR with "broad authority and a general duty ..." *Id.*, ¶ 39.

Moreover, the suggestion that "explicit" means that statutory authority must be so specific as to leave nothing to the discretion of the agency is inimical to the structure of administrative law and the Administrative Procedures Act. By definition, a "rule" means:

> a regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency **to implement, interpret, or make specific legislation** enforced or administered by the agency ....

Wis. Stat. § 227.01(13) (emphasis added). Legislation is necessarily limited to the grant of authority in general terms, and agencies are accorded authority through rulemaking to add specificity. If statutes fully addressed their subject matter, as WMC argues, there would be no need for rules.

The same can be said for decision-making, which is authorized under Ch. 227, Subch. III. Statutes provide the grant of authority, and rules may provide additional specificity and detail that apply to all actions within their scope. Decisions apply those statutes and/or rules to specific factual circumstances, tailoring conditions as appropriate to fulfill legal requirements.

WMC relies on statements by the governor and one state senator as evidence of legislative intent to equate implied authority with general authority. However, a statement of intent or purpose by the governor is not evidence of intent of the legislature, a separate and co-equal branch of government. Selective excerpts of a statement or testimony of a single legislator also are unavailing. "It is inappropriate, however, for a court to rely on the statements of a member of the legislature as to what the legislature intended when enacting a statute." *Labor & Farm Party v. Elections Board*, 117 Wis. 2d 351, 356, 344 N.W.2d 177 (1984) (citations omitted). The Court explained in *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 52, 271 Wis. 2d 633, 681 N.W.2d 110:

> "[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated.... It is the law that governs men, not the intent of the lawgiver...."

(Quoted source omitted.) WMC's citations to friendly individual officials are unpersuasive and should not be considered.

WMC also errs because it quotes statements that do not relate to § 227.10(2m). Act 21 represented a broad revision of the rulemaking provisions in Subch. II of ch. 227, creating new procedures and limitations in the agency rulemaking process. The governor's statement quoted by WMC relates to the statutory authority required to promulgate rules, specifically § 227.11(2)(a). WMC Br. at 11. Likewise, the case WMC cites as a trigger for Act 21 addressed agency rulemaking authority. *Wisconsin Builders Ass'n v. State Dep't of Commerce*, 2009 WI App 20, 316 Wis. 2d 301, 762 N.W.2d 845, *rev. den.* 2009 WI 34.

Section 227.11 relates exclusively to rulemaking, and expressly provides that a statute containing a "statement or declaration of legislative intent, purpose, findings or policy" or "describing the agency's general powers or duties does not confer rule-making authority.... Wis. Stat. § 227.11(2)(a)1 and 2. That statute does not preclude an agency from issuing decisions under a grant of general powers or duties. If it did so, the general delegation of duties would be rendered meaningless.[11]

Section 227.10(2m), which addresses agency decision-making, does not include those same limitations as § 227.11(2)(a). Where a word or words are used in one subsection of a statute but not in related subsection, the court "must conclude

[11] A court may not interpret a statute in a way that renders it (or any part of it) meaningless. *See, e.g., Belding v. Demoulin*, 2014 WI 8, ¶ 17.

that the legislature specifically intended a different meaning." *RURAL v. PSC*, 2000 WI 129, ¶ 39, 239 Wis. 2d 660, 619 N.W.2d 888 (quoted source omitted). One must draw from the distinction between these two sections of Act 21 that the Legislature chose not to include the limitation on rulemaking to agency decision-making.

The Supreme Court has held that chapter 281 provides explicit authority to DNR to consider adverse impacts to waters of the state under the high capacity well program. Sections 281.11 and 281.12 express "with clarity and precision" that DNR is granted the authority "to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private"; that DNR "shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose"; and that DNR's authority is to be "liberally construed" to achieve those purposes. Decades of unanimous Supreme Court decisions have reinforced the delegation of these Public Trust duties. There is nothing in § 227.10(2m), a general statute applicable to all state agencies, that abrogates those duties.

IV. DNR'S INTERPRETATION OF STATE LAW IN THESE CASES IS UNCONSTITUTIONAL.

The core holding of *Lake Beulah* is that DNR's responsibility to protect Public Trust waters from the impacts of high-capacity wells is grounded in Art. IX, § 1 of the Wisconsin Constitution. The State has an affirmative duty to protect Public Trust waters; and DNR is the delegated trustee of that duty. In *Richfield Dairy*, the administrative law judge applied that duty in the context of a well in an

area where high capacity wells are cumulatively ravaging Public Trust resources, concluding that where the close proximity of wells creates a cumulative impact – a "death of a thousand straws" – DNR must consider those cumulative impacts. Neither DNR nor the well applicant appealed that decision; and DNR began to consider cumulative impacts as part of its Public Trust responsibilities.

Appellants argue that DNR does not have the authority to condition approvals except in the narrow areas identified in § 281.34(5)(b)-(d). They therefore raised this constitutional question: if DNR no longer has the authority to protect Public Trust waters from high capacity wells, who does?

DNR first argues that *Lake Beulah* does not require DNR to conduct environmental review for "all" wells, based on quotes from *Lake Beulah*: a) suggesting that the legislature could revoke DNR's authority; and b) stating that the decision did not address wells smaller than the high capacity threshold. DNR Br. at 37-38. Neither of these arguments is meaningful. First, the constitutional requirements of the Public Trust Doctrine rest with the state and are implemented by the legislature delegating the trust responsibilities to the executive branch. *See, e.g., Lake Beulah*, ¶ 32-33. Historically, the legislature has delegated that authority to DNR. The legislature can modify that delegation by enacting new or amended laws. However, it cannot simply ignore or refrain from fulfilling that responsibility. For nearly 120 years, the Supreme Court has held that the State's duty is an affirmative duty, and it cannot be abrogated by the legislature or an attorney general's opinion:

> The legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose. It is supposed that this doctrine has been so firmly rooted in our jurisprudence as to be safe from any assault that can be made upon it.

Priewe v. Wis. State Land & Improv. Co., 103 Wis. 537, 549-50, 79 N.W. 780, 781 (1899). DNR has ignored this bedrock principle.

The fact that the Court in *Lake Beulah* did not address wells below the high capacity threshold also has no significance. Regulation of smaller wells was not before the Court, and the Court traditionally does not address constitutional issues unnecessarily. *See, e,g., Labor & Farm Party v. Elections Bd., Wis.*, 117 Wis. 2d 351, 354, 344 N.W.2d 177 (1984) (the Supreme Court "does not normally decide constitutional questions if the case can be resolved on other grounds."); *Waushara County v. Graf*, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992) (citing "well-established rule" that "appellate courts need not and ordinarily will not consider or decide issues which are not specifically raised on appeal.").

DNR/WMC next argue that the legislature has satisfied its constitutional duties through enactment of 2017 Wisconsin Act 10, which: a) relaxed regulatory requirements for high capacity wells; and b) authorized DNR to study certain lakes in Central Wisconsin over the subsequent three years. DNR Br. at 18-19, 43; WMC Br. at 26-32. This argument is a nonstarter because Act 10 was enacted in June 2017, more than a year after the AG Opinion and nine months after the well approvals under review here. DNR/WMC do not explain how the State's

constitutional duty in September 2016 could have been satisfied by an enactment in June 2017.

Furthermore, labeling a legislative enactment as "comprehensive" does not make it so. DNR/WMC do not – and cannot – argue that Act 10 would protect the Public Trust resources jeopardized by the challenged well approvals or supplement any deficiencies in the existing well program. The state does not fulfill its Public Trust duties by enacting legislation that covers the field: it meets its duty by enacting and implementing measures that actually protect Public Trust waters.

DNR/WMC's argument that the enactment of Act 10 reflects a comprehensive approach to water management is unavailing. The constitutionality of Act 10 is not before this Court. Were it before the Court, however, DNR/WMC would be hard-pressed to explain how a statutory enactment that relaxes the regulation of wells remedies the state's failure to protect Public Trust waters under a more rigorous program. Act 10 allowed high capacity well permit holders to transfer ownership, repair, and replace wells without any DNR review of the impacts those wells on Public Trust or other affected resources. This change precludes DNR from potentially limiting or conditioning withdrawals from existing wells upon transfer or replacement, due to harm to Public Trust waters. This reduction in DNR's oversight of high capacity wells plainly does not fulfill the State's duty to protect Public Trust waters from groundwater pumping.

The study commissioned by Act 10 also is not relevant to this proceeding, and does not correct the infirmity in DNR's failure to act in response to

unambiguous evidence that the wells at issue would cause adverse impacts to Public Trust waters. Act 10 authorized DNR to study a handful of watersheds for impacts from groundwater withdrawals. When the study is completed in several years, DNR may recommend "special measures" to the Legislature to address impacts to Public Trust waters caused by groundwater pumping. The Legislature is free to ignore any DNR recommendations. Further, Act 10 states that no well permit applications in the area covered by the study shall be impacted by DNR's evaluation of impacts to waters in the Central Sands. Wis. Stat. § 281.34(7m)(h). That is, while DNR is evaluating exactly how bad things are in the Central Sands, it is prohibited from using that knowledge to address adverse impacts when processing new well applications in the Central Sands. Again, this legislation plainly does not satisfy the State's Public Trust duties.

Critically, for the well permits that are actually at issue in this litigation, scientific evidence of harm **already** exists, and DNR failed to respond to that evidence in accordance with its Public Trust duties. DNR/WMC cite the Act 10 study in a flawed attempt to inject doubt into what is not genuinely disputed: no further study is needed to determine that **these** wells would cause unacceptable adverse impacts to Public Trust waters. That the Legislature directed DNR to study a handful of watersheds does not absolve DNR of the duty to act now, in the face of concrete scientific evidence that these wells would harm Public Trust waters.

Lest there be any doubt, DNR/WMC do not – and cannot – argue that the existing program, either before or since enactment of Act 10, adequately protects

Public Trust resources. The facts in the cases at bar are comparable to – and in some cases worse than – *Richfield Dairy*, in which the administrative law judge found that the well as approved violated DNR's Public Trust duties.

DNR scientists already have determined in these cases – prior to well approval – that the challenged wells, either alone, in conjunction with other proposed wells, or cumulatively with existing wells or other factors, would cause significant adverse impacts to Public Trust lakes and streams. In the three applications considered together, DNR determined that the affected Stoltenberg Creek and other resources already were substantially impacted. In the Frozene case, DNR determined that the proposed well, in conjunction with the approved but not yet existing Richfield Dairy well, will cause impacts to Pleasant Lake and the Chaffee Creek calcareous fen that the administrative law judge in *Richfield Dairy* found to be unacceptable. In Laskowski, DNR concluded that the affected stream already was too heavily impacted by cranberry-related stream diversions. And in Derousseau, DNR concluded that the well would have unacceptable impacts on the trout stream and should be denied.

The constitutional duty to take action to protect these lakes and streams was invoked by DNR's own scientists. DNR/WMC's interpretation of § 227.10(2m) would prohibit DNR from protecting Public Trust resources despite undisputed evidence of harm. No other state agency has been delegated the authority to protect those resources. Accordingly, there can be no doubt that the DNR/WMC

interpretation of § 227.10(2m) is an unconstitutional abrogation of DNR's Public Trust responsibilities.

This Court should avoid the constitutional issue created by the Appellants' flawed interpretation of § 227.10(2m), and instead reconfirm that the *Lake Beulah* decision meant exactly what it said when the Court unanimously determined that this provision does not affect DNR's explicit authority and affirmative duty to protect Public Trust waters from impacts caused by groundwater withdrawals.

V. CWI'S CHALLENGES ARE NOT PRECLUDED BY WIS. STAT. § 281.34(5M).

A. Petitioners Are Not Challenging DNR's "Lack of Consideration" of Cumulative Impacts.

DNR erroneously argues that Wis. Stat. § 281.34(5m) prohibits a challenge to a well approval that in any way relates to cumulative impacts. Section 281.34(5m) states in its entirety:

> CONSIDERATION OF CUMULATIVE IMPACTS. No person may challenge an approval, or an application for approval, of a high capacity well based on the lack of consideration of cumulative environmental impacts of that high capacity well together with existing wells.

In evaluating DNR's interpretation of § 281.34(5m), there are several pertinent canons of statutory construction. First, the court reviews the statute *de novo.* DNR's interpretation of the statute is entitled to no weight, as courts give no deference to the agency's interpretation of its own statutory authority. *See, e.g., Lake Beulah*, ¶ 23; *Grafft*, 2000 WI App 187, ¶ 4. Words in a statute are to be accorded their common, ordinary and accepted meaning (unless they are specifically defined or technical terms). *See, e.g., Dep't of Justice v. Dep't of Workforce Dev.,*

2015 WI 114, ¶ 22, 365 Wis. 2d 694, 875 N.W.2d 545; *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. If the plain meaning of the statute is evident, no further analysis is required. However, a court may consider the context in which the statute was created. *Kalal*, ¶ 46.

Additionally, a statute designed to promote the public interest is to be liberally construed in favor of its beneficiaries. *See, e.g., Heyde v. Dove*, 2002 WI 131, ¶ 15, 258 Wis. 2d 28, 654 N.W.2d 830. Similarly, procedural statutes are to be liberally construed to permit a determination on the merits. *See, e.g., All Star Rent A Car v. Wisc. Dept. of Transp.*, 2006 WI 85, ¶ 42, 292 Wis. 2d 615, 716 N.W.2d 506; *Outagamie County v. Town of Greeneville*, 2000 WI App 65, ¶ 11, 233 Wis. 2d 566, 608 N.W.2d 414.[12]

The plain language of § 281.34(5m) does not support DNR's broad interpretation or application. It only precludes a challenge based on a "lack of consideration" of cumulative impacts. The common and accepted meaning of "consideration" is "careful thought; deliberation." *The American Heritage Dictionary* (2nd Coll. Ed.) at 312. The Court in *Lake Beulah* recognized that the

[12] Other rules of statutory construction also warrant a narrow construction of § 281.34(5m). Our courts have long recognized the important public interest in access to the courts to scrutinize administrative decisions. *See, e.g., Stacy v. Ashland Cty. Dep't of Pub. Welfare*, 39 Wis. 2d 595, 601, 159 N.W.2d 630, 633 (1968) ("We have consistently held there must be some judicial review of administrative orders."). Courts have expressed their preference that such cases be reviewed on the merits over "outright dismissal of the action without a review of the merits of the underlying decision." *Wagner v. State Med. Exam. Bd.*, 181 Wis. 2d 633, 642, 511 N.W.2d 874 (1994). It is the "legislative policy in Wisconsin to favor judicial review of administrative decisions at the timely instance of any person whose substantial interests are adversely affected." *Kegonsa Jt. Sanit. Dist. v. City of Stoughton*, 87 Wis. 2d 131, 152, 274 N.W.2d 598 (1979).

duty to "consider" impacts is distinct from the duty to act on them, stating that DNR "must consider the environmental impact of the well or in some cases deny a permit application or include conditions in a well permit." *Lake Beulah*, ¶ 4.

Petitioners do not assert that DNR failed to consider cumulative impacts. On the contrary, DNR in each of these cases considered cumulative and other impacts, and in some cases undertook fairly detailed evaluations of the anticipated impacts of the wells. For example, in Frozene, DNR performed modeling and calculations to determine the individual and cumulative impacts of the proposed well on three affected trout streams, Pleasant Lake, and a sensitive calcareous fen and spring pond. R.App. 228-31. Rather, Petitioners challenge DNR's failure to protect the affected waters from the effects of those impacts in its decisions.

B. Petitioners' Challenges Are Not Based Exclusively on Cumulative Impacts as Defined in Wis. Stat. § 281.34(5m).

Section 281.34(5m) also is limited in scope by defining "cumulative impacts" to mean only consideration of the proposed well "together with existing wells." DNR appears to assume that all of these cases involve impacts together with other existing wells. DNR Br. at 44-45. That is not the case. As discussed in Section III, above, Petitioners' challenges also include impacts due to individual wells, the proposed wells with other proposed wells, and the effect of other impacts (*e.g.*, stream diversions). In fact, Paragraph 21 in each Petition begins: "Petitioner's interests are directly injured because DNR did not address the **individual and**

cumulative effects of pumping from the proposed well ...." (emphasis added); *see also*, ¶ 16.[13] For this reason as well, DNR's arguments must fail.

DNR's argument is also frivolous because both DNR and the AG know that DNR evaluated both individual and cumulative impacts in review of the challenged wells, and evidence of those evaluations is included in each Petition as Exhibit B. R. 1-8; see also, R.App. 226-37. DNR's own evaluations include considerations of the direct impacts of the proposed wells without regard to existing wells, cumulative impacts with existing wells, and in some cases impacts of the proposed well in conjunction with other proposed wells that it approved at the same time. Petition Exhibits B reveal, for example:

> 16-CV-2817, 2818 and 2819: DNR evaluated and identified the adverse impacts associated with those three proposed wells (none of which existed at the time) on the same water resources.
>
> 16-CV-2820: DNR staff opined that the 1-1.5 inch drawdown in the Chafee Creek calcareous fen[14] from the proposed well alone could cause a loss of about 10% of the fen area and adversely alter the type of wetland.
>
> 16-CV-2822: DNR staff recommended denial to an already impacted stream due to the potential impact of the one additional well.
>
> 16-CV-2823: DNR staff expressed concern about the impact of the proposed well together with others on the property (which are considered together under § 281.34(1)(b)).

[13] In case No. 16-CV-2820, these allegations are set forth in ¶¶ 22 and 17.

[14] Calcareous fens are rare and sensitive wetland resources, whose flora are dependent on water rich in calcium. Wetland law accords special consideration and protection to calcareous fens. *See, e.g.*, Wis. Stat. § 281.36(3g)(d)7.

DNR focuses on the decision of the Circuit Court, arguing that the Circuit Court based its decision on cumulative impacts. DNR Br. at 45-46. However, this Court reviews DNR's decision *de novo*, independent of the circuit court decision. *See, e.g., Lake Beulah*, ¶ 25; *RURAL*, 2000 WI 129, ¶ 20. Moreover, DNR's argument is misleading. The Circuit Court did not base its decision on cumulative impacts of the proposed well "together with existing wells," which is the narrow exception in the statute. On the contrary, it correctly found that "DNR did consider the impacts of other cumulative effects, whether it was other proposed wells, stream diversions, or other factors." App. 2.

Since the foundational premise of DNR's argument is false, its argument must fail.

CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court's Order.

Dated this 1st day of June, 2018.

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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 certification for a brief and appendix produced with a proportional serif font.

The length of this brief is 10,709 words.

Dated this 1st day of June, 2018.

/s/ Carl A. Sinderbrand
Carl A. Sinderbrand

CERTIFICATION OF COMPLIANCE WITH § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this Brief, which complies with the requirements of § 809.19(12).

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 this 1st day of June, 2018.

/s/ Carl A. Sinderbrand
Carl A. Sinderbrand

EXHIBIT B

Appeal No. 2018AP59

Cir. Ct. Nos. 2016CV2817
2016CV2818
2016CV2819
2016CV2820
2016CV2821
2016CV2822
2016CV2823
2016CV2824

WISCONSIN COURT OF APPEALS
DISTRICT II

CLEAN WISCONSIN, INC. AND PLEASANT LAKE MANAGEMENT DISTRICT,

PETITIONERS-RESPONDENTS,

V.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-APPELLANT,

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

INTERVENORS-CO-APPELLANTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Pursuant to WIS. STAT. RULE 809.61, this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

We certify this and consolidated companion cases[1] as all address 2011 Wis. Act 21 (Act 21) and its application to the regulatory permit approval process relating to "waters of the state." These cases have constitutional (public trust doctrine) and statutory (who is the "trustee" over the waters of the state) implications that should be answered by the highest court of the state.

The State argues that Act 21 was "designed to confine agencies' authority to that 'explicitly permitted by statute,'" and prohibit agencies from "implement[ing] or enforce[ing] any standard, requirement, or threshold ... unless ... explicitly permitted by statute or by a rule." *See* WIS. STAT. § 227.10(2m) (2015-16).[2] Petitioners respond that ***Lake Beulah Mgmt. Dist. v. DNR.***, 2011 WI 54, ¶39, 335 Wis. 2d 47, 799 N.W.2d 73, is factually on point, has not been overruled, and holds that the Department of Natural Resources (DNR) has the authority and general duty to preserve the waters of the state and has the discretion to undertake the review it deems necessary for all proposed high capacity wells.

BACKGROUND

The DNR has been granted "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 [WIS. STAT. ch. 281]. The department also shall formulate plans and programs for the

[1] ***Clean Wisconsin, Inc. v. DNR***, Nos. 2016AP1688, 2016AP2502, unpublished certification (WI App Jan. 16, 2019).

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

prevention and abatement of water pollution and for the maintenance and improvement of water quality." WIS. STAT. § 281.12. Relevant to this case, ch. 281 governs the withdrawal of groundwater and "combines the DNR's overarching authority and duty to manage and preserve waters of the state with certain specific, minimum statutory requirements." ***Lake Beulah***, 335 Wis. 2d 47, ¶35. The statutes create three categories of wells according to the volume of the withdrawal: (1) small wells with a capacity of less than 100,000 gallons per day (gpd); (2) "high capacity well[s]" with a withdrawal capacity of over 100,000 gpd; and (3) high capacity wells with a withdrawal of more than two million gpd. *See* WIS. STAT. §§ 281.34; 281.35.

The DNR must approve any high capacity well that can pump over 100,000 gpd, and the DNR may not approve the well "[i]f the department determines that a proposed high capacity well may impair the water supply of a public utility engaged in furnishing water to or for the public, ... unless it is able to include and includes in the approval conditions, which may include conditions as to location, depth, pumping capacity, rate of flow, and ultimate use, that will ensure that the water supply of the public utility will not be impaired." WIS. STAT. § 281.34(1)(b), (2), (5)(a). The statutes further provide that the DNR must conduct an "environmental review process" for high capacity wells that (1) are located in a groundwater protection area,[3] (2) have water loss of more than

[3] "Groundwater protection area" is an area within 1200 feet of a well used for fire protection purposes, a trout stream, or an outstanding or exceptional resource water under WIS. STAT. § 281.15. WIS. STAT. § 281.34(1)(a)-(am).

ninety-five percent of the amount of the water withdrawn, and (3) may have a significant environmental impact on a spring.[4] Sec. 281.34(4).

The eight wells at issue in this case fall into the second category of "high capacity wells" and are regulated primarily under WIS. STAT. § 281.34. The eight well applications were submitted between March 2014 and May 2015. For each well application, the DNR conducted varying degrees of analysis of the environmental impact. Three of the applications were delayed by concerns about neighboring waters, but no formal investigation was completed. One application was initially recommended for approval with a limited capacity, but then delayed for further evaluation. For the remaining four applications, the DNR recommended that the applications be denied based on the DNR's "obligat[ion] to consider existing cumulative impacts when making decisions on new wells," but the applicants were given the option of denial, withdrawing the application, or putting the application on hold "due to the fact that the Legislature is currently discussing legislation that may affect the review of these applications."

The Wisconsin State Assembly requested a formal opinion from the Attorney General addressing the impact of Act 21 on the court's decision in ***Lake Beulah***. In May 2016, the Wisconsin Attorney General issued his opinion that Act 21 "precluded" "any type of environmental review" for wells outside the limited "types of wells" specified in WIS. STAT. §§ 281.34 and 281.35. The Attorney General further opined that the Wisconsin Supreme Court did not "address" Act 21 in ***Lake Beulah***, and to the extent that it did address Act 21,

[4] "'Spring' means an area of concentrated groundwater discharge occurring at the surface of the land that results in a flow of at least one cubic foot per second at least 80 percent of the time." WIS. STAT. § 281.34(1)(f).

"***Lake Beulah*** ... is no longer controlling." According to the Attorney General, Act 21 "revert[ed]" any residual duty to act under the public trust doctrine "back to the Legislature."

The DNR thereafter adopted the opinion of the Attorney General and began approving backlogged well applications, including the eight wells at issue in this appeal. Petitioners filed for judicial review and challenged the approval process. The DNR argued to the circuit court (1) that Act 21 precludes the DNR from considering environmental impacts outside the defined categories in WIS. STAT. §§ 281.34 and 281.35, (2) that ***Lake Beulah*** is not controlling, and (3) that § 281.34(5m) precludes a challenge based on a lack of consideration of cumulative impacts.[5]

The circuit court disagreed with the DNR's position and concluded that ***Lake Beulah*** is controlling law and vacated the eight well permits. The circuit court also found that the DNR is the unit of government that has been delegated the affirmative duty to protect the waters of the state. The State appeals.

DISCUSSION

The crux of this case is the interplay between ***Lake Beulah*** and Act 21. ***Lake Beulah*** has not been overruled, and neither the circuit court nor the court of appeals may dismiss any statement within ***Lake Beulah*** as "dictum." *See*

[5] See ***In the Matter of a Conditional High Capacity Well Approval for Two Potable Wells to be Located in the Town of Richfield, Adams County Issued to Milk Source Holdings, LLC***, Case Nos. IH-12-03, IH-12-05 (Wis. Div. Hearings & Appeals Sept. 3, 2014) (hereinafter, ***Richfield Dairy***), a decision from a contested case hearing, for a general discussion regarding the "cumulative" issue. As ***Lake Beulah*** encompasses the questions raised in ***Richfield Dairy***, we need not analyze ***Richfield Dairy*** for purposes of this certification.

Zarder v. Humana Ins. Co., 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682. For purposes of appellate review, we must accept that Act 21 was in effect when the court issued its decision in ***Lake Beulah*** and that the court found that Act 21 did "not affect our analysis." ***Lake Beulah***, 335 Wis. 2d 47, ¶39 n.31.

Act 21 made significant changes to statutes relating to the promulgation of administrative rules. Relevant here, Act 21 created WIS. STAT. § 227.10(2m), which provides:

> No agency may implement or enforce any standard, requirement, or threshold, including as 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, except as provided in [WIS. STAT. §] 186.118 (2) (c) and (3) (b) 3. The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter.

The DNR argues that Act 21 prohibits the DNR from considering environmental impacts of wells outside the defined categories in WIS. STAT. §§ 281.34 and 281.35 as it is not "explicitly required or explicitly permitted by statute or by a rule." *See* § 227.10(2m).

Approximately one month after Act 21 went into effect, the decision in ***Lake Beulah*** was issued. We note that the wells at issue in this case are similar to the statutory category of wells at issue in ***Lake Beulah***. The DNR issued a permit to the Village of East Troy for a municipal well, and the petitioners challenged the DNR's decision, claiming it failed to consider the potential impact the well may have on adjacent Lake Beulah, a navigable water. ***Lake Beulah***, 335 Wis. 2d 47, ¶1. ***Lake Beulah*** first addressed the public trust doctrine. It described the public trust doctrine as being "rooted" in article IX, § 1 of the Wisconsin Constitution and that the court has "long confirmed the ongoing strength and

vitality of the State's duty under the public trust doctrine to protect our valuable water resources." ***Lake Beulah***, 335 Wis. 2d 47, ¶¶30-31. The court reiterated the importance of a "broad interpretation and vigorous enforcement of the public trust doctrine," concluding that the state has delegated, by statute, its public trust duties to the DNR. ***Id.***, ¶¶31, 34 (citing ***Wisconsin's Envtl. Decade, Inc. v. DNR***, 85 Wis. 2d 518, 527-28, 271 N.W.2d 69 (1978) (referencing WIS. STAT. § 144.025 (1977), predecessor statute to WIS. STAT. §§ 281.11 and 281.12)).[6] Act 21 did not repeal, amend, or modify any part of §§ 281.11 or 281.12.

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[6] WISCONSIN STAT. § 281.11 provides:

> The department shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private. Continued pollution of the waters of the state has aroused widespread public concern. It endangers public health and threatens the general welfare. A comprehensive action program directed at all present and potential sources of water pollution whether home, farm, recreational, municipal, industrial or commercial is needed to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water. The purpose of this 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. To the end that these vital purposes may be accomplished, this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed in favor of the policy objectives set forth in this subchapter. In order to achieve the policy objectives of this subchapter, it is the express policy of the state to mobilize governmental effort and resources at all levels, state, federal and local, allocating such effort and resources to accomplish the greatest result for the people of the state as a whole. Because of the importance of Lakes Superior and Michigan and Green Bay as vast water resource reservoirs, water quality standards for those rivers emptying into Lakes Superior and Michigan and Green Bay shall be as high as is practicable.

Lake Beulah then addressed the statutory scheme governing high capacity wells and found that WIS. STAT. ch. 281 "combines the DNR's overarching authority and duty to manage and preserve waters of the state with certain specific, minimum statutory requirements." ***Lake Beulah***, 335 Wis. 2d 47, ¶35. The court concluded that through ch. 281, "the legislature has explicitly provided the DNR with the broad authority and a general duty, in part through its delegation of the State's public trust obligations, to manage, protect, and maintain waters of the state." ***Lake Beulah***, 335 Wis. 2d 47, ¶39. "Specifically, for all proposed high capacity wells, the legislature has expressly granted the DNR the authority and a general duty to review all permit applications and to decide whether to issue the permit, to issue the permit with conditions, or to deny the application." ***Id.*** The court found that the DNR has "the discretion to undertake the review it deems necessary for all proposed high capacity wells, including the authority and a general duty to consider the environmental impact of a proposed high capacity well on waters of the state." ***Id.*** The court found that there is nothing in either WIS. STAT. §§ 281.34 or 281.35 "that limits the DNR's authority to consider the environmental impacts of a proposed high capacity well, nor is there any language in subchapter II of ch. 281 that requires the DNR to issue a permit for a well if the statutory requirements are met and no formal review or findings are required." ***Lake Beulah***, 335 Wis. 2d 47, ¶41.

Lake Beulah holds that "[g]eneral standards are common in environmental statutes" and the fact that they are "broad standards does not make them non-existent ones." ***Id.***, ¶43. Act 21 was in effect when ***Lake Beulah*** was issued, and the court noted that all parties were of the opinion that Act 21 did not affect the court's analysis. The court concurred: "We agree with the parties that 2011 Wisconsin Act 21 does not affect our analysis in this case. Therefore, we do

not address this statutory change any further." ***Lake Beulah***, 335 Wis. 2d 47, ¶39 n.31.

CONCLUSION

As only the Wisconsin Supreme Court may amend, modify, or overrule a decision and as the questions presented have statewide concern and implication, we request that the Court accept certification in this case as well as our request for certification in case Nos. 2016AP1688/2502.

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § 809.81 for a document produced with a proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this memorandum is 2,816 words.

Dated this 19th day of June, 2019.

HUSCH BLACKWELL LLP
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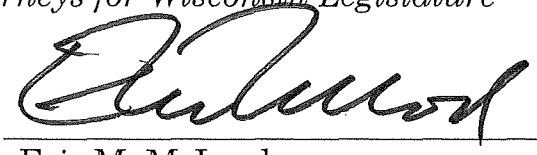
By: 

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