SUPREME COURT OF WISCONSIN

Clean Wisconsin, Inc., Lynda Cochart, Amy Cochart, Roger DeJardin, Sandra Winnemueller and Chad Cochart,

Petitioners-Respondents,

v.

Appeal No. 2016AP001688

Wisconsin Department of Natural Resources,

Respondent-Appellant,

Kinnard Farms, Inc.,

Intervenor-Co-Appellant.

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 John W. Markson, Presiding, Case No. 15CV2633

THE WISCONSIN LEGISLATURE'S SUPPLEMENTAL MEMORANDUM CONCERNING INTERVENTION

Eric M. McLeod
State Bar No. 1021730
HUSCH BLACKWELL LLP
P.O. Box 1379
33 East Main Street, Suite 300
Madison, WI 53701-1379
608-255-4440
608.258.7138 (fax)
eric.mcleod@huschblackwell.com

Lisa M. Lawless
State Bar No. 1021749
HUSCH BLACKWELL LLP
555 East Wells Street, Suite 1900
Milwaukee, Wisconsin 53202-3819
414.273.2100
414.223.5000 (fax)
lisa.lawless@huschblackwell.com

Attorneys for the Wisconsin Legislature

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.*

This case involves the interplay between Act 21 and DNR's issuance of a permit under the Wisconsin Pollution Discharge Elimination System to a large dairy farm. In issuing the permit, DNR did not impose off-site groundwater-monitoring requirements and animal-unit maximums on the permit, as it had no authority to do so. After the permit issued, the petitioners sought administrative review of the permit pursuant to chapter 227 of the Wisconsin Statutes.

Petitioners argued that the permit failed to require monitoring to evaluate the impacts to groundwater and

determine compliance with permit conditions, and failed to set a maximum number of animal units. DNR granted the petition and the matter was referred to the Division of Hearings and Appeals. A motion for summary judgment by Kinnard Farms ("Kinnard") was denied. The matter proceeded to an evidentiary hearing before an Administrative Law Judge, who determined that DNR must review and approve a plan for groundwater monitoring and also specify the maximum number of animal units.

The DNR Secretary initially denied review of the ALJ decision, and Kinnard filed a petition for judicial review with the circuit court. The circuit court, however, found that the ALJ's decision was not final and therefore not subject to judicial review. DNR sought advice from the Department of Justice ("DOJ") regarding its authority under the ALJ's decision. DOJ indicated that DNR did not have authority to impose an animal-unit limit or off-site groundwater monitoring in the permit based upon Act

21. The DNR Secretary then reconsidered her denial of review and reversed portions of the ALJ's decision.

Petitioners and Clean Wisconsin filed a petition for judicial review of the DNR's decision in the circuit court pursuant to chapter 227. The circuit court reversed that decision and remanded with instructions that DNR implement the animal-unit limits and the groundwater monitoring.

DNR appealed to the Court of Appeals and on January 16, 2019, the court of appeals certified the appeal to this Court. On April 9, this 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

[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."

> 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.)

Here, a party to an action has challenged the construction of a statute. Indeed, the Court of Appeals certification order explains this case requires a "determination of the scope and breadth of Act 21," which "will have implications far beyond" the issues in the case and "will touch every state agency within Wisconsin." *See* Certification by Wisconsin Court of Appeals, Appeal Nos. 2016AP1688/2016AP2502, 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

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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.

proceeding. It therefore does not govern the Wisconsin 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

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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).

803.09(2m) is applied on appeal via WIS. STAT. § 809.13, which 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.

HUSCH BLACKWELL LLP
Attorneys for the Wisconsin Legislature

By: 

Eric M. McLeod
State Bar No. 1021730
HUSCH BLACKWELL LLP
P.O. Box 1379
33 East Main Street, Suite 300
Madison, WI 53701-1379
608-255-4440
608.258.7138 (fax)
eric.mcleod@huschblackwell.com

Lisa M. Lawless
State Bar No. 1021749
HUSCH BLACKWELL LLP
555 East Wells Street, Suite 1900
Milwaukee, Wisconsin 53202-3819
414.273.2100
414.223.5000 (fax)
lisa.lawless@huschblackwell.com

EXHIBIT A

Appeal Nos. 2016AP1688
2016AP2502

Cir. Ct. No. 2015CV2633

WISCONSIN COURT OF APPEALS
DISTRICT II

NO. 2016AP1688

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

PETITIONERS-RESPONDENTS,

V.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-APPELLANT,

KINNARD FARMS, INC.,

INTERVENOR-CO-APPELLANT.

NO. 2016AP2502

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

PETITIONERS-RESPONDENTS,

V.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-APPELLANT,

KINNARD FARMS, INC.,

INTERVENOR.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

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

Pursuant to WIS. STAT. RULE 809.61, these appeals are certified to the Wisconsin Supreme Court for its review and determination.

ISSUES

We are certifying these cases as companions to our certification in case No. 2018AP59.[1] The court's decision in case No. 2018AP59, defining the impact of 2011 Wis. Act 21 (Act 21) on the regulatory permit approval process, answering the question of who is trustee of the state's waters, and determining whether ***Lake Beulah Management District v. DNR***, 2011 WI 54, ¶39, 335 Wis. 2d 47, 799 N.W.2d 73, is still controlling law in Wisconsin, will affect the issues in this action. ***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. As these cases also addresses environmental statutes, i.e., the DNR's regulatory permit approval process under the Wisconsin

[1] ***Clean Wisconsin, Inc. v. DNR***, No. 2018AP59, unpublished certification (WI App Jan. 16, 2019).

Pollution Discharge Elimination System (WPDES),[2] we believe the court's answers to the above questions serve as the foundation to addressing the issues in this action.

The State argues that Act 21 is a deliberate "far-reaching" decision on the part of the legislature to shift policy-making decisions away from state agencies and back to the legislature even though the "consequences" of this shift "will, in some cases, eliminate arguably laudable policy choices of an agency." The State submits that under Act 21 the DNR may not impose any conditions on a permit request that are not explicitly set forth by rule or statute, and, therefore, as pertinent to these cases, the DNR has no authority as part of its environmental review to require a large dairy farm to monitor "off-site groundwater" nor impose limits on the number of cows a dairy farm may have.

Clean Wisconsin, Inc. counters that no far-reaching changes have occurred as a result of Act 21 as ***Lake Beulah*** held that pursuant to WIS. STAT. ch. 281 and the public trust doctrine, the legislature "explicitly provided" the DNR with the "broad authority and a general duty ... to manage, protect, and maintain waters of the state." ***Lake Beulah***, 335 Wis. 2d 47, ¶39. Clean Wisconsin agrees, however, that if the court adopts any of the State's arguments, Act 21 would have effects "far beyond the current dispute."

[2] These appeals also involve two procedural issues that are not germane to the substantive issue of Act 21's impact upon the regulatory permit approval process in Wisconsin: whether the DNR could "reconsider" its decision to deny WIS. ADMIN. CODE § NR 2.20 (Oct. 2018) review and whether the circuit court properly exercised its discretion in awarding costs and fees.

We agree with the State and Clean Wisconsin that the court's determination regarding the scope and breadth of Act 21 will have implications far beyond the permitting process for high capacity wells and pollution discharge elimination systems and will touch every state agency within Wisconsin. While the State submits that ***Lake Beulah*** does not control, we cannot make that conclusion as ***Lake Beulah*** has not been overruled and we cannot dismiss any statement therein as "dictum." *See* ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682. We request that the Wisconsin Supreme Court accept certification so as to address the regulatory permit review process in Wisconsin in light of Act 21.

BACKGROUND

In these appeals, Kinnard Farms, Inc. sought approval from the DNR to expand its dairy farm operation by adding a second site and over 3000 dairy cows. Given the size of the operation, Kinnard was required by statute to submit a WPDES permit application.[3] WIS. STAT. §§ 283.31(4)(b), 283.37. Kinnard received approval and a WPDES permit from the DNR in August 2012. After the permit issued, the five named petitioners in sought administrative review through a petition for a contested case hearing. *See* WIS. STAT. § 283.63. The primary

[3] For a detailed discussion of the interaction between the Clean Water Act, 33 U.S.C. § 1251(a), and the WPDES permit process, see ***Andersen v. DNR***, 2011 WI 19, ¶¶33-40, 332 Wis. 2d 41, 796 N.W.2d 1.

Kinnard's proposed site is a "point source" under the WPDES permit process as it is a "concentrated animal feeding operation" (CAFO) pursuant to WIS. STAT. § 283.01(12)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. Wisconsin law defines a CAFO as "an animal feeding operation" with "1,000 animal units or more at any time" that "stores manure or process wastewater in a below or at grade level storage structure or land applies manure or process wastewater." WIS. ADMIN. CODE § NR 243.03(12).

claims in the petition were that the permit failed to "require monitoring to evaluate impacts to groundwater and determine compliance with permit conditions" and failed to set a "maximum number of animal units." The DNR granted the petition and referred the matter to the Division of Hearings and Appeals. *See* WIS. STAT. §§ 227.43(1)(b), 283.63. Kinnard moved for summary judgment arguing that the DNR lacked explicit authority to impose an animal-unit maximum, citing Act 21 (WIS. STAT. § 227.10(2m)). The Administrative Law Judge (ALJ) denied the motion, concluding that disputed issues of fact remained.

After a five-day evidentiary hearing, the ALJ issued its findings of fact and conclusions of law on October 29, 2014. The ALJ found from the facts that there was "a crisis with respect to groundwater quality in the area," resulting in "proliferation of contaminated wells" and "a massive regulatory failure to protect groundwater in the Town of Lincoln." Accordingly, the ALJ determined that "a ground water monitoring plan is essential given that the area is 'susceptible to groundwater contamination.'" The ALJ further opined that the "permit is unreasonable because it does not specify the number of animal units allowed at the facility." The ALJ determined that "it is essential that the [DNR] utilize its clear regulatory authority ... to ensure that Kinnard Farms meet its legal obligation under WIS. ADMIN. CODE § NR 243.14(2)(b)(3) not to contaminate well water with fecal bacteria from manure or process wastewater." The ALJ ordered that the permit be "modified to reflect a maximum number of animal units at the facility" and that the DNR must "review and approve a plan for groundwater monitoring for pollutants of concern at or near the site."

After the DNR Secretary denied review of the ALJ's decision under WIS. ADMIN. CODE § NR 2.20, Kinnard filed a petition for judicial review with the

circuit court. The circuit court determined that the ALJ's order was not final and, therefore, not subject to judicial review until the DNR imposed the conditions ordered by the ALJ. In response, the DNR began to implement the conditions but "[f]or reasons that remain obscure" also sought review from the Department of Justice (DOJ) regarding its authority to do so. The DOJ responded by letter that it believed the DNR did not have the authority to impose an animal-unit limit or off-site groundwater monitoring in the permit based on Act 21.[4] In response, the DNR Secretary reconsidered her decision denying review of the ALJ's decision and issued a decision granting the § NR 2.20 petition and reversed the portions of the ALJ's decision ordering the DNR to include groundwater monitoring and an animal-unit limit in the petition.

The five named petitioners and Clean Wisconsin sought review of the DNR's decision in the circuit court. The cases were consolidated, and the court entered an order reversing the DNR's decision and remanded the case with instructions that the DNR implement the ALJ's order as to groundwater monitoring and animal-unit limits. The circuit court determined that the DNR Secretary lacked authority to reconsider her WIS. ADMIN. CODE § NR 2.20 review denial nearly a year after it was issued. The circuit court further concluded, referencing ***Lake Beulah***, that the permit conditions were within the DNR's authority under Act 21 as there "is ample explicit authority in the statutes and rules that gives DNR the power—and the duty—to impose [the conditions] where it is deemed necessary to assure compliance with WPDES requirements." *See* WIS.

[4] Act 21 had been in effect for almost three years prior to the contested case hearing in this case, and there is no evidence in the record why the DNR did not address this issue previously.

STAT. § 283.31(3)-(5); WIS. ADMIN. CODE §§ NR 243.13, 243.14(1)(a)-(b), 243.15(3)(j)-(k). The DNR and Kinnard appealed.

After the circuit court's decision, petitioners moved for fees and costs under WIS. STAT. § 814.245. The circuit court granted the petitioners' motion, finding that the DNR "was not substantially justified in taking its position" in the case as it did not have "a reasonable basis in law and fact," but stayed the judgment pending the outcome of an appeal. *See* § 814.245(2)(e), (3). The DNR appealed the circuit court's decision to award fees and costs to the petitioners and moved this court to consolidate the two cases on appeal, which we granted.

DISCUSSION

As in our companion certification, the crux of the issue 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* ***Zarder***, 324 Wis. 2d 325, ¶58. 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. We will not further restate our discussion in case No. 2018AP59, but we adopt it for purposes of this certification.

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 Wisconsin Supreme Court accept certification in these cases as well as our request for certification in case No. 2018AP59.

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 2,898 words.

Dated this 19th day of June, 2019.

HUSCH BLACKWELL LLP
Attorneys for Wisconsin Legislature

By: 

Eric M. McLeod
State Bar No. 1021730
33 E. Main Street, Suite 300
P.O. Box 1379
Madison, Wisconsin 53701-1379
608.255.4440
608.258.7138 (fax)
eric.mcleod@huschblackwell.com

Lisa M. Lawless
State Bar No. 1021749
555 East Wells Street, Suite 1900
Milwaukee, Wisconsin 53202-3819
414.273.2100
414.223.5000 (fax)
lisa.lawless@huschblackwell.com