In the Wisconsin Court of Appeals

DISTRICT II

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

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
RESPONDENT-APPELLANT,

and

KINNARD FARMS, INC.,
INTERVENOR-CO-APPELLANT

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

RESPONSE BRIEF AND APPENDIX OF PETITIONERS

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ISSUES PRESENTED

1. Does the Department of Natural Resources (DNR) have authority to impose off-site groundwater monitoring and an animal unit limit in a Wisconsin Pollution Discharge Elimination System (WPDES) permit for a large concentrated animal feeding operation?

The circuit court and the administrative law judge answered yes.

2. Did DNR have authority to "reconsider" its decision to deny section NR2.20 review of an administrative law judge's decision nearly a year after denying such review?

The circuit court answered no.

3. Did the circuit court properly exercise its discretion to award costs and fees to Petitioners pursuant to the Wisconsin Equal Access to Justice Act?

The circuit court answered yes.

INTRODUCTION

This case began almost six years ago when Kewaunee County residents asked DNR to include reasonable limits and monitoring in a water discharge permit for a large concentrated animal feeding operation (CAFO), Kinnard Farms, Inc. After a lengthy hearing, Administrative Law Judge Jeffrey Boldt (ALJ Boldt) held that the only reasonable regulatory response to the drinking water contamination crisis in Kewaunee County was to require some minimal monitoring of Kinnard's impact on groundwater quality.

DNR chose not to appeal and denied Kinnard's request for DNR Secretary review of the ALJ's decision pursuant to NR 2.20. Kinnard petitioned for judicial review, and in that case, DNR defended its authority to impose the groundwater monitoring and animal unit limit ordered by ALJ Boldt.

Nearly a year later, DNR abruptly reversed course and abandoned its legal position. The DNR Secretary "reconsidered" her decision to deny section NR 2.20 review, ignoring the time limits that had long expired, and reversed the ALJ's decision to order off-site groundwater monitoring and an animal unit limit.

DNR would like to make this case about its interpretation of 2011 Wisconsin Act 21 instead of DNR's explicit authority and duty to address a known source of groundwater pollution. If adopted,

DNR's myopic view of the impacts of Act 21 on its programs will have effects far beyond the current dispute and create a regulatory framework that is impossible to implement.

DNR's arguments fail for three reasons. First, the legislature explicitly granted DNR the authority and duty to impose limits and monitoring necessary to develop enforceable permits that comply with the Clean Water Act. Second, DNR does not have unlimited discretion to reverse its decisions when statutory and regulatory time limits have passed and when there is no change in the facts or law to warrant such reversal. Third, the circuit court acted within its authority to award fees and costs to Petitioners given DNR's unreasonable position in this case.

ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case because the issues presented are significant and involve a technical and complex regulatory program. Further, DNR has changed its position throughout this case and may do so in its reply brief.

The Court should publish its decision to provide guidance to the agency, the public, and the regulated community. Publication of the Court's position would provide clarity on the scope of DNR's authority.

STATEMENT OF THE CASE

Several Kewaunee County residents who live near Kinnard's operation challenged DNR's decision to reissue a water discharge permit to Kinnard in 2012. Kinnard operates a large concentrated animal feeding operation in the Town of Lincoln, Kewaunee County. The Kinnard facility currently has 10,060 animal units[1] and plans to expand to 12,860 animal units by 2022. R. App. at 1-2. The Kinnard facility and land spreading fields are located in an area that is very susceptible to groundwater contamination. The groundwater beneath that area is in a fractured carbonate bedrock aquifer—a type of karst geology characterized by shallow soils over fractured bedrock that allows contaminants at the surface to travel rapidly into and through groundwater. Most of the Petitioners have experienced contamination of their drinking water wells. R. 34:670-71.[2]

This case began with a petition for contested case hearing of DNR's decision to reissue a WPDES permit to Kinnard on August 16, 2012. Petitioners objected to the permit because it did not adequately protect surface water and their drinking water.

[1] Animal unit means "a unit of measure used to determine the total number of single animal types or combination of animal types . . . that are at an animal feeding operation." Wis. Admin. Code § NR 243.03(5). For example, 715 milking and dry cows is equal to 1,000 animal units. Wis. Admin. Code § NR 243.05, table 2A.

[2] References to R. 34 are to the administrative record as paginated in the files transmitted to this Court on CD.

Specifically, Petitioners argued that the Kinnard permit was unreasonable because it did not require groundwater monitoring and did not include a limit on the number of animal units at the facility. R. 43:663-64; A. App. at 2-3.

Contested case hearing

DNR granted the petition for contested case hearing and forwarded the case to the Division of Hearings and Appeals to be decided by Administrative Law Judge (ALJ) Jeffrey D. Boldt. R. 43:33, 39. ALJ Boldt presided over a five-day evidentiary hearing that included testimony by experts as well as members of the public who testified "credibly and forcefully about the hardship and financial ruin that this local groundwater contamination crisis has had on their businesses, homes and daily life." R. 34:704-05.

Following the hearing, ALJ Boldt concluded that "[t]he proliferation of contaminated wells represents a massive regulatory failure to protect groundwater in the Town of Lincoln." R. 34:674. ALJ Boldt directed DNR "to utilize its clear regulatory authority to require groundwater monitoring to enhance its ability to prevent further groundwater contamination." R. 34:674. ALJ Boldt further ordered DNR to include an animal unit limit in the permit because "[e]stablishing a cap on the maximum number of animal units will

provide clarity and transparency for all sides as to the limits that are necessary to protect groundwater and surface waters." R. 34:676.

Kinnard's appeal and petition for NR 2.20 review

Kinnard petitioned for DNR Secretary review of the contested case hearing decision pursuant to section NR 2.20. R. 34:681-711. DNR denied Kinnard's NR 2.20 petition for review within the time required. R. 34:718-20. DNR did not petition for judicial review of ALJ Boldt's decision.

Kinnard petitioned for judicial review of the contested case decision, which was heard in the Kewaunee County Circuit Court. R. 34:6419-47. In that case, DNR defended ALJ Boldt's decision and argued that DNR has authority to impose off-site groundwater monitoring and an animal unit limit in Kinnard's WPDES permit. R. 34:6685-93. DNR also asserted that DNR adopted the ALJ decision as DNR's decision when it did not petition for judicial review or grant NR 2.20 review. R. 34:6577. The circuit court determined that Kinnard's petition for judicial review was premature and could not be heard until DNR imposed the conditions ordered by ALJ Boldt. R. 34:6918-23, 6966-68.

DNR's implementation and review of ALJ decision

DNR then began to implement the conditions in ALJ Boldt's decision. On March 19, 2015, DNR sent a notice to Kinnard

requesting a groundwater monitoring plan for landspreading areas or an explanation to justify the absence of off-site groundwater monitoring. R. 40:12-16. On June 3, 2015, DNR Attorney Judy Mills Ohm sent a letter to Kinnard's attorney requesting information necessary to amend the Kinnard Permit consistent with ALJ Boldt's decision. R. 40:17. DNR Attorney Ohm stated, "[a]s required in the DNR Order dated October 29, 2014, DNR will amend the Permit to establish a maximum number of animal units at the facility and will amend the Permit to require a groundwater monitoring plan." R. 40:17.

For reasons that remain unclear, on August 17, 2015, DNR requested a legal opinion from Deputy Attorney General Andrew Cook regarding the impact of Act 21 on DNR's authority to implement these conditions.[3] R. 34:729-30. The next day, Assistant Attorney General Daniel P. Lennington responded with DOJ's opinion that DNR does not have authority to impose an animal unit limit and off-site groundwater monitoring in the Kinnard WPDES permit. R. 34:731-33.

[3] The Dane County Circuit Court later commented on DNR's inability to explain this change in position, "For reasons that remain obscure, DNR requested the Attorney General reexamine the application of a law that the Department of Justice had already argued to a court in the course of this litigation was entirely consistent with the Permit Conditions." R. 42:4.

On September 11, 2015, the DNR Secretary reconsidered her November 25, 2014, decision to deny Kinnard's NR 2.20 petition based on this letter from AAG Lennington. R. 34:725-28. Without prior notice to Petitioners or the opportunity for briefing or argument, the DNR Secretary issued a decision granting Kinnard's NR 2.20 petition and reversing the part of ALJ Boldt's decision that ordered DNR to include off-site groundwater monitoring and an animal unit limit in the Kinnard permit. R. 34:725-28.

Dane County Circuit Court review and decision

Petitioners and Clean Wisconsin (hereinafter collectively, "Petitioners"), sought judicial review of DNR's decision to reconsider and reverse part of ALJ Boldt's decision. R. 1, 17:1-2. The parties' appeals were consolidated in Dane County Circuit Court before the Honorable John W. Markson. R. 33. On July 14, 2016, the circuit court reversed the DNR's September 11, 2015, decision and remanded the case to DNR with directions to implement the ALJ decision requiring off-site groundwater monitoring and an animal unit maximum in the Kinnard WPDES permit. R. 42:26.

The circuit court offered two separate and independent justifications for its reversal of DNR's decision. First, the circuit court held that the DNR Secretary lacked authority to reconsider its decision to deny NR 2.20 review nearly a year after declining such

review (hereinafter, "the procedural issue"). R. 42:7-17. Second, the circuit court determined that DNR erred as a matter of law in its decision because DNR has authority to impose an animal unit limit and off-site groundwater monitoring in the Kinnard WPDES permit (hereinafter, "the substantive issue"). R. 42:17-25.

Regarding the procedural issue, the circuit court concluded that DNR adopted the ALJ decision as its own when it denied NR 2.20 review and did not appeal the ALJ decision. R. 42:9. The court noted that this is consistent with DNR's own argument in response to Kinnard's earlier appeal in this case. R. 42:11. The circuit court did not rely on judicial estoppel or judicial admission, but found DNR's inconsistent position unpersuasive.

> The commonsense fact of the matter is that a party should not be able to come to court and assert a different proposition than one it has asserted before in the same matter absent any good explanation. One would think this should apply with particular force to the Department of Justice, upon whom we should be able to rely for consistency and fair play. Here, nothing of consequence changed between the time DNR told the Kewaunee court the ALJ's decision was in fact its own, and our case, in which it says just the opposite. The ALJ's decision became DNR's. That was the simple truth of the matter then, and it remains the simple truth of the matter now.

R. 42:11-12. The circuit court further concluded that DNR lacked authority to reconsider its decision to deny NR 2.20 review. The court noted that neither DOJ nor DNR cited new facts or law to

support their new interpretation of DNR's authority. R. 42:13. The court distinguished cases that found an agency had authority to reconsider a decision. The court noted that, in those cases, the statutes at issue were silent on reconsideration whereas Chapter 227 and NR 2 provide clear and explicit procedures for appeal or reconsideration, which DNR did not follow in this case. R. 42:14. DNR cannot bypass these time limits, and does not have a general authority to reconsider decisions at any time. R. 42:15. DNR also lacked a good reason to reconsider such as newly discovered evidence or a manifest error of law. R. 42:16.

Regarding the substantive issue, the circuit court interpreted DNR's authority under Chapter 283 and NR 243 under the limitations imposed by Act 21 and concluded that DNR has authority to impose the challenged conditions. The court concluded that DNR has an authority—and duty in this case—to impose an animal unit limit because (1) it is a limit necessary to "assure compliance" with groundwater protection standards and effluent limitations, and (2) it is a permit condition on the "maximum levels of discharges." R. 42:21-23; *see* Wis. Stat. § 281.31(3), (4). The court further concluded that DNR has authority to require off-site groundwater monitoring because it is a permit condition necessary to assure compliance with effluent limitations, such as the prohibitions

in NR 243. R. 42:23-24; *see* Wis. Stat. § 283.31(3), (4). The court explained,

> Furthermore, it is difficult to contemplate a permit condition that would more directly mean "assuring compliance" with a statute or rule than monitoring for compliance. In fact, if monitoring was not sufficiently explicit in "assuring compliance" following the enactment of Act 21, then Act 21 would render the words meaningless.

R. 42:24. DNR and Kinnard appealed the circuit court's decision. R. 52, 53.

WEAJA costs and fees

Following the circuit court decision in their favor, Petitioners timely moved for an award of fees and costs pursuant to the Wisconsin Equal Access to Justice Act (WEAJA), Wis. Stat. § 814.245. R. 45, 51. DNR requested and was granted additional time to respond to Petitioners' WEAJA motion. R. 54. In an oral ruling on September 30, 2016, the circuit court concluded that Petitioners were entitled to fees and other costs in this case because DNR's reconsideration and reversal of the ALJ decision lacked "substantial justification." R. 71:8-12. The circuit court incorporated the reasoning in its decision on the merits and further explained why this case warrants an award of fees and costs under WEAJA. R. 71:8-12. Regarding the procedural issue, the circuit court explained,

> So—ultimately—I think it's quite clear that we cannot operate in a system that would recognize the kind of uncertainty that was created by the department's wholesale reconsideration and reversal of its decision under these circumstances. And—again—I discussed that in some detail in my decision. I'm not going to repeat that here.

R. 71:10. Regarding the substantive issue, the circuit court explained,

> So I think it's really quite an extraordinary situation. Given the unanimity of opinion among all concerned here, the ALJ, the DNR, the DOJ, it's extraordinary that—that this position is then reversed and reversed for no reason that was articulated in any manner that I found satisfactory or really attempted to explain the basis for—for the dramatic reversal of its position. And—again—I incorporate my observations about that from the decision.

R. 71:11-12. The circuit court entered a final judgment on November 23, 2016, and also stayed the judgment so that DNR would not have to submit payment until its appeals were resolved. R. 68, 72. The court also required DNR to pay interest on the fee and cost award. R. 68, 72. DNR appealed the circuit court's decision to award fees and costs to Petitioners. R. 69. DNR moved this Court to consolidate the appeal on fees and costs with the appeals of the circuit court's decision on the merits, which this Court granted. *See* Order Consolidating Cases, *Clean Wis. v. Dep't of Natural Res.*, Case Nos. 16AP1688 & 16AP2502 (Wis. Ct. App. Jan. 24, 2017).

DNR reissuance of Kinnard WPDES permit in 2018

While this appeal was pending, DNR reissued a WPDES permit to Kinnard, but did not include an animal unit limit in the permit or require off-site groundwater monitoring. A. App. at 131-66. Five Kewaunee County residents petitioned DNR for a contested case hearing on the Kinnard WPDES permit reissued in 2018. The petition asserts that DNR did not follow the law when it reissued the Kinnard WPDES permit because the Dane County Circuit Court ordered DNR to include those conditions in the Kinnard WPDES permit, and DNR has not requested nor received a stay of that order. A. App. at 118-30

STANDARD OF REVIEW

As to the first and second issues, this Court should review the agency decision de novo with no deference to the agency's interpretation of law because these issues involve the scope of the agency's authority. *Amsoil Inc. v. Labor Ind. Rev. Comm'n*, 173 Wis. 2d 154, 165, 496 N.W.2d 150 (Ct. App. 1992). These issues also involve statutory and regulatory interpretation, which appellate courts review de novo. *All Star Rent a Car v. Dep't of Trans.*, 2006 WI 85, ¶ 13, 292 Wis. 2d 615, 716 N.W.2d 506. In judicial review of an agency decision, appellate courts review the decision of the agency, not the circuit court. *Hilton ex rel. Pages Homeowners'*

Ass'n v. Dep't of Natural Res., 2006 WI 84, ¶ 15, 293 Wis. 2d 1, 717 N.W.2d 166.

"Statutory interpretation begins with the language of the statute." *Wis. Indus. Energy Group, Inc. v. Pub. Serv. Comm'n*, 2012 WI 89, ¶ 14, 342 Wis. 2d 576, 819 N.W.2d 240. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Considering statutory purpose is part of the plain meaning analysis, and "courts will favor an interpretation of statutory language that fulfills the statute's purpose." *Wis. Indus. Energy Group*, 342 Wis. 2d 576, ¶ 15. "When an administrative agency promulgates regulations pursuant to a power delegated by the legislature, we construe those regulations together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason." *Wis. Ass'n of State Prosecutors v. Wisconsin Employment Relations Comm'n*, 2018 WI 17, ¶ 44, 380 Wis. 2d 1, 907 N.W.2d 425 (quoting *DOR v. Menasha Corp.*, 2008 WI 88, ¶ 45, 311 Wis. 2d 579, 754 N.W.2d 95).

As to the third issue, an appellate court reviews "the circuit court's determination on whether the state's position was

substantially justified under the erroneous exercise of discretion standard." *Stern by Mohr v. Dep't of Health and Family Servs.*, 212 Wis. 2d 393, 397-98, 569 N.W.2d 79 (Ct. App. 1997). A reviewing court will uphold the lower court's discretionary determination if the court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *LeMere v. LeMere*, 2003 WI 67, ¶ 13, 262 Wis. 2d 426, 436, 663 N.W.2d 789 (quoting *Long v. Long*, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995)).

ARGUMENT

I. DNR has explicit authority to impose off-site groundwater monitoring and an animal unit limit in the Kinnard permit.

We agree with DNR that this Court should address and decide whether DNR has authority to impose these conditions in a WPDES permit for a CAFO. Even under Act 21's limits on agency authority, the WPDES program grants DNR explicit authority to impose these conditions in the Kinnard permit. DNR initially agreed with this interpretation before reversing its position and arguing against its own authority. R. 34:6682-96; 37:21-22. DNR now tries to make this case about Act 21 and its "far-reaching" "consequences." DNR Br. at 2. But the fact is that the parties' dispute is about the WPDES program and whether it grants explicit authority to DNR to impose

these conditions. While we disagree with DNR's interpretation of Act 21, the central dispute is about the extent of explicit authority under the WPDES program.

A. WPDES Program Framework

Wisconsin law prohibits the discharge of any pollutant to waters of the state[4] unless DNR authorizes the discharge in a permit. Wis. Stat. § 283.31(1). The minimum requirements for this permitting program—the WPDES program—are set forth in Chapter 283 of the Wisconsin Statutes. DNR may issue water discharge permits only if DNR includes appropriate effluent limits and any "additional conditions" necessary to "assure compliance" with effluent limits[5] and groundwater protection standards.[6] Wis. Stat. § 283.31(3), (4); Wis. Admin. Code § NR 243.13(1). WPDES permits must also include a limit on the maximum level of discharges authorized under that permit. Wis. Stat. § 283.31(5).

CAFOs are subject to these requirements because they are "point sources" as defined in Wis. Stat. § 283.01(12). A CAFO's agricultural waste, including manure and water that comes into

[4] "Waters of the state" includes both surface water and groundwater. Wis. Stat. § 283.01(20).
[5] "Effluent limitations" include "any restriction established by the department . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into waters of this state." Wis. Stat. § 283.01(6); Wis. Admin. Code § NR 205.03(15).
[6] DNR promulgated groundwater protection standards in Chapter NR 140 of the Wisconsin Administrative Code, as authorized by Chapter 160, Wis. Stats.

contact with animal feed or manure, is defined as a "pollutant" and subject to regulation. Wis. Stat. § 283.01(13). The WPDES program regulates all CAFO pollution discharges, including discharges from the production area—on site—and the fields where manure is land applied—off site. *Maple Leaf Farms v. Dep't of Natural Res.*, 2001 WI App 170, ¶ 26, 247 Wis. 2d 96, 633 N.W.2d 720; *see also* Wis. Admin. Code § NR 243.14 (requiring CAFOs to develop Nutrient Management Plans (NMPs) and comply with requirements for land application of manure).

CAFOs and other industries must comply with minimum effluent limitations and prohibitions specific to that industry. Depending on the nature of an industry's discharges, effluent limits may be expressed as numeric limits—such as a specific concentration of a pollutant—or as non-numeric limits, such as best management practices. *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 496-97, 502 (2d Cir. 2005) (describing examples of best management practices at CAFOs such as "requirements designed to minimize the possibility of overflows" from manure storage facilities, and the requirement to "develop and implement a nutrient management plan").

Chapter NR 243 contains the WPDES program regulations for CAFOs, which include the following effluent limitations relevant

to this appeal. First, any permitted CAFO discharge must comply with surface water and groundwater standards. Wis. Admin. Code § NR 243.13(5)(a). Second, the so-called "no discharge" effluent limitation prohibits any on-site discharge from a CAFO except during certain storm events and as long has the CAFO has at least 180 days of properly designed manure storage. Wis. Admin. Code §§ NR 243.13(1); NR 243.15(3)(j)-(k). Third, CAFOs must have enough manure storage to contain at least 180 days of the manure and process wastewater generated at the CAFO. Wis. Admin. Code § NR 243.15(3)(j)-(k). Fourth, a CAFO may not contaminate a well with fecal matter or bacteria. Wis. Admin. Code § NR 243.14(2)(b)3. These are all examples of effluent limitations because they restrict the quantity, rate, or concentration of pollutants that are or may be discharged from a CAFO to groundwater and surface waters. *See* Wis. Stat. § 283.01(6) (defining "effluent limitation"); *see also supra* note 2.

The number of animals that will be housed at a CAFO is a critical component of DNR's review and approval of CAFO permits. For example, it is how DNR determines whether a CAFO has at least 180 days of manure storage. Wis. Admin. Code §§ NR 243.15(3)(j)-(k) (requiring CAFOs to have "a minimum of 180 days of storage,"

which is "calculated based on the maximum animals present at an operation").

B. DNR has explicit authority to require off-site groundwater monitoring in the Kinnard permit.

Several statutes and rules provide DNR with explicit authority to require off-site groundwater monitoring in this case. First, such monitoring is authorized when necessary to "assure compliance" with effluent limitations applicable to CAFOs. Second, DNR has broad authority to take "any actions necessary" to protect public health and groundwater quality. Third, DNR's rules authorize and require DNR to implement appropriate monitoring in WPDES permits.

The first basis for DNR's authority and duty is that it is necessary to "assure compliance" with effluent limitations and groundwater protection standards. Wis. Stat. § 283.31(3), (4); *see also* Wis. Admin. Code § NR 243.13(1). Subsection (3) provides that WPDES permits must require compliance with "effluent limitations." Wis. Stat. § 283.31(3). Subsection (4) explicitly authorizes and requires DNR to "prescribe conditions for permits . . .

to assure compliance with" subsection (3) requirements.[7] Wis. Stat. § 283.31(4).

Thus, this statute provides explicit authority for DNR to impose monitoring—as an "additional condition[]"—if it is necessary to assure compliance with effluent limits or groundwater protection standards. *Id*.

In this case, the ALJ found that off-site groundwater monitoring was necessary to ensure that CAFO discharges comply with groundwater protection standards and do not pollute wells. R. 34:671, 677. Specifically the ALJ concluded that DNR must require such groundwater monitoring to assure compliance with effluent limitations such as the prohibition against causing fecal contamination of a well, § NR 243.14(2)(b)(3),[8] and the requirement that CAFO discharges comply with groundwater protection standards, § NR 243.13(5).[9] R. 34:677

As explained above, *supra* at 18, the prohibition against fecal contamination of a well is an effluent limitation because it restricts

[7] DNR asserts that off-site groundwater monitoring is neither an effluent limit nor a groundwater protection standard. Petitioners agree. Rather, it is a permit condition necessary to assure compliance with these requirements.

[8] The ALJ found, "[G]iven the proliferation of contaminated wells at or near the project site, it is essential that the Department utilize its clear regulatory authority as set forth below to ensure that Kinnard Farms meet its legal obligation under Wis. Admin. Code NR 243.14(2)(b)(3)." R. 34:671, 677.

[9] The ALJ found, "While the Department has not previously required groundwater monitoring, it has clear regulatory authority to do so in the context of a CAFO WPDES permit. See Wis. Stat. § 283.31(3), (4); *see also* Wis. Admin. Code § NR 243.13(1), (5), 243.15(3)(c)2., (7)." R. 34:674-75.

to zero the amount of manure or fecal matter that a CAFO may discharge to groundwater. Off-site groundwater monitoring is an "additional condition[]" necessary to assure compliance with that limitation because the area where Kinnard land applies manure is very susceptible to groundwater contamination,[10] many area wells are already contaminated with e. coli bacteria indicative of fecal contamination, and there are many other CAFOs in Kewaunee County.[11]

The second statutory and regulatory basis for DNR's authority to impose this condition is in the groundwater protection statutes and rules. In Chapter 160, Wis. Stats., the legislature delegated to DNR broad authority to establish, monitor, and enforce health-based, numeric groundwater quality standards, which DNR promulgated in Chapter NR 140, Wis. Admin. Code. Chapter NR 140 applies to "all facilities, practices and activities which may affect groundwater quality," including those regulated under ch. 283. Wis. Admin. Code § NR 140.03. Pursuant to those rules, DNR "may take *any actions* within the context of regulatory programs established in statutes or rules outside of this chapter, if those actions

[10] Dr. Maureen Muldoon "testified persuasively that the area around Kinnard Farms is very vulnerable to groundwater contamination." R. 34:672.
[11] "[T]he level of groundwater contamination including E Coli bacteria in the area at or near the project site is also very unusual, as is the proliferation of CAFOs in Kewaunee County." R. 34:670.

are necessary to protect public health and welfare." Wis. Admin. Code § NR 140.02(4). These rules provide an explicit and broad grant of authority to DNR to issue conditions or monitoring where necessary to protect groundwater and public health.

The third source of regulatory authority is in the WPDES program regulations, chapters NR 205 and NR 243. Section NR 205.066(1) requires DNR to "determine on a case-by-case basis the monitoring frequency to be required for each effluent limitation in a [WPDES] permit." DNR's assertion that no effluent limitations apply to off-site land application areas is unsupported. DNR Br. at 30. NMPs and the restrictions included in those plans constitute "effluent limitations" because they are restrictions on the amount of pollution that may be discharged from land application areas of a CAFO to surface water and groundwater. *See* Wis. Stat. § 283.01(6); *see also, supra* at 18. Federal courts interpreting the parallel definition of "effluent limitation" in the federal Clean Water Act definitively concluded that the NMP and its terms constitute effluent limitations. *Waterkeeper*, 399 F.3d at 501.

Finally, Chapter 243—which provides the WPDES regulations specific to the CAFO industry—explicitly incorporates DNR's authority and obligation "to include conditions . . . that are necessary to achieve compliance with surface water and

groundwater quality standards." Wis. Admin. Code § NR 243.13(1). It further provides DNR with the authority to "require the permittee to implement practices in addition to or that are more stringent than the requirements specified in [section NR 243.14] when necessary to prevent exceedances of groundwater quality standard" considering the "[p]otential impact to groundwater in areas with direct conduits to groundwater [and] shallow soils over bedrock." Wis. Admin. Code § 243.14(10)(g).

DNR makes several arguments to undercut this clear statutory and regulatory authority based on Act 21, all of which are either misleading or incorrect. *See infra* section I.D. DNR also asserts that *Maple Leaf* holds that Chapter 283 does not explicitly authorize the regulation of land application areas at CAFOs. The *Maple Leaf* Court did, in fact, conclude that Chapter 283 gave DNR authority to regulate land application areas. Since *Maple Leaf*, DNR promulgated Chapter 243, which regulates and provides effluent limitations for discharges from CAFO land application areas. *See e.g.*, Wis. Admin. Code § NR 243.14 (providing requirements for land application areas). The *Maple Leaf* case was decided before Act 21 was enacted, and we cannot apply the new law to the language used in a case that predates it.

C. DNR has explicit authority to impose an animal unit limit in the Kinnard permit.

DNR has authority to include an animal unit limit in a CAFO WPDES permit if such a condition is necessary to assure compliance with an effluent limitation, or to ensure that the permit sets a maximum level of discharge. *See* Wis. Stat. § 283.31(3)-(5).

In this case, ALJ Boldt determined that an animal unit limit was necessary to assure compliance with the 180-day storage effluent limitation in NR 243.15(3)(k).[12] R. 34:676. The 180-day storage requirement is related to the "no discharge" limitation, which authorizes discharges from manure storage facilities during certain rain events. Wis. Admin. Code § NR 243.13. The 180-day storage requirement is an effluent limitation because it restricts the amount of manure and other agricultural waste that a CAFO may discharge during these rain events. *See* Wis. Admin. Code § NR 243.13(2), 243.15(3)(k); *see also supra* at 18.

The ALJ concluded that an animal unit was necessary to assure compliance with the 180-day storage effluent limitation based, in part, on Kinnard's previous history of noncompliance with permit conditions related to this storage requirement. R. 34:673. The

[12] DNR admitted during oral arguments before the Dane County Circuit Court that the 180-day storage requirement was one of the effluent limitations applicable to CAFOs. R. 57:18 ("But there are a number of effluent limitations, and different things that are covered in a permit, and a 180 day storage requirement is one.").

ALJ concluded that an animal unit limit provides a practical means of assuring compliance with the 180-day storage limit. R. 34:676.

DNR also has authority to include an animal unit limit in a WPDES permit because it provides the maximum level of discharges authorized under the permit. The Legislature explicitly required that all WPDES permits "issued by the department . . . specify maximum levels of discharge." Wis. Stat. § 283.31(5). Logic dictates that limiting the number of animals at a CAFO is a practical way to quantify and limit the amount of manure and agricultural waste produced and discharged from that CAFO. The ALJ found that the number of animals correlates to the amount of manure and process wastewater produced at a CAFO. R. 34:673 (finding that "both generation and the discharge of manure is directly related to the number of animal units on site"). The ALJ also concluded that a limit on the number of animals is an effective, transparent, and enforceable method to regulate the amount of waste that a CAFO will generate and discharge. R. 34:676.

DNR argues that an animal unit maximum is not a maximum level of discharges based on a contorted argument regarding whether animals are pollutants. DNR Br. at 32-33. As explained in the ALJ and circuit court decisions, a limit on animal units is about the

manure and other waste that they produce—not the animals themselves. R. 34:673, 42:21-22.

For the reasons explained below, Act 21 did not modify or remove the explicit statutory and regulatory authority for these permit conditions as described above.

D. Act 21 did not withdraw or modify laws that provide explicit statutory and regulatory authority to impose the challenged conditions.

2011 Wisconsin Act 21 was enacted on May 23, 2011, and in about 2015 the Department of Justice adopted the position that Act 21 dramatically limited agency authority. *See e.g.*, R. 34:731-33; 1 Op. Wis. Att'y Gen. 16 (May 10, 2016). DNR would like to make this case about Act 21. But DNR's argument is untethered from the statutory language and the principles of statutory interpretation. More importantly, this case is about DNR's authority under the WPDES program and DNR's own rules. Further, DNR mischaracterizes Act 21 and misleads this Court to accomplish a restrictive interpretation of its own authority.

Act 21's changes to administrative law are more limited than DNR will admit. Act 21 limits agency regulatory authority by prohibiting an agency from enforcing or implementing a requirement or permit condition unless it is explicitly required or explicitly permitted by statute or rule. Stated otherwise, this provision requires

DNR to have explicit statutory or regulatory authority to impose a permit condition or enforce a requirement. Act 21 further limits agency rulemaking authority by providing that "statements of legislative intent, purpose, findings, or policy," and "provisions describing the agency's general powers or duties" do not confer rulemaking authority beyond that explicitly provided elsewhere. In other words, DNR cannot use statutory statements of policy or purpose as the sole basis of authority to make rules, but this has no impact whatsoever on DNR's authority to impose conditions in a permit.

While Act 21 imposes additional limits on agency permitting and rulemaking authority, it is not the "seismic" shift that DNR would like this Court to believe it is.[13] DNR asserts that Act 21 modified decades of precedent holding that agencies have implied authority. DNR Br. at 23, 25. The truth is that Act 21 did not go so far. This is evident from the text of Act 21 and judicial decisions

[13] The AG opinion cited by DNR is unpersuasive for several reasons. *See* DNR Br. at 25. First, it addressed how Act 21 modified DNR's rulemaking authority, not how it changed DNR's permitting or regulatory authority. Further, the analysis in the AG opinion is not based on statutory text or legislative history. Instead, the AG opinion relies on a press release by Governor Walker, which was issued before the legislature passed this law and which is not consistent with the text of the enacted legislation. 4 Op. Wis. Att'y Gen. 17 at 2 (Dec. 8, 2017).

since, which continue to recognize that agencies have implied powers.[14]

More importantly to the instant case, DNR incorrectly asserts that Act 21 prohibits it from using a broad delegation of statutory authority to impose conditions in permits on a case-by-case basis. DNR Br. at 24-25, 29, 32. DNR asserts that, after Act 21, DNR must promulgate rules to implement all broad grants of statutory authority (such as that in section 283.31(3), (4)) to specify how it will be applied in individual cases. DNR Br. at 24-25, 29. Nothing in Act 21 rescinds a legislative grant of general authority or requires agencies to promulgate rules in order to exercise broad grants of authority. As the Wisconsin Supreme Court recently noted, when interpreting legislation, "[n]othing is to be added to what the text states or reasonably implies." *Wis. Ass'n of State Prosecutors*, 380 Wis. 2d 1, ¶ 45 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 193-94 (2012)). Accordingly, DNR's argument lacks merit because the text of Act 21 does not implicitly

[14] *See, e.g.*, *Lake Beulah Mgmt. Dist. v. Dep't of Natural Res.*, 2011 WI 54, ¶ 39 n.31, 335 Wis. 2d 47, 799 N.W.2d 73. *AllEnergy Corporation v. Trempealeau Cnty. Env't & Land Use Comm'n*, 2017 WI 52, ¶ 37, 375 Wis. 2d 329, 895 N.W.2d 368; *Wis. Ass'n of State Prosecutors v. Wis. Empl. Rel. Comm'n*, 2018 WI 17, ¶¶ 37-38, 380 Wis. 2d 1, 907 N.W.2d 425 (recognizing that agencies have "those powers which are expressly conferred or which are necessarily implied" by statute).

revoke the explicit and broad authority cited by Petitioners, the ALJ, and the circuit court.

The Wisconsin Supreme Court confirmed as much in a post-Act 21 decision interpreting a broad grant of authority to DNR in a different regulatory program. In *Lake Beulah Management District*, the Court concluded that legislature "explicitly provided" DNR with the "broad authority and a general duty . . . to manage, protect, and maintain waters of the state" based on the broad authority conferred by Chapter 281 and the public trust doctrine. *Lake Beulah Mgmt. Dist. v. Dep't of Natural Res.*, 2011 WI 54, ¶ 39, 335 Wis. 2d 47, 799 N.W.2d 73. In that case, the amici industry trade associations argued that Act 21 limited DNR's broad grant of authority under Chapter 281. *Id.*, ¶ 39 n.31. DNR did not agree with the industry trade associations' interpretation of Act 21 in the *Lake Beulah* case. *Id.* The Court concluded that Act 21 did not affect its analysis or conclusion that the legislature "explicitly provided" DNR with the broad authority and general duty to consider impacts to surface waters when making high capacity well permitting decisions. *Id.* Similarly, in this case, DNR has explicit authority to impose the challenged conditions, so there is no conflict with Act 21.

DNR's approach to Act 21 in this instance creates significant and widespread problems for state administrative agencies. It leaves

uncertainty for agencies, the regulated community, and interested parties about whether regulatory language providing broad authority and agency discretion has any meaning. *See e.g.*, Wis. Admin. Code § NR 243.13(1), 243.14(10), 243.19(1). If Act 21 implicitly revoked such agency rules, or rendered entire statutory provisions inert, then it will generate conflict with the federal government because changes to some of these regulatory programs, including the WPDES program, must meet minimum federal requirements and be approved by EPA. Wis. Stat. § 283.11(2).

Finally, DNR's argument in this case suggests that it would require all permit conditions be listed verbatim in statutes or rules. The reality is that the regulatory framework for this and other complex environmental laws explicitly leaves certain matters to agency discretion. DNR's interpretation would lead to an inflexible and cumbersome regulatory program that fails to comply with statutory mandates, protect the environment, or serve the needs of permittees. *Watton v. Hegerty*, 2008 WI 74, ¶ 14, 311 Wis. 2d 52, 751 N.W.2d 369 (providing that courts should interpret statutes to avoid absurd or unreasonable results).

II. DNR does not have authority to reconsider its decisions outside of the statutory and regulatory deadlines.

A. This issue is not moot.

"An issue is moot when its resolution will have no practical effect on the underlying controversy… In other words, a moot question is one which circumstances have rendered purely academic." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425. DNR's authority to reconsider its decisions is not a purely academic question. It invokes important questions of finality, due process, and fairness that will likely affect permittees and concerned citizens in the future.

Additionally, the resolution of this issue determines whether Petitioners are entitled to the fee and cost award by the circuit court. No matter how this Court resolves the substantive issue of DNR's authority to impose the challenged conditions, it should address this issue to resolve whether Petitioners are entitled to WEAJA fees as prevailing parties on this question.

B. Even if this Court determines that this issue is moot, it falls under the exceptions to the mootness doctrine and should be decided by this Court.

Moot points are considered by the court when "the issue has great public importance, a statute's constitutionality is involved, or a decision is needed to guide the trial courts." *Olson*, 233 Wis. 2d 685, ¶ 3 (quoting *Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 487, 368 N.W.2d 668 (Ct. App. 1985)). "Furthermore, we take up moot

questions where the issue is 'likely of repetition and yet evades review' because the situation involved is one that typically is resolved before completion of the appellate process." *Olson*, 233 Wis. 2d 685, ¶ 3 (quoting *State ex rel. La Crosse Tribune v. Circuit Court*, 115 Wis. 2d 220, 229, 340 N.W.2d 460 (1983)).

DNR's position on this issue—that it has broad inherent authority to reconsider any of its decisions—has the potential to affect a large number of people and to arise again in the future. This issue is likely to recur given the numerous quasi-judicial decisions that DNR makes each year. DNR has thousands of individual permits that authorize permittees, such as CAFOs, to discharge effluents into water, emit pollutants into air, and fill in wetlands. DNR is also involved in numerous contested case hearings each year regarding the propriety of its decisions.

Additionally, DNR's authority to reconsider section NR 2.20 decisions in particular is likely to recur and evade review, especially regarding WPDES permits that expire every five years. Over 1,000 WPDES permits for industrial and municipal facilities are currently in effect. Such permits expire every five years as required by state and federal law. Wis. Stat. § 283.53(1); 33 U.S.C. § 1342(b)(1)(B). As is evident from this case, the administrative and judicial review process often takes much longer than five years. Allowing DNR to

evade review of its unlawful actions that thwart meaningful review of its WPDES permit decisions makes a mockery of the opportunity for public participation and review.

The scope of DNR's authority to reconsider its decisions is a matter of great public importance because it involves a public policy issue that could affect a large number of permittees and interested persons. The Wisconsin Supreme Court concluded that public policy issues qualify as matters of great public importance. *In re Sheila W.*, 2013 WI 63, ¶ 6, 348 Wis. 2d 674, 835 N.W.2d 148 (concluding that important social policy issues such as "when or if a minor can withdraw consent to life-saving medical treatment" qualify as an issue of great public importance). This case involves such public policy issues, as the circuit court noted in its decision:

> The laws that provide structure and predictability to our administrative process do not allow an agency to change its mind on a whim or for political purposes. The people of Wisconsin reasonably expect consistency, uniformity, and predictability from their administrative agencies and from the Department of Justice. Having decided not to seek judicial review and denying Kinnard's request for Secretary review, DNR had no authority to reverse the ALJ decision. Its attempt to do so is without any basis in law, and it is void.

R. 42:17.

For the above reasons, this Court should address the procedural issue presented in this case because it is either not moot or falls under the exceptions to the mootness doctrine.

C. DNR does not have authority to ignore statutory and regulatory time limits or to reconsider a decision nearly a year later.

DNR would like this Court to bypass this issue because DNR blatantly ignored the law in an attempt to reverse an outcome that it did not like. Wisconsin's administrative statutes and rules provide a circumscribed process for contested case hearings and decisions to ensure a full and fair hearing, and the finality of the outcome. DNR—like all agencies—is a creature of statute and only has those powers expressly conferred or necessarily implied from the statutory provisions under which it operates. *Wis. Ass'n of State Prosecutors*, 380 Wis. 2d 1, ¶ 37.

DNR is bound by the statutes that enable it and the rules that it promulgates. To ensure finality and fairness, the legislature limited DNR's authority to modify or revoke an ALJ decision once a contested case proceeds through a hearing. Additionally, time limits apply to DNR's options following a contested case decision. As explained further below, nothing in case law, statutes, or rules gives DNR authority to change its mind and legal position nearly a year after making a decision.

1. DNR adopted the ALJ decision as its decision when it denied NR 2.20 review and did not petition for judicial review.

Far from being an "arcane dispute," DNR Br. at 35, this issue turns on a straightforward application of administrative law. According to Wis. Stat. § 227.46(3), DNR may, by rule, "[d]irect that the hearing examiner's decision be the final decision of the agency;" may "direct that the record be certified to it without an intervening proposed decision;" or may follow the second option with discretion to limit oral and written arguments in certain proceedings. Wis. Stat. § 227.46(3)(a)-(c). Consistent with this statute, DNR promulgated Wis. Admin. Code § NR 2.155, which further defines and limits its options:

> (1) ADMINISTRATIVE LAW JUDGE DECISION. The administrative law judge shall prepare findings of fact, conclusions of law and decision subsequent to each contested case heard. *Unless the department petitions for judicial review as provided in s. 227.46 (8), Stats., the decision shall be the final decision of the department, but may be reviewed in the manner described in s. NR 2.20.* Every decision shall include findings regarding compliance with the requirements of s. 1.11, Stats., to the extent compliance with s. 1.11, Stats., was at issue in the contested case.
> (2) SECRETARY DECISION.
> (a) Notwithstanding sub. (1), the secretary, prior to hearing, may direct that the record be certified to the secretary or secretary's designee for decision in accordance with the provisions of s. 227.46 (3) (b), Stats., without an intervening decision by the administrative law judge.
> (b) Notwithstanding sub. (1), the secretary, prior to hearing, may direct that the decision be made in accordance with the provisions of s. 227.46 (2) or (4), Stats.

Wis. Admin. Code § NR 2.155(1)-(2) (emphasis added).

To summarize, DNR's rules provide three options: (1) petition for judicial review within 30 days of the ALJ decision, (2) grant a petition for section NR 2.20 review within 14 days of receipt of the petition, or (3) adopt and follow the ALJ decision. Wis. Admin. Code §§ NR 2.155(1), 2.20; *see also* Wis. Stat. §§ 227.46(8), 227.52, 227.53. The first two options are subject to strict time limits—30 days for a petition for judicial review, and 14 days for section NR 2.20 review. Wis. Stat. §§ 227.46(8), 227.53(1)(a)2.; Wis. Admin. Code § NR 2.20. If DNR does not take either action within the required time, then DNR adopts the ALJ decision as its decision. Wis. Admin. Code § NR 2.155(1).

DNR's lawfully promulgated rules are binding on it until it modifies or rescinds those rules through the rulemaking process in Chapter 227. *Wisconsin Citizens Concerned for Cranes & Doves v. Dep't of Nat. Res.*, 2004 WI 40, ¶ 5 n.5, 270 Wis. 2d 318, 677 N.W.2d 612 (quoting *Staples v. DHSS*, 115 Wis. 2d 363, 367, 340 N.W.2d 194 (1983) ("Administrative rules enacted pursuant to statutory rulemaking authority have the force and effect of law in Wisconsin.")). DNR may not, on a whim, choose not to follow its rules simply because it has the power to change those rules.

The circuit court rejected DNR's argument that it did not adopt the ALJ decision as its own, noting "it did, as a matter of

operation of the administrative rules; and it did, as a matter of fact." R. 42:9. This fact was definitively asserted by DNR through its counsel the Department of Justice in an earlier appeal in this case, "The [ALJ's] Decision became the DNR's decision pursuant to Wis. Stats. § 227.46(3) and Wisconsin Administrative Code § NR 2.155." R. 34:6577. The circuit court did not apply judicial estoppel in this case, but did note that DNR's inconsistent legal positions undermined its legal arguments:

> The commonsense fact of the matter is that a party should not be able to come to court and assert a different proposition than one it has asserted before in the same matter absent any good explanation. One would think this should apply with particular force to the Department of Justice, upon whom we should be able to rely for consistency and fair play. Here, nothing of consequence changed between the time DNR told the Kewaunee court the ALJ's decision was in fact its own, and our case, in which it says just the opposite. That was the simple truth of the matter then, and it remains the simple truth of the matter now.

R. 42:11-12.

2. Finality is not dispositive of whether DNR had authority to reconsider its decision to deny NR 2.20 review.

The ALJ's decision became final as to DNR because DNR's decision not to appeal and to deny NR 2.20 review determined *DNR's* legal rights and obligations and required *DNR* to comply with certain directives regarding Kinnard's permit. *See Sierra Club v.*

Dep't of Nat. Res., 2007 WI App 181, ¶¶ 13-15, 304 Wis. 2d 614, 736 N.W.2d 918. For this reason, the circuit court dismissed DNR's argument regarding finality, noting that it "rings false." R. 42:11. The circuit court explained why the ALJ decision became final as to DNR even though it was not final for purposes of judicial review for the other parties in the case:

> The ALJ's decision required DNR to modify the permit. The DNR Secretary declined to change the order and DNR went about complying with the order and requiring Kinnard to submit necessary information. From DNR's perspective, the ALJ's decision established just what DNR had to do. And, DNR set out to do it. From the two other parties' perspectives, they did not know what they would need to do until DNR established the criteria and amended the permit. Those things were well underway when DNR abruptly changed course.

R. 42:10-11. Additionally, DNR's finality argument is an attempt to obscure the fact that DNR's rules explicitly prohibit DNR from reconsidering its decision not to appeal and not to grant NR 2.20 review.

3. DNR lacked authority to reconsider its decision to deny NR 2.20 review because such authority conflicts with DNR's rules.

As explained above, section NR 2.20(3) mandates that the secretary has 14 days to "decide whether or not to grant the requested review." Wis. Admin. Code § NR 2.20(3). The DNR Secretary timely denied Kinnard's petition for review. R. 34:718-19.

Section NR 2.20 does not allow DNR to reconsider its decision to deny its review of the ALJ decision. The arguments in DNR's decision and the AG letter cannot overcome this conflict.

In the September 11, 2015, decision, the DNR Secretary asserted that DNR had authority to reconsider its decision due to "new information, legal analysis, and subsequent court proceedings." R. 34:727. "Subsequent court proceedings" refer to the Kewaunee County Circuit Court's dismissal of Kinnard Farms' petition for judicial review—in which DNR asserted that it had authority to impose these conditions. R. 34:6918-6923. The "legal analysis" refers to the August 18, 2015, letter from Assistant Attorney General Daniel P. Lennington in response to DNR's request. R. 34:731-33. The DNR Secretary's decision also asserted that under Wis. Stat. § 227.46(3), "the Department may determine whether DHA may issue the final agency action in a particular case." R. 34:727.

This rationale is a conclusion in search of an analysis. DNR is unable to explain why DNR ignored the advice of one Assistant Attorney General, whose brief outlined DNR's authority to impose these conditions, and requested the opinion of another Assistant Attorney General, whose legal advice DNR decided to follow. DNR

also fails to point to new factual or legal developments that would warrant DNR's reconsideration of its earlier decision. R. 42:13.

Further, section 227.46(3) does not authorize DNR to institute itself as the decision-maker after an ALJ holds a hearing and rules against DNR. DNR's authority under section 227.46(3)—which DNR implemented and further refined in Wis. Admin. Code § NR 2.155—gives DNR two options: DNR may "[d]irect that the [ALJ] decision be the final decision of the agency," or direct that DNR itself act as the decision-maker "without an intervening proposed decision" by the ALJ. If DNR wants to act as the decision-maker in a particular case, it must make that decision "prior to hearing." Wis. Admin. Code § NR 2.155. In this case, because ALJ Boldt held a hearing and issued findings of fact and conclusions of law, DNR lost its chance to step in as the decision-maker.

Any inherent authority to reconsider decisions is limited by DNR's enabling statutes and rules. As explained above, DNR's ability to act as the decision-maker or to review or reverse an ALJ decision are constrained by time limits, which DNR may not avoid by relying on a general authority to reconsider. *See Currier v. Dep't of Rev.*, 2006 WI App 12, ¶ 32, 288 Wis. 2d 693, 709 N.W.2d 520 (requiring strict compliance with Chapter 227 in agency decisions).

In the few cases on an agency's reconsideration power, the Court has concluded that an agency has implied authority to reconsider only when it is conducted within a reasonable time, and only if it does not conflict with applicable statutory provisions. *See, e.g.*, *Schoen v. Bd. of Fire and Police Comm'rs of Milwaukee*, 2015 WI App 95, ¶ 22, 366 Wis. 2d 279, 873 N.W.2d 232 (providing that an administrative body had implied authority to reconsider a decision when such reconsideration took place 8 days after initial determination); *Bookman v. U.S.*, 453 F.2d 1263, 1265 (1972) (providing "absent contrary legislative intent or other affirmative evidence, this court will sustain the reconsidered decision of an agency, as long as the administrative action is conducted within a short and reasonable time period").

DNR asserts that it must be able to reconsider and modify its decisions at any time, "whatever its internal rules provide," because DNR "simply cannot implement [the ALJ's] decision because [that] would be unlawful." DNR Br. at 36. This frames DNR's role as the ultimate arbiter of its legal authority and duty. But the reality is that the legislature created an independent, separate process for administrative review of agency decisions (and interpretations of law) and made those decisions subject to judicial review. It is our

court system and this Court that ultimately determines the legality of DNR's actions.

III. The circuit court properly awarded fees and costs to Petitioners under WEAJA, including interest.

A. The circuit court properly exercised its discretion in awarding WEAJA fees and costs to Petitioners.

The purpose of fee shifting in WEAJA is to encourage private litigants to pursue administrative and civil actions against state agencies, to compensate parties for the cost of defending against unreasonable government action, and to deter state agencies from prosecuting or defending cases in which its position is not substantially justified. *Sheely v. Dep't. of Health and Social Servs.*, 150 Wis. 2d 320, 336, 442 N.W.2d 1 (1989) (quoting *Berman v. Schweiker*, 713 F.2d 1290, 1297 (7th Cir. 1983)). Awarding fees and costs to Petitioners serves each of these purposes given DNR's unreasonable position in this case.

A court shall award costs and fees to prevailing parties in administrative actions "unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust."[15]

[15] DNR did not and does not dispute that Petitioners qualify as small nonprofits and individuals, and that Petitioners were prevailing parties. R. 71:7. DNR also does not dispute the reasonableness or necessity of the amount of fees Petitioners claimed. R. 71:8.

Wis. Stat. § 814.245. In such cases, the state bears the burden of demonstrating "(1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced." *Sheely*, 150 Wis. 2d at 337.[16] The substantial justification test is "essentially one of reasonableness, without more." *Susie Q Fish Co. v. Dep't of Rev.*, 148 Wis. 2d 862, 866, 436 N.W.2d 914 (Ct. App. 1989). To determine whether the state's position was substantially justified, the court should "look to the record of both the underlying government conduct at issue and the totality of the circumstances present before and during litigation." *Bracegirdle v. Dep't of Regulation and Licensing*, 159 Wis. 2d 402, 425, 464 N.W.2d 111 (Ct. App. 1990) (quoting *Barry v. Bowen*, 825 F.2d 1324, 1330 (9th Cir. 2987) (interpreting the Equal Access to Justice Act after which WEAJA is patterned)).

The circuit court properly applied this legal standard in its decision to award WEAJA fees to Petitioners. The circuit court's oral decision focuses on the second prong of the substantial justification analysis—whether DNR had a reasonable basis in law for its legal theory. R. 71:8. In addition to incorporating the

[16] DNR asserts that its position is substantially justified if it has "some arguable merit." The Court has clarified that reasonableness is the proper standard, not arguable merit. *Stern*, 212 Wis. 2d at 398 n3.

reasoning in the court's lengthy written decision on the merits, the circuit court further explained the reasons for its ruling that DNR lacked substantial justification in this case.

Regarding the procedural issue, the circuit court explained that DNR's decision to reconsider was not supported by precedent, conflicted with the language of relevant statutes, was not done in a reasonable time, and lacked an adequate factual or legal basis for reconsideration. R. 71:9-10. DNR mischaracterizes the circuit court's reasoning as relying solely on the fact that DNR did not cite precedent for its position. DNR Br. at 47. The circuit court did not find DNR's position unreasonable solely because it lacked precedent. Rather the circuit court explained that DNR's position was unreasonable because it conflicted with the time limits for review of administrative decisions, and could not be based on an agency's general authority to reconsider because DNR lacked an adequate reason to reconsider and waited too long. R. 71:9-10. The circuit court further reasoned, "I think it's quite clear that we cannot operate in a system that would recognize the kind of uncertainty that was created by the department's wholesale reconsideration and reversal of its decision under these circumstances." R. 71:10.

Regarding the substantive issue, the circuit court explained further why DNR's legal position was unreasonable:

> So I think it's really quite an extraordinary situation. Given the unanimity of opinion among all concerned here, the ALJ, the DNR, the DOJ, it's extraordinary that—that this position is then reversed and reversed for no reason that was articulated in any manner that I found satisfactory or really attempted to explain the basis for—for the dramatic reversal of its position. And—again—I incorporate my observations about that from the decision.

R. 71:12. DNR incorrectly asserts that the circuit court "treat[ed] DNR's loss as dispositive of" DNR's lack of substantial justification on the substantive issue. DNR Br. at 46. To the contrary, the circuit court explicitly stated that "It's not enough—of course—that the petitioners prevailed" and went on to weigh DNR's changing legal interpretation throughout this case and its failure to explain a legal or factual basis for its change in position. R. 71:9. The circuit court also explained that it was persuaded by the unanimity of legal interpretations on this issue by the administrative law judge, DNR, and the first DOJ attorney assigned to this case. For each of these reasons, the circuit court properly awarded WEAJA fees and costs to Petitioners in this case.

B. The circuit court had competency to enter a final judgment awarding WEAJA fees to Petitioners.

This issue is a red herring and does not ultimately determine Petitioners' right to fees and costs. The fact is that Petitioners made a timely motion for fees on which the court issued an oral ruling before the record was transmitted to the court of appeals. R. 71.

DNR requested and was granted additional time to file its response brief. R. 54. Finally, in order to accommodate DNR's request for a stay and DNR counsel's request for time to consider the interest issue, the circuit court gave the parties additional time to discuss a proposed order. R. 71:16-18.[17]

Any defect in the formal entry of the final judgment was due to DNR's own delay and did not prejudice the parties or interfere with this Court's proceedings. It is a technical error that was not the due to any error on Petitioners' part. When the circuit court made its oral decision on the merits, the court intended that to be its final decision regarding Petitioners' right to WEAJA fees. R. 72:28-29. Moreover, DNR's argument that the circuit court's oral ruling was not final misstates the cited authority. DNR Brief at 45. The Wisconsin Supreme Court explained, while an order must be in writing in order to confer a right to appeal, that "does not mean that the oral pronouncement of an order may not be effective insofar as it concerns the parties and the trial court." *In re Matter of Refusal to Submit to Chem. Test*, 70 Wis. 2d 220, 222, 234 N.W.2d 345 (1975).

[17] During the hearing, Attorney Vandermeuse stated, "I will say that your proposal for . . . how to hand the payment seems reasonable to me, but I'm kind of in uncharted waters here, and I'm not sure if I have the authority to agree to it. That being said, it sounds like that's what petitioners would agree to and what the Court thinks is the most reasonable, and I certainly defer to that. If—I guess I'm trying to think of a way that I'd be able to address this within a reasonable period of time if—if I found that my agency had an issue with it." R. 71:17.

Thus, the circuit court's oral ruling became effective on September 30, 2016, before this Court received the record on appeal.

Even if this court determines that the circuit court did not have competency to enter the final judgment, the court may "remand the record to the circuit court for additional proceedings while the appeal is pending." Wis. Stat. § 808.07(6). The appropriate procedure would be to remand the record to the circuit court and to stay the appeal pending the circuit court's entry of a final judgment consistent with its oral ruling. *State v. Jacobus*, 167 Wis. 2d 230, 232-34, 481 N.W.2d 642 (Ct. App. 1992). Alternatively, Petitioners have the right to "petition the appellate court for remand to the circuit court for action upon specific issues." Wis. Stat. § 808.07(5).

C. Petitioners are entitled to interest on WEAJA award.

The circuit court correctly concluded that Petitioners are entitled to interest on the WEAJA award while DNR pursues its appeal on the merits of this case. The legislature explicitly authorized the imposition of interest against the state. Section 815.05(8) provides in relevant part (omitting how interest is calculated), "Except as provided in s. 807.01 (4), every execution upon a judgment for the recovery of money shall direct the collection of interest . . . on the amount recovered from the date of the entry of the judgment until it is paid."

In *Burlington Northern Railroad Co. v. Superior*, the Wisconsin Supreme Court concluded that § 815.05(8) applies to all money judgments against the government.

> The City's final argument in connection with sec. 66.09 is that this court has previously held that unless a statute specifically prescribes a different rate, the rate to be applied to governmental judgment debtors is the legal rate established by sec. 138.04. The City relies on *Boldt v. State*, 101 Wis. 2d 566, 583, 305 N.W.2d 133, cert. denied 454 U.S. 973 (1981), and *City of Milwaukee v. Firemen Relief Ass'n of Milwaukee*, 42 Wis. 2d 23, 39, 165 N.W.2d 384 (1969). We agree with the circuit court and the court of appeals that these cases are not helpful in answering the question presented in the case at bar. Neither the *Boldt* decision nor the briefs filed in the *Boldt* case discuss the issue of interest at length or refer to sec. 815.05(8). The *Milwaukee Firemen Relief* case preceded the enactment of sec. 815.05(8) specifying an interest rate other than the legal rate of interest and is therefore not applicable here.
>
> *On analyzing secs. 66.09(1), 138.04, and 815.05(8), we conclude that sec. 815.05(8) establishes the postjudgment interest rate for every judgment for which the legislature has not explicitly provided a different postjudgment interest rate.*

Burlington Northern Railroad Co. v. Superior, 159 Wis. 2d 434, 441-42, 464 N.W.2d 643 (1991). For these reasons, this Court should uphold the circuit court's inclusion of interest in the WEAJA award to Petitioners.

CONCLUSION

For the foregoing reasons, this Court should affirm the decisions of the circuit court and the administrative law judge.

Dated this 25th day of June, 2018.

Respectfully submitted,

Electronically signed by

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,435 words.

Dated this 25th day of June, 2018.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § (Rule) 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 25th day of June, 2018.

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