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SUPREME COURT OF WISCONSIN
Case 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,

WISCONSIN LEGISLATURE,

Intervenor.

On Appeal by Certification by Wisconsin Court of Appeals
District II, Appeal No. 2016AP1688
Dane County Circuit Court Case No. 2015CV002633,
The Honorable John W. Markson, Presiding

BRIEF OF INTERVENOR-CO-APPELLANT KINNARD FARMS, INC.

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Does DNR have authority to impose off-site groundwater-monitoring requirements and an animal-unit maximum on a WPDES permit? The circuit court answered yes.

Did DNR retain discretion to decide whether to impose certain permit conditions after denying review of the ALJ's decision? The circuit court answered no.

The Court of Appeals certified the appeal to this Court because this case raises questions of statewide concern most appropriately answered by the highest court of this State. Additionally, this case addresses the interplay between this Court's 2011 decision in *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, and 2011 Wis. Act 21 (Act 21). As only the Supreme Court may amend, modify, or overrule a decision, this matter is most appropriately addressed directly by this Court.[1]

[1] Although the circuit court's decision assessing costs and fees against the state is also an issue in this appeal, Kinnard Farms interests are not impacted by that issue, and thus will brief the Court only on Issues 1 and 2.

INTRODUCTION[2]

For decades, Wisconsin courts struggled to determine whether a particular statute or rule conferred upon an agency "implicit" powers. This line of cases—which forced judges to read between the lines of clear text and dwell on questions of policy—produced widespread regulatory uncertainty and unpredictability. It also effectively made agencies a principal source of laws in the State, infringing on the constitutional role of the Legislature.

Those days ended with the enactment of Act 21 in 2011. Henceforth, "[n]o agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any [permit] issued by the agency, unless that standard, requirement, or threshold is *explicitly required* or *explicitly permitted* by statute or by a [valid] rule." Wis. Stat. § 227.10(2m) (emphasis added).

The circuit court in this case missed the significance of this law entirely. Even though no statute or rule explicitly

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[2] On May 2, 2018, Kinnard Farms moved for permission from the District II Court of Appeals to join DNR's Opening Brief in lieu of filing separate briefs. App.151-156. On May 4, 2018, the Court of Appeals granted the parties permission to do so. App.157. As such, the contents of this brief mirror a substantial portion of the Wisconsin Department of Natural Resources' Opening Brief to the Court of Appeals.

gives the Department of Natural Resources authority to require large dairy farms (through conditions on a permit) to monitor off-site groundwater for pollutants or to set a limit on the number of animals that the farm may keep, and even though the circuit court did not even try to identify one, the circuit court thought it was enough that more than a dozen statutes and regulations—read together—fairly ***implied*** these powers.

Not only did the court fail to account for Act 21, it also ignored this Court's holding that no state statute "expressly authorize[s] the DNR" to impose "off-site" conditions. *Maple Leaf Farms, Inc. v. DNR*, 2001 WI App 170, ¶ 13, 247 Wis. 2d 96, 633 N.W.2d 720. Nor does state law expressly empower DNR to regulate a dairy farm's number of animals through discharge permit conditions.

The issues in this case go to the limits of administrative agency power, and the relationship between the legislature and an agency that owes its very existence to the legislature. The issues presented are recurring and important, and their resolution necessary to guide Wisconsin courts. This Court should reverse the DNR's imposition of

unauthorized conditions in Kinnard Farms' WPDES permit, making clear that the unambiguous meaning of Act 21 is the law of Wisconsin.

ORAL ARGUMENT AND PUBLICATION

On January 05, 2021, this Court issued an order for merits briefing and stated that oral argument would be scheduled in due course.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

A. In 1970, Congress empowered the Environmental Protection Agency (EPA) to administer the National Pollution Discharge Elimination System (NPDES), a permitting program for point sources of water pollution, including "solid waste" and "agricultural waste." *See* 33 U.S.C. §§ 1311, 1362(6); *Andersen v. DNR*, 2011 WI 19, ¶ 33, 332 Wis. 2d 41, 796 N.W.2d 1. A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged," including a ditch, well, or "concentrated animal feeding operation." 33 U.S.C. § 1362(14); *see also* Wis. Stat. § 283.01(12)(a). The Act also authorizes EPA to allow States to administer their own permitting programs, in lieu of the NPDES scheme, so long

as those state programs meet certain federal requirements. 33 U.S.C. § 1342(b); *Andersen*, 332 Wis. 2d 41, ¶¶ 34–36. In 1974, EPA approved Wisconsin's permit program, the Wisconsin Pollution Discharge Elimination System (WPDES). *see Andersen*, 332 Wis. 2d 41, ¶ 37. The Wisconsin Department of Natural Resources (DNR) administers the WPDES program, *see* Wis. Stat. § 283.001(2), which is subject to federal oversight, 33 U.S.C. § 1342(c), (d); *Andersen*, 332 Wis. 2d 41, ¶¶ 39–40; 40 C.F.R. § 123.63(a). One key difference between the NPDES and WPDES programs is that the WPDES covers discharges to groundwater. *Compare* 40 C.F.R. § 122.2 (explaining that "waters of the United States" do not include groundwater), *with* Wis. Stat. § 283.01(20) (defining "[w]aters of the state" to include groundwater).

B. An owner or operator of a point source may not discharge pollutants into waters of the State unless it does so under a lawful WPDES permit issued by DNR. Wis. Stat. §§ 283.31, 283.37. DNR may issue a "general permit applicable to a designated area of the state authorizing discharges from specified categories or classes of point sources located within

that area" or, for sources not covered by a general permit, an individualized permit. Wis. Stat. §§ 283.35, 283.37. Once DNR receives a WPDES permit application, DNR must notify the public and receive public comment for a period of at least 30 days and must hold a public hearing on the permit if requested. Wis. Stat. §§ 283.39, 283.49.

All point-source permits must include several kinds of pollutant-discharge conditions "whenever applicable." Wis. Stat. § 283.31(3). Those include "[e]ffluent limitations" (or "restriction[s] . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents," Wis. Stat. § 283.01(6)), and "[e]ffluent standards, effluents prohibitions and pretreatment standards," Wis. Stat. § 283.31(3)(c); *see also* Wis. Admin. Code § NR 205.065. The statute also directs DNR to "prescribe conditions for permits issued under this section to assure compliance with [the § 283.31(3)] requirements," and specifically enumerates certain reporting and access requirements. Wis. Stat. § 283.31(4); *see also* Wis. Admin. Code § NR 205.07(1).

C. Under both federal and state law, "point sources" include large farms known as "concentrated animal

feeding operation[s]" (CAFOs). 33 U.S.C. § 1362(14); Wis. Stat. § 283.01(12). Generally, Wisconsin law defines a CAFO as any animal-feeding operation with "1,000 animal units or more at any time" that "stores manure or process wastewater" in storage structures at or below "grade level," or that "land applies manure or process wastewater."[3] Wis. Admin. Code § NR 243.03(12); *see also* 40 C.F.R. § 122.23(b) (defining "Large CAFO" to include operations housing at least 700 mature dairy cows for at least 45 days in a 12-month period); *infra* p. 40 (defining animal unit).

In accordance with § 283.31(3), DNR has promulgated "[s]tandard WPDES permit requirements for large CAFOs," found in Wis. Admin. Code § NR 243.13. This regulation applies different pollutant-discharge requirements to different categories of large CAFOs. For discharges to navigable waters from large dairy CAFOs, DNR imposes an effluent limitation based on the adequacy of the containment structure, providing that large dairy CAFOs "may not discharge" any pollutants (i.e., "manure or process wastewater pollutants")

[3] "Process wastewater" is "wastewater from the production area." Wis. Admin. Code § NR 243.03(53).

into "navigable waters from the production area." Wis. Admin. Code § NR 243.13(2).[4] The only circumstance in which a CAFO is not responsible for discharge of manure or process-wastewater pollutants to a navigable water is when rainfall has caused "an overflow of manure or process wastewater from a containment or storage structure," that structure is "properly designed, constructed and maintained," the "production area" meets certain "inspection, maintenance and record keeping requirements," *id*., and the discharge does not result in noncompliance with groundwater and surface water quality standards, *id*. § NR 243.13(5).

As an additional condition of obtaining a WPDES permit, CAFOs must submit for DNR approval a "nutrient management plan . . . outlining the amounts, timing, locations, methods and other aspects regarding the land application of manure and process wastewater." Wis. Admin. Code § NR 243.14(1). The plan "shall contain information necessary to document how the operation's land application activities will comply with [federal and DNR regulations] and

[4] The "production area" "includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas but not CAFO outdoor vegetated areas." Wis. Admin. Code § NR 243.03(54).

the conditions of the operation's WPDES permit," including NR 243.13(2)'s restrictions on manure and process-wastewater discharge. *Id*. DNR's regulations mandate a comprehensive set of highly technical and specific requirements, including that "[m]anure or process wastewater may not pond" and that CAFOs may not apply them to "saturated soils" or spread them on "areas of a field with a depth to groundwater or bedrock of less than 24 inches" or "within 100 feet of a direct conduit to groundwater." Wis. Admin. Code § NR 243.14(2)(b).

D. Once DNR grants a WPDES permit application, any permittee, applicant, affected State, or five or more affected persons may petition DNR for review of DNR's permitting decision and "the reasonableness of or necessity for any term or condition" of any permit. Wis. Stat. § 283.63(1). If DNR grants the petition, DNR (either itself or by appointment of an administrative law judge) must hold a public hearing on the issues raised in the petition and issue a decision within 90 days of the close of the hearing. Wis. Stat. § 283.63(1)(b) & (d). Any person adversely affected by DNR's final decision may then petition for judicial review of

that decision under Wis. Stat. § 227.52. Wis. Stat. § 283.63(2). The nature and stages of the administrative-review process—and in particular when an agency order constitutes DNR's "final decision"—are explained at length *infra* pp. 43-49.

II. FACTUAL BACKGROUND

A. Contested Case Hearing

Kinnard Farms, Inc., owns and operates a large dairy in Kewaunee County. R.34:0226.[5] In 2012, Kinnard sought to expand its operation by adding a second site ("Site 2") and over 3,000 dairy cows. R.34:0226. But first, Kinnard Farms needed approval from DNR and a new WPDES permit, *see* Wis. Stat. §§ 283.31(4)(b), 283.59(1); R.34:0226–27, which it received on August 16, 2012, R.34:0045. The WPDES permit was effective September 1, 2012. R.34:0045–74.

After DNR issued the permit, five affected individuals (the individual Petitioners here) sought administrative review. R.34:0001–32; *see* Wis. Stat. § 283.63. Two of the petition's main claims were that the permit improperly failed to "require monitoring to evaluate impacts to groundwater and determine

[5] References to "R." are to the record index in 16AP1688. Documents entered into the record subsequent to R.58 are cited as "App.".

compliance with permit conditions," R.34:0013–17, and to set a "maximum number of animal units," R.34:0017–20.

DNR granted the petition and referred the matter to the Division of Hearings and Appeals, where Administrative Law Judge (ALJ) Jeffrey Boldt presided over the hearing. R.34:0039–110. Kinnard moved for summary judgment, arguing that DNR lacked explicit authority to impose an animal-unit maximum and citing Wis. Stat. § 227.10(2m). R.34:0165–68. DNR agreed with Kinnard that "no law or statute requires [DNR] to articulate a maximum animal unit" number in WPDES permits. R.34:0181. The ALJ denied summary judgment, R.34:0405–12, concluding, among other things, that "disputed issues of fact" remained, R.34:0411.

On October 29, 2014, the ALJ issued its "findings of fact, conclusions of law and order." App.012-030. The ALJ determined that "a groundwater monitoring plan is essential" at Site 2, App.025, and that the permit was "unreasonable because it d[id] not specify the number of animal units allowed at the facility," App.026. In addition, the ALJ called for monitoring of "two or three representative off-site landspreading fields," but recognized that this "would require

the voluntary participation of off-site property owners," App.025, and so required such monitoring only "if practicable," App.029. The ALJ further concluded that, since "the number of animal units corresponds directly to the amount of waste generated by a CAFO," "a cap on animal units [wa]s a good idea in this particular case because of concerns over Kinnard Farms' ability to comply with regulatory requirements." App.026. The ALJ held that DNR should modify the permit "to reflect th[e] additional requirement" of an animal-unit maximum. App.026.

The ALJ left the rest up to DNR, ordering that DNR (1) modify the permit "to reflect a maximum number of animal units at the facility in addition to current storage requirements" and (2) "review and approve a plan for groundwater monitoring . . . at or near [Site 2]" "includ[ing] no less than six groundwater monitoring wells and, if practicable, at least two of which monitor groundwater quality impacts from off-site landspreading." App.029.

B. DNR's Review Of The ALJ's Decision

Kinnard timely petitioned the DNR Secretary for reconsideration of the ALJ's decision. *See* R.34:0718; Wis. Admin. Code § NR 2.20. On November 25, 2014, the

Secretary denied review, explaining that these issues were "amenable to judicial review" and that therefore the issues "would most appropriately [be] decided by the courts of this state." App.031-032. Kinnard then filed a petition for judicial review in the Kewaunee County Circuit Court. R.34:6419–47. The Kewaunee County Circuit Court held that the ALJ's order was not final and therefore not judicially reviewable under chapter 227. App.034-039. On June 19, 2015, Kinnard Farms appealed the Circuit Court's order of dismissal for non-finality to the Court of Appeals, District III. App.158-159.

DNR then sought clarification from the Wisconsin Department of Justice (DOJ) regarding the application of Act 21 to the ALJ's proposed permit conditions. *See* R.34:0731–41. After receiving clear guidance from DOJ that the conditions would be unlawful under Act 21 and advice that the Secretary should reconsider her decision under NR 2.20, DNR issued its "Final Order regarding [Kinnard's] WPDES Permit" on September 11, 2015. App.040-047. DNR approved a proposed monitoring plan for Site 2, which did not include any off-site groundwater monitoring. App.041-

043. The DNR Secretary then explained that DNR "may not amend the WPDES Permit to include conditions unless those conditions are explicitly required or explicitly permitted by statute or by rule," that animal-unit maximums and off-site groundwater monitoring are not "explicitly required or explicitly permitted by statute or by a rule," and therefore those conditions "will not be added" to the permit. App.046 (citing Wis. Stat. § 227.10(2m)). Styling her response as a re-consideration of her earlier denial of Kinnard's NR 2.20 petition, the Secretary explained that her order would "constitute the final agency action for all purposes under ch. 227 in this case." App.046. After the Secretary issued her re-consideration, Kinnard Farms voluntarily dismissed the appeal to the Court of Appeals filed on June 19, 2015 from the Kewaunee County Circuit Court's Order for Dismissal. App. 160.

C. Proceedings In The Circuit Court

On October 12, 2015, Clean Wisconsin, an environmental group, filed a petition for judicial review of the Secretary's decision in Dane County Circuit Court. R.1. Likewise, the individual Petitioners filed a petition for judicial review in Kewaunee County Circuit Court. Petition,

Cochart v. DNR, No. 15-cv-0091 (Kewaunee Cty. Cir. Ct. Oct. 12, 2015). DNR moved to consolidate these cases in Dane County, R.10, which the Dane County Circuit Court granted, R.33.

The circuit court ruled for the Petitioners. App.048-073. It first concluded that "[t]he ALJ's decision became DNR's decision when the DNR Secretary denied Kinnard's § NR 2.20 Petition for Review." App.054-059. The court explained that DNR had "by rule" "direct[ed] that the [ALJ's] decision be the final decision of the agency" "unless DNR petition[ed] for judicial review." App.054-056. Notwithstanding that another circuit court had concluded that the ALJ's decision was interlocutory and therefore not judicially reviewable, App.034-039, the court held that the ALJ's decision became the final decision of DNR because DNR had not petitioned for judicial review, App.056-058. The court next determined that "[t]he DNR Secretary's attempt to reverse [her] denial of Kinnard's § NR 2.20 Petition was untimely and beyond her authority." App.059-064.

On the merits, the circuit court determined that DNR has authority to impose the ALJ's permit conditions under Act 21. App.064-072. The court explained that it must read Act 21 "in conjunction with other statutes" and that it "must consider Act 21 within the greater context of chapter 283," including the statement of purpose contained therein. App.065-066 (citing Wis. Stat. § 283.001(1)). The court ruled that an animal-unit maximum was the equivalent of an effluent limitation and a maximum level of discharge, and that DNR was therefore explicitly authorized to impose such a maximum by Wis. Stat. § 283.31(3), (4) & (5). App.068 (mistakenly referring to § 283.32). The court also purported to locate explicit authority for animal-unit maximums in the administrative code. App.069.

The court also ruled that DNR has explicit authority to impose off-site groundwater monitoring (App.070-072), citing Wis. Stat. § 283.31(4), which "requires DNR to establish permit conditions that assure compliance with [ ] effluent limitations." App.070-071. The court further ruled that DNR's nutrient-management-plan regulations explicitly authorize DNR to impose off-site groundwater monitoring

because they "set out prohibited outcomes" and a permit "cannot ensure specific outcomes without fashioning site- and operation-specific conditions calculated to lead to the outcome." App.070-071.

D. Proceedings in the Court of Appeals and Supreme Court

DNR and Kinnard Farms appealed the Circuit Court's judgment to the court of appeals, R.52-53, and moved to consolidate the appeals. The court of appeals granted the motion. *See* Order Consolidating Cases, *Clean Wis. v. DNR*, Nos. 16AP1688 & 16AP2502 (Wis. Ct. App. Jan. 24, 2017).

DNR selected District II for its appeals, and Kinnard Farms interposed no objection. Before briefing began, however, District IV transferred the cases to its own docket. Other Papers, *Clean Wis. v. DNR*, No. 16AP1688 (Wis. Ct. App. Aug. 31, 2016). DNR petitioned the Wisconsin Supreme Court for a supervisory writ, arguing that District IV's transfer order violated Wis. Stat. § 752.21(2). Petition, *DNR v. Wis. Ct. App. Dist. IV*, No. 16AP1980 (Wis. Oct. 13, 2016). The Court stayed briefing in this case pending its decision on the supervisory writ. Order, *DNR v. Dist. IV*, No. 16AP1980 (Wis. Dec. 9, 2016).

On April 3, 2018, the Supreme Court issued its decision granting the writ and ordering District IV to return the case to District II's docket. *State ex rel. DNR v. Wis. Ct. App., Dist. IV*, 2018 WI 25, 380 Wis. 2d 354, 909 N.W.2d 114. Merits briefing then resumed. Transfer and Order, *Clean Wis. v. DNR*, Nos. 16AP1688 & 16AP2502 (Wis. Ct. App. Apr. 3, 2018).

On January 16, 2019, upon determining that these cases have "constitutional . . . and statutory . . . implications that should be answered by the highest court of the state," District II certified this case and consolidated companion cases to this Court pursuant to Wis. Stat. § 809.61. App.03-011. On April 9, 2019, this Court granted the certification of this case and accepted the appeal for all issues raised before District II. App.001-002. On May 7, 2019, this Court stayed briefing on the merits until further order (App.148-150), and on January 05, 2021, set the current briefing schedule. App.146-148.

E. New WPDES Permit And New Contested Case Hearing

While the Wisconsin Supreme Court was considering whether to grant a supervisory writ, Kinnard's 2012 WPDES

permit expired, *see* R.34:0045, and Kinnard applied for and received a new WPDES permit, effective February 1, 2018, App.108. The new permit (like the old permit) does not contain off-site groundwater-monitoring requirements or an animal-unit maximum. App.107-139. A group of citizens petitioned for a contested-case hearing on the new permit, arguing that, in light of the circuit court's decision in this case, DNR was required impose off-site groundwater-monitoring requirements and an animal-unit maximum on Kinnard's new permit. App.094-106. The contested case was dismissed pursuant to a settlement of the parties, with the parties agreeing in general to implement the ruling of this Court, if necessary, in a modification of the new WPDES permit.

STANDARD OF REVIEW

"When an appeal is taken from a circuit court order reviewing an agency decision, [appellate courts] review the decision of the agency, not the circuit court." *Hilton ex rel. Pages Homeowners' Ass'n v. DNR*, 2006 WI 84, ¶ 15, 293 Wis. 2d 1, 717 N.W.2d 166. This Court reviews an administrative agency's conclusions of law de novo. *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496,

914 N.W.2d 21. This Court reviews questions regarding the scope of agency authority de novo. *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 13, 270 Wis. 2d 318, 677 N.W.2d 612.

SUMMARY OF ARGUMENT

I. Although Kinnard's 2012 permit has expired, this Court should nevertheless decide the substantive question presented here: whether Act 21 prohibits DNR from imposing the conditions ordered by the circuit court. This question remains in live controversy before DNR (given the pending resolution of the new Kinnard permit on the basis of what this Court does), it is important, and lower courts would benefit from this Court's guidance.

Act 21 prohibits DNR from imposing these permit conditions. After Act 21, any permit condition that an agency wishes to impose must either be "explicitly required" or "explicitly permitted" by statute or rule. In this case, neither off-site groundwater monitoring nor animal-unit maximums are explicitly required or explicitly permitted by either the Wisconsin Statutes or the Wisconsin Administrative Code.

II. Petitioners improperly claim that DNR failed to comply with its procedural rules in issuing the challenged

order. Petitioners' procedural argument has several flaws. DNR has no obligation to defend erroneous positions of law in litigation. In any event, because the ALJ's decision below was not final, DNR retained discretion to revisit the ALJ's conditions. The ALJ's decision could not become DNR's final decision because the ALJ's order was merely interlocutory, and thus DNR retained the authority to determine for itself what the permit conditions would be. Indeed, quasi-judicial agencies such as DNR always retain authority to reconsider decisions, especially when those decisions involve errors of law.

ARGUMENT

I. UNDER ACT 21, DNR LACKS AUTHORITY TO ADD AN OFF-SITE GROUNDWATER-MONITORING REQUIREMENT AND AN ANIMAL-UNIT MAXIMUM TO KINNARD'S PERMIT.

A. This Court Should Decide This Important, Recurring Act 21 Question, Over Which There Remains A Live Legal Controversy.

Procedural developments in this case may give rise to questions of possible mootness. As explained above, Kinnard's 2012 permit, the subject of Petitioners' challenge here, has expired, and Kinnard now operates under a new

permit App.107-139, and how that permit gets implemented depends on what is decided in this case. Supra p. 19.

Under Wisconsin's doctrine of mootness, an "issue" in a case (and not necessarily the case itself) "is moot when its resolution will have no practical effect on the underlying controversy" because developments in the case have "rendered" the issue "purely academic." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425. "Generally, moot issues will not be considered by an appellate court." *Id*. Yet a court may—indeed, "should"—decide a technically moot issue when (1) the question has "great public importance"; (2) it implicates a statute's constitutionality; (3) "a decision is needed to guide the trial courts"; or (4) "the situation is likely to be repeated but seems to evade review because it is resolved before the completion of the appellate process." *State ex rel. Milwaukee Cty. Pers. Review Bd. v. Clarke*, 2006 WI App 186, ¶ 31, 296 Wis. 2d 210, 723 N.W.2d 141.

For at least three independent reasons, this Court should decide the substantive Act 21 question despite the fact that the 2012 WPDES permit that is the subject of this case

has expired. First, the question is not moot, because, as experience has shown, there will be repeated challenges to any Kinnard Farms WPDES permit that does not contain an animal unit maximum and offsite groundwater monitoring requirements. Thus, whether Act 21 forbids DNR from imposing the permit conditions that Petitioners seek—"the underlying controversy" here—will continue to be very much a live question. Second and third, even if this Court concludes that the Act 21 issue is moot, it easily meets two of the mootness doctrine's exceptions. In light of the significance of Act 21, the issue plainly "has great public importance," and "a decision is needed to guide" judges, who so far have disagreed over Act 21's effect. *Compare* App.064-073, *with* App.140-145.[6]

B. Act 21 Forbids DNR From Imposing The Permit Conditions Ordered By The Circuit Court.

This case raises important questions of administrative law, and the limits of the power of administrative agencies to impose requirements on regulated entities like Kinnard

[6] It is also possible that this issue will recur yet evade review. WPDES permits last a maximum of five years, Wis. Stat. § 283.53(1), while litigating a case from DNR up through the appellate courts often can take longer, as this case shows. *See Clarke*, 296 Wis. 2d 210, ¶ 31.

Farms. "It is axiomatic that because the legislature creates administrative agencies as part of the executive branch, such agencies have only those powers" that the Legislature has delegated to them. *Cranes & Doves*, 270 Wis. 2d 318, ¶ 14 (citation omitted). Hence, "[t]he nature and scope of an agency's powers are issues of statutory interpretation." *Id*. ¶ 6. And as in any other statutory context, where the Legislature has expressly provided for something, it is the role of courts to give effect to the enacted language. *See id.; see also State ex rel. Kalal v. Cir. Ct. for Dane Cty.,* 2004 WI 58, ¶¶ 49–50, 271 Wis. 2d 633, 681N.W.2d 110. Questions of implicit agency authority, on the other hand, are another matter. In the first decision to "determine the scope of an administrative agency's implied power under a statute," the Wisconsin Supreme Court adopted a broad standard that "a power which is not expressed [may] be reasonably implied from the express terms of the statute." *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 358–59, 190 N.W.2d 529 (1971), *vacated on other grounds*, 408 U.S. 915 (1972).

It was against this backdrop of the "implied power" era that Wisconsin adopted Act 21. Most relevant here, Act 21 discarded the court-devised presumption against implied

delegations and replaced it with a flat prohibition. *See State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929 (1928). It did this through two principal provisions. The first prohibits agencies from "implement[ing] or enforc[ing] any standard, requirement, or threshold, including as a term or condition of any license[7] issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter." 2011 Wis. Act 21, § 1r (codified at Wis. Stat. § 227.10(2m)) (emphasis added). Second, Act 21 provides that "[a] statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature." *Id*. § 3 (codified at Wis. Stat. § 227.11(2)(a)2). The same rule applies to "statement[s] or declaration[s] of legislative intent, purpose, findings, or policy." *Id*. (codified at Wis. Stat. § 227.11(2)(a)1).

[7] This includes an "agency permit." Wis. Stat. § 227.01.

Act 21 unambiguously provides that, when seeking to impose permit conditions, agencies can no longer infer authority from general language. This follows from the plain meaning of the term "explicit." *See Kalal*, 271 Wis. 2d 633, ¶ 45 (citation omitted). "Explicit" means "[d]istinctly expressing all that is meant; leaving nothing merely implied or suggested; express." 5 *Oxford English Dictionary* 572 (2d ed. 1989). "Implicit," on the other hand, means "[i]mplied though not plainly expressed; naturally or necessarily involved in, or capable of being inferred from, something else." 7 *Oxford English Dictionary* 724 (2d ed. 1989); *see also id*. at 725 (definition of "imply"). These definitions make clear that if a statute or rule has not conferred a power to impose licensing requirements expressly and specifically, then, under Act 21, it has not conferred the power at all—*even if* the power is "naturally or necessarily involved in," or a logical consequence of, a general grant of authority.

This new regime has important implications for the choice between administrative adjudication and administrative rulemaking.[8] While an agency can no longer

[8] *See Administrative Adjudication*, Black's Law Dictionary (10th ed. 2014) ("The process used by an administrative agency to issue regulations through an adversary proceeding," which might result in a permit, license, or order; "[c]f. Rulemaking.").

read statutes as a source of implicit powers to be wielded case- by-case after Act 21, it *can* potentially adopt rules—provided that it has explicit authority to do so, *see* Wis. Stat. § 227.11(1)—interpreting statutory language. For example, DNR can promulgate regulations interpreting what are "conditions . . . to assure compliance with the requirements of sub. (3)," which addresses "effluent limitations." Wis. Stat. § 283.31(3)–(4). In this way, Act 21 preserves agency flexibility to interpret the Legislature's general directives, while also promoting predictability, since rules (like statutes) put regulated entities on notice.

Although the meaning of Act 21 is unambiguous, its interpretation has been a source of debate and has resulted in conflicting guidance from different authorities. At a time when controlling judicial decisions were lacking, former Attorney General Schimel issued two comprehensive analyses of Act 21's seismic effect on Wisconsin administrative law. The former Attorney General explained

that §§ 227.10(2m) and 227.11(2)(a) straightforwardly "prevent agencies from relying on any supposed inherent or implicit authority" and reflect "the Legislature's deliberate decision to shift policymaking decisions away from state agencies and to the Legislature." Wis. Op. Att'y Gen. 04-17, 2017 WL 6408797, at *3 (Dec. 8, 2017); *see also*. Wis. Op. Att'y Gen. 01-16, 2016 WL 2771698 (May 10, 2016); *Schill v. Wis. Rapids Sch. Dist*., 2010 WI 86, ¶ 106, 327 Wis. 2d 572, 786 N.W.2d 177 ("[A] well-reasoned [Attorney General] opinion is of persuasive value when a court later addresses the meaning of the same statute.").

However, earlier this year, current Attorney General Kaul withdrew the previous Attorney General's 2016 and 2017 Opinions regarding the applicability of Act 21, reasoning that the previous Attorney General had misinterpreted Act 21. Then, the current AG issued a markedly different, and facially flawed, interpretation of Act 21 concluding that general or broad statutes do in fact confer explicit authority upon an agency.

While AG opinions are typically considered to have persuasive value, this Court should expressly reject the

current AG's opinion for several reasons. Most notably, the opinion is facially inconsistent with the language of the statute and recent interpretations of Act 21 by this Court. As such, the persuasive value of the current AG opinion and its usefulness in resolving the legal issues at hand is questionable. *See State ex rel. Lank v. Rzentkowski*, 141 Wis. 2d 846, 856, 416 N.W.2d 635 (Ct. App. 1987) (stating that a court may reject the reasoning of the AG if it finds that an opinion is of no persuasive effect in a case).

In recent decisions, this Court affirmed that Act 21 ended the era of implied delegations of authority to administrative agencies. *See Wis. Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900; *see also Papa v. Wis. Dep't of Health Servs.*, 2020 WI 66, 393 Wis. 2d 1, 946 N.W.2d 17. These crucial decisions made the following principle clear: that no agency may implement or enforce any standard, requirement, or threshold, unless it is explicitly required or explicitly permitted by statute or by a previously promulgated rule to do so. *Palm*, 391 Wis. 2d 497, ¶¶ 54-55; *Papa*, 393 Wis. 2d 1, ¶ 32. Additionally, this Court left no doubt that Wis. Stat. § 227.11(2)(a)(1-3) prevents agencies

from using broad statutes describing an agency's general duties or legislative purpose to find authority where not explicitly granted. *See Palm*, 391 Wis. 2d 497, ¶ 52 (citations omitted). In determining whether explicit authority is granted to an agency, the Court should analyze the plain language of the enabling statute or previously promulgated rules and should "narrowly construe imprecise delegations of power" to the agency. *Papa*, 393 Wis. 2d 1, ¶ 34; *Palm*, 391 Wis. 2d 497, ¶ 52 (citing Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012)).

The analysis in *Papa v. Wis. Dep't of Health Services* is particularly illustrative as it provides a guide for determining the scope of an agency's authority under the Act 21 regime. In *Papa*, this Court reviewed the scope of the Wisconsin Department of Health Services' (DHS) authority under Wis. Stat. § 49.45 to recoup payments made to Medicaid service providers in Wisconsin under the so-called 'Perfection Policy'. *Papa*, 393 Wis. 2d 1, ¶ 2. Petitioners in that case challenged the Perfection Policy which allowed recoupment of payments made for services provided to

Medicaid patients if DHS found *any* documentation imperfections in a service provider's records. *Id*.

In determining whether DHS had exceeded its scope of authority—and ultimately holding that it did—this Court reasoned that, pursuant to Wis. Stat. § 227.10(2m), DHS did not have the authority to implement or enforce the 'Perfection Policy' "unless it [was] explicitly required or permitted to do so by statute or a previously promulgated rule." *Id*. ¶ 32. The Court analyzed the plain language of the governing statute and previously promulgated DHS rules, and compared the explicit grant of authority within each source to DHS's 'Perfection Policy'. *Id*. ¶ 41. In doing so, the Court concluded that the DHS's policy was not explicitly permitted or required under Wis. Stat. § 49.45(3)(f)1.-2:

> No statute or promulgated rule explicitly requires or permits recoupment based on mere imperfection . . . so long as DHS can verify that a covered service was actually provided, the claim was appropriate, and the claim was accurate, DHS cannot recoup payments based on a record imperfection. A record imperfection alone is not an independent basis for recouping payments. The Perfection Policy therefore exceeds DHS's recoupment authority.

Id. ¶ 42.

Consequently, the Court held that there was no legal basis for the policy because neither source of authority—the governing statute or previously promulgated rules to implement its recoupment authority—explicitly required or permitted DHS to implement this specific policy. *Id*. ¶¶ 36-41. As explained next, that principle compels the same result in this case.

1. DNR Lacks Explicit Authority To Impose Off-Site Groundwater-Monitoring Requirements In WPDES Permits

No statute or rule "explicitly requires" or "explicitly permits" DNR to impose off-site groundwater-monitoring requirements on WPDES permits. *See* Wis. Stat. § 227.10(2m). Rather, all of the statutes and rules that Petitioners and the circuit court cite fall into one of two general categories: (1) those that cannot be read to grant either explicit or implicit authority to impose off-site groundwater-monitoring requirements, and (2) those that conceivably could confer only *implicit* authority for imposing off-site groundwater-monitoring requirements. The first category is quite easily disposed of: there is no possible universe in which they confer authority on DNR, even by

implication, because they do not relate to groundwater monitoring at all. Those in the second category fare no better, because, as confirmed by this Court in *Palm* and *Papa*, implicit agency authority—even authority to carry out an action "naturally or necessarily involved in," or a logical consequence of, explicit authority, *supra* pp. 26-30—no longer exists after Act 21.

1. *Chapter 283*. Whether Chapter 283 of the Wisconsin Statutes "expressly authorize[s] the DNR" to impose permit conditions "regulat[ing] off-site manure applications" is a settled question. *Maple Leaf*, 247 Wis. 2d 96, ¶ 13. This Court held, in a published opinion, that it "does not." *Id*. Because imposing off-site groundwater-monitoring requirements on manure applications is a lesser-included power within "regulat[ing] off-site manure applications," *id*., Act 21—read together with *Maple Leaf*—makes clear that DNR lacks this authority, absent a valid, explicit rule providing otherwise. That should end the statutory inquiry.

Yet even without the benefit of *Maple Leaf*, it would be clear that chapter 283 does not confer upon DNR explicit authority to impose on WPDES permits off-site groundwater-

monitoring requirements not authorized by rule. To begin, chapter 283's policy statement does not actually grant DNR any authority. It explains that the purpose of the WPDES program is to protect waters from pollution and "to grant [DNR] all authority necessary to establish, administer, and maintain a state pollutant discharge elimination system to effectuate [this] policy." Wis. Stat. § 283.001(2). This language simply describes a general statutory goal—a goal that chapter 283's *other*, specific provisions presumably pursue. After Act 21, it is only these later statutory sections that could do the work of conferring agency power. *See id*. § 227.10(2m); *see also id*. § 227.11(2)(a); *see also Palm*, 391 Wis. 2d 497, ¶ 52.

Based on the plain language of the statute, none of the provisions of § 283.31, which provides for WPDES permit conditions, explicitly requires or permits off-site groundwater-monitoring requirements. *See Papa*, 393 Wis. 2d 1, ¶ 40 (analyzing the plain language of the statutory provision and previously promulgated rules to the policy to determine whether DHS had explicit authority). Subsection 283.31(3) states that DNR may issue a WPDES permit "upon

condition that [ ] discharges will meet all . . . applicable . . . [e]ffluent limitations[,] [s]tandards of performance for new sources[,] [e]ffluent standards, effluents prohibitions and pretreatment standards[,]" "[g]roundwater protection standards," and "[a]ny more stringent limitations, including those" necessary to comply with either federal law, a "continuing planning process," or "an approved areawide waste treatment management plan." Wis. Stat. § 283.31(3). Subsection (3) falls into the first category of statutory provisions described *supra* p. 32: for the most part, it describes numerical standards or limitations that DNR might set on a particular pollutant (e.g., "for Pollutant A, no more discharge than X"). But a monitoring requirement is not a numerical standard or limitation. To illustrate, although an off-site groundwater-monitoring requirement might aid in DNR's enforcement of an "effluent limitation," the monitoring requirement is not itself an effluent limitation, because it is not a "restriction . . . on quantities, rates, and concentrations of [discharged pollutants]." Wis. Stat. § 283.01(6); *compare* Wis. Admin. Code § NR 217.13. Nor are off-site groundwater- monitoring requirements

"groundwater protection standards" because although they might help protect groundwater, they are not themselves "[e]nforcement standard[s] . . . expressing the concentration of a substance in groundwater." Wis. Stat. § 160.01(2).

Subsection 283.31(4), which requires DNR to "prescribe conditions for permits issued under this section to assure compliance with the requirements of sub. (3)," also does not vest DNR with authority to impose off-site groundwater- monitoring requirements on a WPDES permit. To begin with, even without Act 21, this provision certainly *would not* confer authority to impose any condition that would not help "assure compliance" with subsection (3). In a separate rule (that Petitioners do not challenge), DNR has determined the subsection (3) limitations "applicable" to large dairy CAFOs. These limitations include, for purposes of state law, a technology-based effluent limitation forbidding any discharge of manure or wastewater to navigable waters "from the production area," located *on site*. *See supra* p. 8 & n.4;

Wis. Admin. Code § NR 243.13(2).[9] In any event, broad grants of power like that contained in the first sentence of subsection (4) no longer authorize DNR to impose ad hoc permit conditions not explicitly permitted or required by a valid rule. *See supra* pp. 26-27. Thus, even if one concludes that off-site groundwater-monitoring requirements are "naturally or necessarily involved in," or a logical consequence of, subsection (4), DNR cannot impose those requirements after Act 21—at least absent a valid rule that explicitly specified that permit condition, *supra* pp. 26-27. *See Papa*, 393 Wis. 2d 1, ¶¶ 38-40.

2. *Chapter NR 205*. Chapter NR 205, which contains general WPDES permit requirements and applies to all point source discharges of pollutants," Wis. Admin. Code § NR 205.02, also does not help Petitioners. NR 205.065 requires DNR to set effluent limitations, but as explained *supra* pp. 34-36, an off-site groundwater-monitoring

[9] Although there might be another subsection (3) limitation applicable to CAFOs from federal regulations, *see* Wis. Stat. § 283.31(3)(d)2., 40 C.F.R. § 412.31(b), that limitation, even if applicable, is insufficient to require or permit off-site *groundwater* monitoring for the same reasons that Wisconsin's nutrient-management-plan regulation is insufficient, *see infra* pp. 40-41.

requirement is not an effluent limitation. NR 205.07 provides that DNR must include in every WPDES permit the requirements provided in Wis. Stat. § 283.31(4)(a)–(f) as well as other record-keeping and reporting requirements, duties to mitigate damages, and other like requirements. Wis. Admin. Code § NR 205.07(1); *see also* § NR 205.07(3) (listing permissive conditions). But none of these requirements calls for off-site groundwater monitoring. *See id.*; *see also* Wis. Stat. § 283.31(4)(a)–(f).

NR 205.066 requires DNR to determine, "on a case-by-case basis," the frequency at which a permittee must conduct monitoring "for each effluent limitation in a permit." Wis. Admin. Code § NR 205.066(1). But the only effluent limitation "applicable" to large dairy CAFOs under state law governs exclusively on-site discharges. *Supra* p. 8 & n.4. DNR's regulations impose no effluent limitations on off-site landspreading fields.[10]

3. *Chapter NR 243*. The far more relevant chapter NR 243, which collects DNR's regulations of WPDES

[10] Instead, they require only that a CAFO's landspreading practices comply with the CAFO's nutrient-management plan and federal and DNR regulations. *See supra* pp. 9-10.

permitting for CAFOs specifically, likewise does not confer authority to require off-site groundwater monitoring. Chapter NR 243 explicitly permits DNR to impose only production-area groundwater monitoring; it contains no explicit provisions relating to *off-site* groundwater monitoring at all. NR 243.15 and 243.16, governing "proposed" and "previously constructed" "facilities or systems," state that DNR may impose on-site groundwater monitoring for manure and wastewater "storage or containment facilities," among other on-site facilities. Wis. Admin. Code §§ NR 243.15(3)(c), (7) & 243.16(3) (requiring groundwater-monitoring systems only at or around the storage or containment facility). They do not at all contemplate off-site monitoring of manure-landspreading fields. And the inclusion of the former suggests the exclusion of the latter. *See Cranes & Doves*, 270 Wis. 2d 318, ¶ 17 n.11.

The ALJ and circuit court both discerned authority for DNR to impose off-site groundwater monitoring from statutes and regulations that do not explicitly require or permit off-site groundwater monitoring. App.024-025, 070-071. But as explained, all of these statutory and regulatory sections only

implicitly address off-site groundwater-monitoring authority, and, as this Court affirmed, implicit authority is not good enough after Act 21. *Supra* pp. 29-30. And while DNR has exercised its rulemaking authority to require only on-site monitoring, Petitioners do not challenge those rules as insufficiently comprehensive.

2. DNR Lacks Explicit Authority To Impose Animal-Unit Maximums On WPDES Permits

1. *Chapter 283*. As with off-site groundwater-monitoring requirements, chapter 283 does not explicitly require or explicitly permit animal-unit maximums. An "animal unit" is simply 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). An animal-unit maximum is not an effluent limitation, effluents prohibition, groundwater protection standard, a standard of performance for new sources, or the like. *See* Wis. Stat. § 283.31(3).

And while the broad language of Subsection (4)—that DNR "shall impose conditions . . . to ensure compliance with" subsection (3)—may previously have granted implicit authority to DNR to impose animal-unit maximums, it does

no longer. *See supra* pp. 29-30; *see also Palm,* 2020 WI 42; *see also Papa*, 2020 WI 66. In any event, the only subsection (3) requirement "applicable" to large dairy CAFOs under state law is a technology-based effluent limitation of "no[ ] discharge" from the production area. *Supra* p. 8-9. So long as the CAFO maintains an adequate amount of on-site waste storage to comply with this rule, there is no limit to the number of animals a CAFO can have.

Finally, an animal-unit maximum is not a maximum level of discharge. *See* Wis. Stat. § 283.31(5). A "discharge" is "any addition of any pollutant to the waters of this state from any point source." Wis. Stat. § 283.01(4)–(5). The term "pollutant," in turn, includes "biological materials" and "agricultural waste," but it does not include animals. Wis. Stat. § 283.01(13). Thus, to set a maximum number of animal units is not to set a maximum level of discharge.

2. *Chapter NR 205*. None of the general requirements contained in chapter NR 205 explicitly requires or explicitly permits animal-unit maximums. As explained above, an animal-unit maximum is not an effluent limitation. Wis. Admin. Code § NR 205.065. Nor does an animal-unit

maximum serve to monitor for each effluent limitation. *Id*. § NR 205.066.

3. *Chapter NR 243*. No provision of the more specific chapter NR 243 explicitly requires or explicitly permits animal-unit maximums. For example, while NR 243.14 imposes certain requirements on CAFOs' nutrient- management plans, it does not at all address animal-unit maximums. Animal units are mentioned only once, in a provision exempting from emergency liquid-manure permissions those emergencies caused by a lack of adequate storage due to an increase in animal units. Wis. Admin. Code § NR 243.14(7)(d)2. Likewise, in NR 243.15, the only mention of a maximum number of animals is a requirement that the CAFO have adequate liquid-manure storage "based on the maximum animals present at [the] operation for the period of time liquid manure . . . [is] to be stored." Wis. Admin. Code § NR 243.15(3)(k). This is not a limit on the number of animals a CAFO can have, but simply a requirement that, however many animals the farmer chooses to keep, the CAFO have adequate storage for the manure produced.

Neither the ALJ nor the circuit court could identify any statutory or regulatory provisions explicitly providing for an animal-unit maximum. The ALJ cited no authority, explicit or otherwise, for DNR to impose animal-unit maximums. Indeed, the ALJ admitted that "[n]o applicable rule or statute requires a WPDES permit to specify a number of animal units at a CAFO facility." App.023. Likewise, the circuit court could identify no explicit authority in the administrative code for DNR to set an animal-unit maximum, the purpose of which would be to do indirectly what the express provisions on waste storage do directly. This Court has affirmed that an agency has authority to act *only if* a statutory or regulatory provision explicitly authorizes it to do so. *Palm*, 2020 WI 42; *Papa*, 2020 WI 66. Therefore, the analysis should end there.

II. THE DNR SECRETARY WAS EMPOWERED UNDER DNR RULES TO OMIT THE ALJ'S CONDITIONS FROM KINNARD'S PERMIT.

A. The ALJ's Decision Did Not Become The Agency's Final Decision.

Petitioners have raised a procedural challenge to DNR's 2015 decision to overrule the ALJ's imposition of unlawful conditions on Kinnard's permit. The theory is that because DNR allegedly "did not follow its own procedures in

this case and did not act in the time prescribed by law," see R.37:7, DNR lacked authority to overturn the ALJ's decision and so, in the circuit court's words, "[i]ts attempt to do so . . . is void," App.064. This theory falters at every step, including at the threshold.

DNR's administrative-review procedure begins when an aggrieved party files a contested-case petition. *See* Wis. Stat. § 283.63(1). If, as here, "5 or more persons" object to the agency's issuance of a permit, they "may secure a review by the department" by filing a petition with the Secretary. *Id*. That petition can trigger a contested-case hearing, and the DNR Secretary then determines whether to keep the case within DNR or whether to set in motion the appointment of a hearing examiner—or ALJ—from the Division of Hearings and Appeals to preside over the hearing. Wis. Stat. §§ 283.63(1)(b) and 227.43(1)(b). If an ALJ presides, then, at the conclusion of the hearing, the ALJ "[m]ake[s] or recommend[s] findings of fact, conclusions of law and decisions." Wis. Stat. § 227.46(1)(h). Those findings and conclusions constitute the "final decision of . . . [the] hearing examiner" within the meaning of § 227.47(1), as well as the

"final decision rendered after a contested case hearing" described in NR 2.20.

Whether and under what circumstances the "final decision" of an ALJ becomes the final decision of the *agency* is an entirely separate question, which the Legislature has appointed DNR to answer. The default rule is that an ALJ's contested-case decision is not the final decision of the agency, but "an agency may by rule or in a particular case may by order . . . [d]irect that the hearing examiner's decision be the final decision of the agency." Wis. Stat. § 227.46(3)(a).[11] In accordance with that statute, DNR has by rule provided that after a contested-case hearing, "*[u]nless the department petitions for judicial review as provided in s. 227.46(8), Stats.,* the [ALJ's] decision shall be the final decision of the department, but may be reviewed in the manner described in s. NR 2.20." Wis. Admin. Code § NR 2.155(1) (emphasis added).

[11] Alternatively, the agency can simply "direct that the record be certified to it" without any "proposed decision" or direct the hearing examiner to prepare a proposed decision that the agency might later adopt "as the final decision in the case." Wis. Stat. §§ 227.46(3)(b)–(c) and 227.46(2).

Critically, an ALJ's decision cannot become the final decision of DNR under NR 2.155 until it is judicially reviewable. NR 2.155 implicitly makes the judicial reviewability of an agency order necessary to its becoming "the final decision of the department."[12] The opening clause conveys this point: *"Unless the department petitions for judicial review as provided in s. 227.46(8)"*—the statute reads to impose a "final order" requirement—"the [ALJ's] decision shall be the final decision of the department . . . ." Wis. Admin. Code § NR 2.155(1) (emphasis added). To read this rule as capable of converting non-final orders into "final decision[s] of the department," one would need to construe the "unless" clause as awkwardly forcing DNR to file jurisdictionally improper petitions for review (i.e., to challenge unreviewable, non-final orders) simply to preclude the possibility that those orders would later be taken to represent DNR's "final decision." The better reading of the rule—indeed, the only reasonable one—is that the "unless" clause's description of the event's occurrence (the filing of a

[12] Necessary, but not always sufficient: even if the order is judicially reviewable, it is not the final decision of the agency if DNR files for judicial review. *See* Wis. Admin. Code § NR 2.155(1).

petition) contemplates that that event can in fact *properly* occur. In other words, where DNR cannot plausibly petition for judicial review of an ALJ's order because it is interlocutory, the order cannot possibly represent the final decision of DNR. *See Kalal*, 271 Wis. 2d 633, ¶ 46.

A decision is not "final for purposes of judicial review" unless it satisfies § 227.52 as interpreted by *Sierra Club* and its forebears. *Sierra Club v. DNR*, 2007 WI App 181, ¶ 13, 304 Wis. 2d 614, 736 N.W.2d 918; *see also Pasch v. DOR*, 58 Wis. 2d 346, 353, 206 N.W.2d 157 (1973). Section 227.52 states that "[a]dministrative decisions which adversely affect the substantial interests of any person . . . are subject to review as provided in this chapter." Wis. Stat. § 227.52; *see also* Wis. Stat. § 227.53(1). Although this text does not explicitly "require that an administrative decision be 'final' in order to be subject to judicial review," *Sierra Club*, 304 Wis. 2d 614, ¶ 13, the Wisconsin Supreme Court has long determined that, to be judicially reviewable, an agency action must be "final, in the sense that [it] determine[s] the further legal rights of the person seeking review," *Waste*

Mgmt. of Wis., Inc. v. DNR, 128 Wis. 2d 59, 90, 381 N.W.2d 318 (1986).

This distinction between final and non-final decisions of an agency tracks the line separating final and interlocutory orders of a court. *See Pasch*, 58 Wis. 2d at 354. In both contexts, the analysis "focus[es] on [the order's] substance and not its form or label." *Sierra Club*, 304 Wis. 2d 614, ¶ 14. An order is final when it "directly affects the legal rights, duties, or privileges of a person." *Id*. ¶ 15 (citation omitted). Conversely, an agency's decision is interlocutory, and not final, "where the substantial rights of the parties . . . remain undetermined and the cause is retained for further action." *Id*. (citation omitted). Put differently, an interlocutory order "leaves [matters] open for future determination." *Emp'rs Mut. Life Ins. Co. v. Indus. Comm'n*, 230 Wis. 670, 683, 284 N.W. 548 (1939).

Like a court that retains discretion over an interlocutory order, *see, e.g., In re Commitment of Krueger*, 2001 WI App 76, ¶ 13, 242 Wis. 2d 793, 626 N.W.2d 83, DNR retains complete discretion to alter judicially unreviewable orders that do not constitute its final decisions.

For one thing, nothing in the statutes requires DNR to adopt an ALJ's contested-case decision. Indeed, quite the opposite is true: the default rule is that an ALJ's contested-case decision is *not* the decision of the agency, and only becomes so if the agency, in its discretion, chooses to adopt it. Wis. Stat. § 227.46(3)(a). This makes sense, because it is the agency, not the ALJ, on whom the statutes place the responsibility for holding a hearing and making a final decision. *See Andersen v. DNR*, 2010 WI App 64, ¶ 21, 324 Wis. 2d 828, 783 N.W.2d 877, *rev'd on other grounds,* 2011 WI 19, 332 Wis. 2d 41, 796 N.W.2d 1 (discussing Wis. Stat. § 283.63). ALJs can preside over contested cases arising under § 283.63 only if the DNR Secretary, in her discretion, chooses to refer the case to the Division of Hearings and Appeals. *Supra* p. 44.

B. Even If The ALJ's Decision Became The Agency's Decision, DNR Has Inherent Authority To Reconsider Its Decision.

Moreover, even if the ALJ's decision were somehow the decision of DNR, DNR, as a quasi-judicial body, "ha[s] inherent authority to reconsider its decision[s]." *Schoen v. Bd. of Fire & Police Comm'rs of Milwaukee*, 2015 WI App 95,

¶ 20, 366 Wis. 2d 279, 873 N.W.2d 232. "It is a fundamental and basic principle of administrative agency law that an administrative agency has the power to reconsider its own decisions since the power to decide carries with it the power to reconsider." *Id*. (citation omitted). It would be particularly "unreasonable to conclude that the [agency] is powerless to correct an error of its own making when it realizes it has misapplied the very law the legislature has established." *Id*. ¶ 21. Notably, the *Schoen* court did not state that the agency's authority to reconsider its decision turns on how much time has passed since the initial decision.

The circuit court's contrary conclusion, that the Secretary lacked authority to revise the ALJ's order, App.054-064, rests on several errors. First, it wrongly reads NR 2.155 to "render[ ] the ALJ's decision final once the Secretary denied review." App.054-060. As explained *supra* pp. 45-48, that provision covers only judicially reviewable orders; it does not apply to interlocutory orders of an ALJ. For the same reason, the circuit court's reliance on the statute providing for rehearings, App.061-062, is misplaced, because

that too applies only to "final decision[s]." Wis. Stat. § 227.49(1).

Applied here, these principles show that the ALJ's order did not constitute the final decision of DNR and that, consequently, DNR retained discretion over the permit conditions. First, as the circuit court for Kewaunee County squarely held, the ALJ's order was not final because it was not a judicially reviewable final agency action. *See* App.034-039. It did not settle "the legal rights, duties, or privileges" of the litigants, which "remain[ed] undetermined." *Sierra Club*, 304 Wis. 2d 614, ¶ 15 (citation omitted). In particular, the ALJ ordered that certain sections of the permit "be modified [by DNR] to reflect a maximum number of animal units at the facility" and directed DNR to "review and approve a plan for groundwater monitoring" including "no less than six groundwater monitoring wells, and if practicable, at least two of which monitor groundwater quality impacts from off-site landspreading." App.029. The question of what the final permit would look like, and whether that permit would satisfy the ALJ's order, remained "open for future determination." *Emp'rs Mut*., 230 Wis. at 683; *see Sierra Club*, 304 Wis. 2d

614, ¶ 19 (non-final order "d[id] not fully resolve the modifications to be made" to the permit, instead "requir[ing] further DNR action"). Because the order was not a final agency action reviewable under § 227.52, it could not have become the final decision of DNR under NR 2.155, but instead was subject to further revision by DNR, the statutory "reviewing department." *Andersen*, 324 Wis. 2d 828, ¶ 21; *see supra* p. 49.[13] Here, the Secretary exercised that "reviewing" authority after receiving and considering DOJ's legal advice. App.044-047.

CONCLUSION

If the circuit court's substantive disregard of Act 21 in this case is allowed to stand, then Act 21 will have been effectively overturned. If Kinnard Farm's permit is to include an animal unit maximum and offsite groundwater monitoring requirement, then the legislature must pass legislation

[13] While the circuit court faulted DNR for stating in a different case before a different circuit court that "'[t]he [ALJ's] Decision became the DNR's decision pursuant to Wis. Stats. § 227.46(3) and Wisconsin Administrative Code § NR 2.155(1),'" App.058 (quoting R.34:6577), DNR's unreasoned position on this issue in a different case is plainly not binding. *See State v. Petty*, 201 Wis. 2d 337, 348, 548 N.W.2d 817 (1996) (setting forth the elements of equitable judicial estoppel, none of which is present here).

explicitly authorizing such conditions or oversee DNR's promulgation of administrative rules explicitly authorizing the imposition of such conditions. While this Court may conclude that the imposition of such conditions is appropriate or even necessary, it must leave it to the Legislature and the agency to fulfill their roles within the framework of Act 21. For these reasons and all of those discussed above, the Court should reverse the circuit court's ruling on the imposition of the animal unit maximum and offsite groundwater monitoring conditions in Kinnard Farms' WPDES permit.

Respectfully submitted this 4th day of February, 2021.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,859 words.

Dated: February 4, 2021

Jordan J. Hemaidan

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

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: February 4, 2021

_____

Jordan J. Hemaidan

SUPREME COURT OF WISCONSIN
Case 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,

WISCONSIN LEGISLATURE,

Intervenor.

On Appeal by Certification by Wisconsin Court of Appeals
District II, Appeal No. 2016AP1688
Dane County Circuit Court Case No. 2015CV002633,
The Honorable John W. Markson, Presiding

AFFIDAVIT OF MAILING

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, Susan Bunge, being first duly sworn, state that on February 4, 2021, I caused three (3) true and correct copies of the Brief and Appendix of Intervenor-Co-Appellant Kinnard Farms, Inc. to be served upon the following via First Class mail, postage prepaid:

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Subscribed and sworn to before me
This 4th day of February, 2021.

Notary Public, State of Wisconsin
My Commission: