No. 16AP1688

In the Wisconsin Supreme Court

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 Certification by Court of Appeals, Dis. II, January 16, 2019 On Appeal from Dane County Circuit Court, Hon. John W. Markson, Presiding, Case No. 15-cv-2633

INTERVENOR THE WISCONSIN LEGISLATURE'S BRIEF

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ISSUES PRESENTED

1. Does the Wisconsin Department of Natural Resources have explicit authority to impose off-site groundwater-monitoring requirements and an animal-unit maximum in a Wisconsin Pollutant Discharge Elimination System permit?

The circuit court answered yes.

Another issue was presented in the court of appeals: 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 Legislature will not be addressing that issue in this brief.

INTRODUCTION

In 2011, the Legislature enacted Act 21, which confines the authority of administrative agencies to that "explicitly" conferred by the Legislature. Wis. Stat. §§ 227.10(2m), 227.11(2)(a).[1] Act 21 ensures that agencies—which are part of the executive

[1] The principal statutes and regulations discussed in this brief are provided in the Appendix ("App.").

branch—do not impinge on the legislative branch's authority to determine public policy.

This case concerns the decision of the Department of Natural Resources ("DNR") that it did not have the authority to require large dairy farms (through conditions in a Wisconsin Pollutant Discharge Elimination System ("WPDES")[2] permit) to monitor off-site groundwater for pollutants or to set a limit on the number of animals that the farm may keep. Because no statute or rule explicitly gives DNR that authority, DNR determined that Wis. Stat. § 227.10(2m) precludes it from imposing the animal-unit-maximum condition or the off-site groundwater-monitoring condition in the WPDES permit. Accordingly, DNR properly issued the WPDES permit to Kinnard Firms without those conditions. The Court should affirm DNR's decision to issue the permit and reverse the circuit court's decision vacating the permit.

[2] Following the last page of this brief is a Key to Terms used in the brief.

STATEMENT OF THE CASE

Kinnard Farms, Inc. ("Kinnard Farms") operates a large dairy in Kewaunee County. R.34—2764-2804;[3] App.79-119. In 2012, Kinnard sought to expand its operation by adding a second site ("Site 2") and more than 3,000 dairy cows. App.4. But first it needed approval from DNR and a new WPDES permit, *see* Wis. Stat. §§ 283.31(4)(b), 283.59(1); App.4. This case arose from a contested case hearing concerning a WPDES permit issued by DNR to Kinnard Farms, which it received on August 16, 2012, R.34—3786-817; App.120-151. The WPDES permit was effective September 1, 2012. R.34—3786-87; App.120-21.

Kinnard Farms' WPDES permit was contested by interested persons in an administrative review proceeding. The permit was ultimately issued, and the challengers filed for judicial review in circuit court under Chapter 227. R.1; App.35. At issue in the challenge are permit requirements under the Wisconsin Pollution Discharge Elimination System, specifically

[3] References to the administrative record (R.34) are to the administrative record as contained in the files on the CD contained in the Record filed with the court of appeals and this Court and the pagination as it appears therein.

whether the statutory scheme governing that program explicitly authorizes DNR to impose off-site groundwater-monitoring and animal-unit-maximum conditions upon such a permit.

I. Regulatory Background

A. The National and Wisconsin Pollution Discharge Elimination Systems

In 1970, Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *Andersen v. DNR*, 2011 WI 19, ¶ 33, 332 Wis. 2d 41, 796 N.W.2d 1. To achieve this goal, 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." 33 U.S.C. § 1362(6); *see also* 33 U.S.C. § 1311; *Andersen*, 2011 WI 19, ¶ 33.

Under the Clean Water Act, states may 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*, 2011 WI 19, ¶¶ 34–36. In 1974, EPA approved Wisconsin's permit program, the WPDES. *EPA*, *NPDES State Program Information*, *State Program Authority*, https://www.epa.gov/npdes/npdes-state-program-information (last visited February 1, 2021); *see Andersen*, 2011 WI 19, ¶ 37.

DNR administers the WPDES program, s*ee* Wis. Stat. § 283.001(2), consistent with applicable federal requirements, 33 U.S.C. § 1342(c), (d); *Andersen*, 2011 WI 19, ¶¶ 39–40; 40 C.F.R. § 123.63(a). Under this program, the discharge of any pollutant into "waters of the state" of Wisconsin requires a WPDES permit issued by DNR. Wis. Stat. § 281.31(1). "Waters of the state" include both surface water and groundwater. Wis. Stat. § 283.01(20).

B. Point-Source Permits

Kinnard Farms is a "point source"[4] under the WPDES statutory scheme. The owner or operator of a point source may

[4] A "[p]oint source" is defined as "a discernible, confined, and discrete conveyance . . . from which pollutants may be discharged," including a ditch, well, or "concentrated animal feeding operation." Wis. Stat. § 283.01(12)(a); *see also* 33 U.S.C. § 1362(14).

not discharge pollutants into the waters of Wisconsin unless it does so under a lawful WPDES permit issued by DNR.[5] Wis. Stat. §§ 283.31, 283.37. Once DNR receives a WPDES permit application, it must notify the public and receive public comment for 30 days and must hold a public hearing on the permit if requested. Wis. Stat. §§ 283.39, 283.49.

DNR "may issue" a WPDES permit "upon condition" that authorized discharges will meet certain statutory criteria. Wis. Stat. § 283.31(3). This criteria includes "[e]ffluent limitations," Wis. Stat. § 283.31(3)(a)[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 section 283.31(3)] requirements[,]" and specifically enumerates certain

[5] 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.

[6] "Effluent limitations" are "restriction[s] . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources." Wis. Stat. § 283.01(6).

reporting and access requirements. Wis. Stat. § 283.31(4); *see also* Wis. Admin. Code § NR 205.07(1).

C. Concentrated Animal Feeding Operations

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."[7] 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); see below at page 44 (defining animal unit).

Under Wis. Stat. § 283.31(3), DNR has promulgated "[s]tandard WDPES [*sic*] permit requirements for large CAFOs," found in Wis. Admin. Code § NR 243.13. These regulations apply

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

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 manure or process wastewater pollutants to navigable waters from the production area." Wis. Admin. Code § NR 243.13(2).[8] 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

[8] The "[p]roduction 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).

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)(a). The plan "shall contain information necessary to document how the operation's land application activities will comply with [federal and DNR regulations] and the conditions of the operation's WPDES permit[,]" including Wis. Admin. Code § NR 243.13(2)'s restrictions on manure and process-wastewater discharge. Wis. Admin. Code NR 243.14(1)(b).

DNR's regulations impose a comprehensive set of highly technical and specific requirements on nutrient management, 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. Petitions for Review From Permit Decisions

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, Wis. Stat. § 227.46(1)—must hold a public hearing on the issues raised in the petition. Wis. Stat. § 283.63(1)(b), (d).

If DNR refers the matter outside of the department, the presiding administrative law judge may "[m]ake or recommend findings of fact, conclusions of law and decisions." Wis. Stat. § 227.46(1)(h). These findings and conclusions constitute the "final decision of . . . [the] hearing examiner" for purposes of section 227.47(1), as well as the "final decision rendered after a contested case hearing" for purposes of Wis. Admin. Code § NR

2.20, which allows a party to petition the department secretary to review the administrative law judge's decision. However, the final decision of the administrative law judge does not become the final decision of the agency unless it chooses to adopt the decision by rule or order, as permitted by Wis. Stat. § 227.46(3)(a).

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).

II. Factual Background

A. Contesting Case Hearing

As noted, Kinnard Farms operates a large dairy in Kewaunee County and in 2012 it sought to expand its operation by adding Site 2 and more than 3,000 dairy cows. App.4. But first it needed approval from DNR and a new WPDES permit, *see* Wis. Stat. §§ 283.31(4)(b), 283.59(1), which it received on August 16, 2012, R.34—3786-817; App.120-51. The WPDES permit was effective September 1, 2012; it expired on August 31, 2017. R.34—3786; App.120.

After DNR issued the permit, five affected individuals (the individual petitioners) sought administrative review of the decision. R.34—0001-32; *see* Wis. Stat. § 283.63. Two of petitioners' main claims were that the permit improperly failed to "require monitoring to evaluate impacts to groundwater and determine 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, as permitted under Wis. Stat. § 227.46(1), where Administrative Law Judge ("ALJ") Jeffrey Boldt presided over the hearing. R.34—0039-110. *See* Wis. Stat. § 227.46(1). Kinnard Farms 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 Farms 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." R.1—26-44; App.60-78; R.34—662-80. The ALJ determined that "a groundwater monitoring plan is essential" at Site 2 and that the permit was "unreasonable because it [did] not specify the number of animal units allowed at the facility," R.1—39, 40; App.73, 74; R.34—675, 676. The ALJ also 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[,]" R.1—39; App.73, and so required such monitoring only "if practicable," R.1—43; App.77.

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 [was] a good idea in this particular case because of concerns over Kinnard Farms' ability to comply with regulatory requirements." R.1—40;

App.74. So the ALJ held that DNR should modify the permit "to reflect th[e] additional requirement" of an animal-unit maximum. *Id.*

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." R.1—43; App.77.

B. DNR's Review of the ALJ's Decision

Kinnard Farms timely petitioned the DNR Secretary for review of the ALJ's decision under NR 2.20. *See* R.34—681-711; Wis. Admin. Code § NR 2.20. On November 25, 2014, the Secretary denied review, explaining that these issues were "amenable to judicial review" and therefore the issues "would most appropriately [be] decided by the courts of this state." R.34—718-19. Kinnard Farms then filed a petition for judicial

review in the Kewaunee County Circuit Court. R.34—6419-47. The circuit court held that the ALJ's order was not final and therefore not judicially reviewable under Chapter 227. R.34—6969.

DNR then sought clarification from the Wisconsin Department of Justice ("DOJ") regarding the application of Wis. Stat. 227.10(2m) (Act 21) to the ALJ's proposed permit conditions. *See* R.1—13-14; App.47-48. After receiving clear guidance from DOJ that the conditions would be unlawful under Wis. Stat. § 227.10(2m) and advice that the Secretary should reconsider her decision under Wis. Admin. Code § NR 2.20, DNR issued its final order regarding Kinnard Farms' WPDES permit on September 11, 2015. R.1—15-25; R.1—9-12; App.49-59, 43-46.

DNR approved a proposed monitoring plan for Site 2, which did not include any off-site groundwater monitoring. R.34—721-724; App.152-155. The DNR Secretary explained that (1) DNR "may not amend the WPDES permit to include conditions unless those conditions are explicitly required or explicitly permitted by

statute or by rule"; (2) that animal-unit maximums and off-site groundwater monitoring are not "explicitly required or explicitly permitted by statute or by a rule"; and, therefore, (3) those conditions "will not be added" to the permit. R.1—11; App.45 (citing Wis. Stat. § 227.10(2m)). Styling her response as a reconsideration of her earlier denial of Kinnard Farms' 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." R.1—11; App.45.

C. Circuit Court Proceedings

On October 12, 2015, Clean Wisconsin, an interested environmental group, filed a petition for judicial review from DNR's WPDES permit decision in Dane County Circuit Court. R.1; App.35-78. The individual petitioners filed a petition for judicial review in Kewaunee County Circuit Court. R.34—6419-47. The two actions were consolidated in Dane County. R.33.

The circuit court vacated the WPDES permit on both procedural and substantive grounds. R.42; App.9-34. On the

merits,[9] the court determined that DNR has authority to impose the off-site groundwater-monitoring requirements and the maximum-animal-unit requirements in the permit. R.42—17-26; App.25–34. The court explained that it must read Wis. Stat. § 227.10(2m) "in conjunction with other statutes" and that it "must consider [that statute] within the greater context of chapter 283," including Chapter 283's statement of purpose provision. R.42—18, 19; App.26, 27 (citing Wis. Stat. § 283.001(1)). The court held that an animal-unit maximum was the equivalent of an "effluent" limitation and a maximum level of discharge, and thus DNR was authorized to impose such a maximum by Wis. Stat. § 283.31(3), (4), and (5). R.42—21-22;

[9] The court first determined that "[t]he ALJ's decision became DNR's decision when the DNR Secretary denied Kinnard's § NR 2.20 Petition for Review." R.42—7; App.15. 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." R.42—7, 8 9. 14; App.15, 16, 17, 22. Notwithstanding that another circuit court had concluded that the ALJ's decision was interlocutory and therefore not judicially reviewable, R.42—10; App.18, the court held that the ALJ's decision became the final decision of DNR because DNR had not petitioned for judicial review, R.42—9-10; App.17-18. 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." R.42—12; App.20. These facts bear on the second issue DNR raised in the court of appeals. The Legislature is not addressing that issue.

App.29-30 (mistakenly referring to § 283.32). The court also purported to find authority for animal-unit maximums in the Wisconsin Administrative Code. R.42—21-22; App.29-30.

The circuit court held that there is explicit authority to impose off-site groundwater monitoring. R.42—25; App.33. The court cited Wis. Stat. § 283.31(4), which "requires DNR to establish permit conditions that assure compliance with [ ] effluent limitations." R.42—23; App.31. The court also held that DNR's nutrient-management-plan regulations 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." R.42—23-24; App.31–32.

D. The Appeal

DNR appealed. On January 16, 2019, the court of appeals certified the appeal to this Court. App.1. On April 9, 2019, the Court accepted certification. On April 25, 2019, the Joint Committee on Legislative Organization on behalf of the

Wisconsin Legislature ("the Legislature") petitioned to intervene in this appeal. This Court granted the Legislature's intervention motion on January 5, 2021.

On May 2, 2019, DNR informed the Court that it was dismissing Appeal No. 2016AP2502, the Kewaunee County judicial review action filed by the five individual petitioners. This appeal remains, in which Kinnard Farms intervened and appealed.

STANDARD OF REVIEW

In this Chapter 227 proceeding, the Court reviews DNR's permit decision, not the decision of the circuit court. *Lamar Cent. Outdoor, LLC v. Div. of Hearings & Appeals*, 2019 WI 109, ¶ 9, 389 Wis. 2d 486, 936 N.W.2d 573; *Myers v. Wisconsin Dep't of Nat. Res.*, 2019 WI 5, ¶ 17, 385 Wis. 2d 176, 922 N.W.2d 47; *Lake Beulah*, 2011 WI 54, ¶ 25.

Petitioners ask the Court to set aside DNR's decision to grant Kinnard Farms the WPDES permit. The Court's task is quite narrow. "Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action . . . under a

specified provision of this section, it shall affirm the agency's action." Wis. Stat. § 227.57(2). "The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law." Wis. Stat. § 227.57(5).

The party seeking to overturn the agency decision bears the burden of proof. *Bethards v. DWD*, 2017 WI App 37, ¶ 16, 376 Wis. 2d 347, 899 N.W.2d 364.

Issues of statutory interpretation are reviewed by the Court independently without deference to DNR's interpretation. *Lamar*, 2019 WI 109, ¶ 9; *State v. Reyes Fuerte*, 2017 WI 104, ¶ 18, 378 Wis. 2d 504, 904 N.W.2d 773 ("Statutory interpretation is an issue of law we review de novo.").

ARGUMENT

As the source of agency authority, the Legislature has the power to determine the extent of that authority.[10] Wisconsin Statute section 227.10(2m) reflects and reinforces that principle, preventing agencies from "enforc[ing] any standard [or] requirement"—"including as a term or condition of any license issued by the agency"—that is not "explicitly required or explicitly permitted by statute or by a rule" properly promulgated under Chapter 227. This prevents agencies from making or inferring their own authority—authority that could be used improperly to make public policy decisions entrusted to the Legislature.

Here, section 227.10(2m) prohibited DNR from imposing both off-site groundwater-monitoring requirements and animal-unit maximums on WPDES permits because neither off-site

[10] *Chicago & N.W. Ry. Co. v. Pub. Serv. Comm'n*, 43 Wis. 2d 570, 579, 169 N.W.2d 65, 69 (1969); *Myers v. Wisconsin Dep't of Nat. Res.*, 2019 WI 5, ¶ 21, 385 Wis. 2d 176, 922 N.W.2d 47; *Martinez v. Dep't of Indus., Labor & Human Relations*, 165 Wis. 2d 687, 697, 478 N.W.2d 582, 585 (1992); *Wisconsin Citizens Concerned for Cranes & Doves v. DNR*, 270 Wis. 2d 318, 335, 677 N.W.2d 612 (2004); *SEIU v. Vos*, 2020 WI 67, ¶ 98, 393 Wis. 2d 38, 946 N.W.2d 35.

groundwater monitoring nor animal-unit maximums are "explicitly required or explicitly permitted" by the Wisconsin Statutes or the Wisconsin Administrative Code. None of the authority discussed before the ALJ or the circuit court stands to the contrary. Thus, this Court should reverse the decision of the circuit court and affirm DNR's WPDES permit decision.[11]

[11] Kinnard's 2012 permit, which is the subject of this case, has expired, R.34-3786; App.120, and Kinnard now operates under a new permit. See Wisconsin DNR, Kinnard Farms Inc. CAFO Permit, https://dnr.wisconsin.gov/topic/CAFO/KinnardFarm.html (last visited on Feb. 4, 2021). Despite the 2012 permit's expiration, this Court should still address the issues here. A court may decide a technically moot issue when it "(1) is of great public importance; (2) occurs so frequently that a definitive decision is necessary to guide circuit courts; (3) is likely to arise again and a decision of the court would alleviate uncertainty; or (4) will likely be repeated, but evades appellate review because the appellate review process cannot be completed or even undertaken in time to have a practical effect on the parties." *Outagamie County v. Melanie L.*, 2013 WI 67, ¶ 80, 349 Wis. 2d 148, 833 N.W.2d 607; *see also In re. Matter of Commitment of J.W.K.*, 2019 WI 54, ¶¶ 12, 29, 386 Wis. 2d 672, 927 N.W.2d 509.

For at least three independent reasons, this Court should decide the substantive Act 21 question. First, whether Act 21 forbids DNR from imposing the permit conditions that Petitioners seek—the underlying controversy here—is very much a live question. Although the 2012 permit has expired, the question of whether DNR should impose the off-site groundwater-monitoring and animal-unit-maximum conditions on Kinnard Farms remains in dispute. 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" agencies and judges.

A. As an Administrative Agency, DNR's Power is Limited to That Granted by the Legislature.

At its core, this case turns on the authority the Legislature has vested in DNR, an administrative agency.

As this Court recently stressed, "[i]t is important to remember that administrative agencies are creatures of the legislature." *Myers*, 2019 WI 5, ¶ 21. Accordingly, agencies "can exercise only those powers granted by the legislature." *Martinez*, 165 Wis. 2d at 697.

To that end, "[a]n agency charged with administering the law may not substitute its own policy for that of the legislature." *Seider v. O'Connell*, 2000 WI 76, ¶ 78, 236 Wis. 2d 211, 612 N.W.2d 659 (citation omitted). Instead, the Legislature's policy decisions control. And "to implement the policy decisions of the Legislature, the Legislature delegates to agencies, by statute, the power to promulgate administrative rules." *Coyne v. Walker*, 2016 WI 38, ¶ 18, 368 Wis. 2d 444, 879 N.W.2d 520. These standards provide necessary context under which the Legislature passed Act 21, which limits agency overreach.

B. Wis. Stat. § 227.10(2m) Prohibits Imposing Requirements or Conditions Not Explicitly Provided by Statute or Rule.

DNR adhered to the controlling law when it issued the WPDES permit and declined to include the off-site groundwater-monitoring requirement and the maximum-animal-unit requirement. Neither of those requirements is explicitly authorized by statute or rule. No language in Chapter 283 or any other statute expressly provides that such requirements may be imposed. If DNR were to impose requirements for off-site groundwater-monitoring or animal-unit maximums in the WPDES permit, it would be doing so without explicit statutory or regulatory authority.

DNR correctly declined to impose those requirements in the permit because such requirements are prohibited by Wis. Stat. § 277.10(2m). Section 227.10(2m) confines agency authority to that "explicitly" conferred by the Legislature. First, an agency cannot "implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued

by the agency"[12] that is not "explicitly required or explicitly permitted by statute or by a rule" that has been properly promulgated. Wis. Stat. § 227.10(2m). The Court has referred to this as the "explicit authority requirement." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 52, 391 Wis. 2d 497, 942 N.W.2d 900.

Second, section 227.11(2)(a) recognizes that statutory provisions "containing a statement . . . of legislative intent, purpose, findings, or policy" and any provisions "describing [an] agency's general powers or duties" are not enough to "confer rule-making authority . . . beyond the rule-making authority that is explicitly conferred on the agency by the legislature." Wis. Stat. § 227.11(2)(a)1.–2. Instead, an agency's rule-making authority is limited to that "explicitly conferred on the agency by the legislature." *Id.*

The "explicit authority requirement is codified at Wis. Stat. § 227.10(2m)," *Palm*, 2020 WI 42, ¶ 52, which provides:

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[12] An "agency permit" constitutes a license. Wis. Stat. § 227.01.

> No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter . . . .

Wis. Stat. § 227.10(2m).

This legislative instruction that an administrative agency is unauthorized to enforce any standard or requirement not "explicitly required" or "explicitly permitted" by statute or rule precludes regulatory authority to enforce a requirement or standard when such authority is not explicitly provided, but is rather inferred from statute by implication. *See Palm*, 2020 WI 42, ¶ 52. As the Court recently explained,

> Formerly, court decisions permitted Wisconsin administrative agency powers to be implied. In theory, "any reasonable doubt pertaining to an agency's implied powers" was resolved "against the agency." However, the Legislature concluded that this theory did not match reality. Therefore, under 2011 Wis. Act 21, the Legislature significantly altered our administrative law jurisprudence by imposing an "explicit authority requirement" on our interpretations of agency powers.

Id. ¶ 51 (citations omitted).

The word "explicitly" is a word of common usage that is not defined in Chapter 227. The Court applies "the ordinary and accepted meaning of [a statutory] term unless it has a technical or special definition." *State v. McKellips*, 2016 WI 51, ¶ 32, 369 Wis. 2d 437, 881 N.W.2d 258. The Court may consult the dictionary to establish the common meaning of an undefined statutory term. *Id.*

A standard or requirement may not be enforced or implemented by an agency unless it is "explicitly required" or "explicitly permitted" by statute. The word "explicitly" means that the standard or requirement must be expressly and specifically set forth in a statute. "Explicit" means "[d]istinctly expressing all that is meant; leaving nothing merely implied or suggested; express." 5 *Oxford English Dictionary* 572 (2d ed. 1989); *see also* Definition of "explicit," at dictionary.com, available at *https://www.dictionary.com/browse/explicit?s=t* (last visited Feb. 4, 2020) (App.191) ("explicit" means "fully and clearly

expressed or demonstrated; leaving nothing merely implied; unequivocal.").

"Implicit," the converse, 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* Definition of "implicit," at dictionary.com, available at *https://www.dictionary.com/browse/implicit?s=t* (last visited Feb. 4, 2020) (App.192) ("implicit" means "implied, rather than expressly stated").

Section 227.10(2m) provides that a requirement or condition must be expressly and specifically (*i.e.*, "explicitly") set forth in a statute before an agency may enforce or implement the requirement or condition. If the requirement or condition is not explicitly set forth in a statute, then the agency may not enforce or implement the requirement or condition. Put another way, section 227.10(2m) provides that if a statute or rule has not conferred a power to an agency expressly and specifically, then

the agency does not have the power at all—*even if* the power may arguably be implicit, that is, "naturally or necessarily involved in," or a logical consequence of, a general grant of authority.

When analyzing whether an agency action meets this "explicit authority requirement," the Court looks to the agency's enabling statutes to determine whether they explicitly authorize the agency to perform the act in question. *See Papa v. DHS*, 2020 WI 66, ¶¶ 32–43, 393 Wis. 2d 1, 946 N.W.2d 17. In *Papa*, this Court began its analysis with the "plain language" of the agency's enabling statutes to determine the precise scope of the agency's "explicit authority." *Id.* ¶¶ 32, 40. The Court then "compare[d] this explicit grant of [ ] authority," *id.* ¶ 41, to the specific agency action at issue, to conclude that "[n]o statute or promulgated rule explicitly require[d] or permit[ted]" the agency action, and therefore that the agency action "exceed[ed]" its explicit statutory authority. *Id.* ¶ 41.

In *Myers*, the Court similarly declined to infer agency authority not provided by statute. 2019 WI 5, ¶ 24. There, the

Court found that DNR lacked authority to modify or rescind a pier permit where the statutes did not explicitly authorize it to do so. *Id.* ¶ 37. The Court explained that when the plain language of a statute does not explicitly confer authority on an agency, the Court "will not read such language into the statute." *Id.* ¶ 24.

Related to the explicit authority requirement, Act 21 also enacted Wis. Stat. § 227.11(2)(a)1. and 2., which provide that general statements of policy or purpose and statutes describing general powers or duties may not confer rule-making authority beyond that specifically provided by statute. This helps enforce section 227.10(2m)'s "explicit authority requirement" by designating the types of statutes that necessarily *fail* to confer explicit authority. Section 227.11(2)(a)1. and 2. therefore reject the proposition that a statutory provision "containing a statement or declaration of legislative intent, purpose, findings, or policy" or "[a] statutory provision describing the agency's general powers or duties" may "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."

This statute "prevent[s] agencies from circumventing this new 'explicit authority' requirement by simply utilizing broad statutes describing the agency's general duties or legislative purpose as a blank check for regulatory authority." *Palm*, 2020 WI 42, ¶ 52 (quoting Kirsten Koschnick, *Making "Explicit Authority" Explicit: Deciphering Wis. Act 21's Prescriptions for Agency Rulemaking Authority*, 2019 Wis. L. Rev. 993, 996).

Sections 227.10(2m) and 227.11(2)(a) reflect and reinforce the Legislature's position vis-à-vis administrative agencies. As the source of agency authority, the Legislature has complete discretion to determine the extent of that authority. *See Chicago & N.W. Ry. Co.*, 43 Wis. 2d at 579 ("[A]dministrative agencies are the creatures of the legislature and are responsible to it. Consequently the legislature may withdraw powers which have been granted, prescribe the procedure through which granted

powers are to be exercised, and if necessary wipe out the agency entirely.").

By enacting Act 21, the Legislature ensured that agencies do not impinge on the legislative branch's authority to determine public policy. *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 539, 576 N.W.2d 245 (1998) ("This court has long held that it is the province of the legislature . . . to determine public policy."); *State ex rel. Thomson v. Giessel*, 265 Wis. 185, 193, 60 N.W.2d 873 (1953) ("We hardly see how . . . it can be said that the legislature, which is the voice of the people, has no freedom of action in determining the best methods of giving to the public that service for which it is willing and able to pay. It is the best judge of what is necessary to meet the needs of the public and in what manner the service shall be directed.") (citation omitted).

Agency authority to impose requirements or conditions upon regulated parties cannot be created by implication from statutes that do not specifically delineate such requirements or conditions. By confining agency authority to that "explicitly"

conferred by the Legislature, Act 21 prevents agencies from making or inferring their own authority—authority that could be used to improperly make public policy decisions. That would create a separation-of-powers issue. *See, e.g.*, *Schmidt v. Dep't of Resource Dev.*, 39 Wis. 2d 46, 158 N.W.2d 306 (1968).

Act 21 steps in to ensure that agencies do not exercise greater authority than the Legislature did, in reality, grant them. Section 227.10(2m) and section 227.10(2)(a) are essentially rules of construction for determining the parameters of a statutory delegation of agency authority and an instruction manual advising how the Legislature confers such authority. As the government branch responsible for creating all agency authority, the Legislature declares through Act 21 that any agency authority not granted explicitly is not authority granted at all.

C. Section 227.10(2m) Applies to the Permit Requirements at Issue.

The key issue here is whether the Legislature provided DNR with "explicit[]" authority to impose off-site groundwater-monitoring requirements and animal-unit maximums in WPDES

permits. Imposing off-site groundwater-monitoring requirements or animal-unit maximums as permit requirements constitutes "implement[ing] or enforc[ing]" a "requirement" as "a term or condition of [a] license[.]" Wis. Stat. § 227.10(2m). Those requirements may be enforced or implemented only if they are explicitly required by statute.

Here, DNR properly granted the WPDES permit without those requirements because they are not explicitly provided by statute. DNR is without authority to implement or enforce those requirements because there is no statute explicitly providing for off-site groundwater-monitoring requirements or animal-unit maximums on WPDES permits.

1. No Statute or Rule Explicitly Provides for Off-Site Groundwater-Monitoring Requirements.

No statute or rule—including the ones cited by the ALJ and circuit court, Wisconsin Statutes Chapter 283, and Wisconsin Administrative Code Chapter NR 205 or Chapter NR 243—"explicitly require[s]" or "explicitly permit[s]" DNR to impose off-site groundwater-monitoring requirements on WPDES permits.

a. At Best, Chapter 283 Provides Only Implicit Authority, Which is Insufficient Under Wis. Stat. § 227.10(2m).

The court of appeals has already acknowledged that Chapter "283 does not expressly authorize the DNR to regulate off-site manure applications[.]" *Maple Leaf Farms, Inc. v. State, Dep't of Nat. Res.*, 2001 WI App 170, ¶ 13, 247 Wis. 2d 96, 633 N.W.2d 720. Because imposing off-site groundwater-monitoring requirements on manure applications is, at most, a lesser-included power within "regulat[ing] off-site manure applications," *id.*, Wis. Stat. § 227.10(2m)—read together with *Maple Leaf*—makes clear that DNR lacks this authority.

To be sure, nothing in Chapter 283 confers upon DNR explicit authority to impose off-site groundwater-monitoring requirements in WPDES permits. The chapter's first section is a general statement of policy and purpose that confers no such explicit authority. This statute, entitled "Statement of policy and purpose," 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 th[is] policy[.]" Wis. Stat. § 283.001(2).

But this language only describes a general statutory goal. Statutory statements of purpose at most provide *implicit* authority. And Wis. Stat. § 227.11(2)(a)1. provides that agency authority can no longer be inferred from statutory provisions "containing a statement . . . of . . . purpose . . . or policy." Because section 283.001 is simply a prefatory "Statement of policy and purpose," it does not confer upon DNR the requisite authority. So, it is up to Chapter 283's other, specific provisions to provide the necessary explicit authority.

None of the provisions of § 283.31—the statute providing for WPDES permit conditions—confer explicit authority either. Specifically, section 283.31(3), which Clean Wisconsin points to as DNR's grant of explicit authority, provides 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).

That statute describes numerical standards or limitations that DNR might set on a particular pollutant. *See* Wis. Stat. § 283.01(6) (defining "effluent limitation"). But a monitoring requirement is not a numerical standard or limitation. 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." Although monitoring

requirements would help watch the quality of the groundwater, those requirements do not set standards for the quality of the groundwater. Groundwater-monitoring requirements do not meet the definition of groundwater protection standards because they are not themselves "[e]nforcement standard[s] . . . expressing the concentration of a substance in groundwater[.]" Wis. Stat. § 160.01(2).

Section 283.31(4) also does not explicitly provide for off-site groundwater-monitoring requirements. That statute requires DNR to "prescribe conditions for permits issued under this section to assure compliance with the requirements of sub. (3)[,]" and describes what those conditions "shall include." Wis. Stat. § 283.31(4). The requirements of subsection (3) do not include off-site groundwater-monitoring. The required conditions of subsection (4) include, for example, provisions regarding the frequency and levels of discharge of pollutants; reporting to DNR certain facility expansions, production increases, or process

modifications; and allowing DNR entry into premises at the effluent source or where records are located. *Id.*

Section 283.31 thus does not explicitly provide for off-site groundwater-monitoring requirements. DNR therefore cannot implement or enforce off-site groundwater-monitoring pursuant to Wis. Stat. § 283.31 because it provides no explicit authority for such requirements. Wis. Stat. § 227.10(2m).

b. Nothing in Wis. Admin. Code Chapter NR 205 Calls for Off-Site Groundwater-Monitoring Requirements.

Wisconsin Administrative Code 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 provide explicit authority requiring or permitting off-site groundwater-monitoring. Section NR 205.065 requires DNR to set effluent limitations, but, as explained above, an off-site groundwater-monitoring requirement is not an effluent limitation.

Wisconsin Administrative Code section 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 id.* § NR 205.07(3) (listing permissive conditions). However, none of these requirements explicitly provides for off-site groundwater monitoring. *See id.*; *see also* Wis. Stat. § 283.31(4)(a)–(f).

Finally, Wis. Admin. Code § 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. See below at pages 41

to 42. On the other hand, DNR regulations impose no effluent limitations on *off-site* landspreading fields.[13]

c. Wis. Admin. Code Chapter NR 243 Covers Only Production-Area Groundwater-Monitoring.

Wisconsin Administrative Code Chapter NR 243, which sets forth DNR regulations for WPDES permitting for CAFOs, likewise does not confer authority to require off-site groundwater-monitoring. That Chapter allows DNR to impose only production-area (that is, *on-site*) groundwater monitoring.

Chapter NR 243 contains no explicit provisions relating to *off-site* groundwater-monitoring. Wisconsin Administrative Code sections NR 243.15 and 243.16, governing "proposed" and "previously constructed facilities or systems," provide 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) and 243.16(3) (requiring groundwater-monitoring systems *only* at or

[13] Instead, they require only that a CAFO's landspreading practices comply with the CAFO's nutrient-management plan and federal and DNR regulations. See above at pages 9 to 10.

around the storage or containment facility). They do not at all explicitly address *off-site* monitoring of manure-landspreading fields.

The inclusion of express authorization of *on-site* groundwater-monitoring further supports the exclusion of *off-site* groundwater monitoring. Under the doctrine of *expressio unius est exclusio alterius*, the fact that DNR regulations provide only for *on-site* groundwater-monitoring means that it chose not to provide for off-site groundwater-monitoring — presumably because there is no statutory authority expressly providing for such off-site monitoring. *See Wisconsin Citizens Concerned for Cranes & Doves*, 2004 WI 40, ¶ 17 n.11 (Under the doctrine of *expressio unius est exclusio alterius*, "the expression of one thing excludes another.").

d. Any Off-Site Groundwater Monitoring Authority is Based Upon Implication.

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. R.1—38-39; App.72-73; R.42—23-24; App.31-32. But none of the statutes or regulations cited as support explicitly provide for off-site groundwater-monitoring. Authority for such monitoring is merely inferred from those statutes. However, because those statutes do not explicitly set forth a requirement for off-site groundwater-monitoring, those provisions cannot be interpreted to provide for such monitoring by implication. In other words, the statutes do not meet the explicit authority requirement of Wis. Stat. § 227.10(2m) because the DNR statutes do not explicitly provide for off-site groundwater-monitoring.

Therefore, in light of section 227.10(2m), DNR lacks authority to impose such requirements. Thus, DNR correctly issued the WPDES permit without including off-site groundwater-monitoring requirements. If DNR had included such requirement, the permit would have exceeded DNR's statutory authority as defined by Wis. Stat. § 227.10(2m).

2. No Statute or Rule Explicitly Provides for Animal-Unit Maximums.

No statute or rule—including the ones cited before the ALJ and circuit court, Wisconsin Statutes Chapter 238 and Wisconsin Administrative Code Chapters NR 205 and 243—"explicitly require[s]" or "explicitly permit[s]" DNR to impose animal-unit maximums in WPDES permits.

a. Chapter 283 Does Not Explicitly Provide for Animal-Unit Maximums.

As with off-site groundwater-monitoring requirements, Chapter 283 does not explicitly require or explicitly permit animal-unit maximums. An "animal unit" is 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). Section 283.31(3) expressly addresses effluent limitations, effluents prohibitions, groundwater protection standards, and standards of performance for new sources. *See* Wis. Stat. § 283.31(3). It does not expressly address animal-unit maximums. And none of the topics

addressed in section 283.31(3) are synonymous with animal-unit maximums.

Further, the indefinite language of section 283.31(4)—that DNR "shall prescribe conditions . . . to assure compliance with" subsection (3)—also does not explicitly address animal-unit maximums. That open-ended language does not explicitly require or explicitly permit animal-unit maximums. It does not address that subject at all. Thus, at most, an animal-unit maximum would be a condition found only by implication, if it is deemed to be a condition necessary to ensure compliance with subsection (3). However, Wis. Stat. § 227.10(2m) bars DNR from imposing requirements based upon implicit authority.

In any event, the only section 283.31(3) requirement "applicable" to large dairy CAFOs under state law is a technology-based effluent limitation of "no[ ] discharge" from the production area. See above at page 8, n.8. That does not explicitly address or impose any limitation upon animal-unit maximums. These two subjects are apples and oranges. As long

as the CAFO maintains an adequate amount of on-site waste storage to comply with the "no[ ] discharge" rule, there is no limit to the number of animals a CAFO can have.

Finally, the express language allowing the permit to set the maximum levels of discharge does not expressly address animal-unit maximums. *See* Wis. Stat. § 283.31(5). A "[d]ischarge of pollutant" 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. *Id.* § 283.01(13). Thus, the explicit authority to set maximum levels of discharge does not explicitly set a maximum number of animal units. Again, those are two distinct matters.

b. Nothing in Wis. Admin. Code Chapter NR 205 Provides for Animal-Unit Maximums.

None of the general requirements contained in Wisconsin Administrative Code 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. Thus, expressly allowing effluent limitations does not constitute an express authorization of animal-unit maximums. Nor does the language providing for monitoring for effluent limitations address or provide for animal-unit maximums. *Id.* § NR 205.066.

c. Wis. Admin. Code Chapter NR 243 Does Not Address Animal-Unit Maximums.

No provision in Wisconsin Administrative Code Chapter NR 243 "explicitly require[s] or explicitly permit[s]" animal-unit maximums. For example, while Wis. Admin. Code § NR 243.14 imposes certain requirements on CAFOs' nutrient-management plans, it does not 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 Wis. Admin. Code § 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.

d. Authority for Animal-Unit Maximums is Not Addressed and is Only Inferred From Statutes or Rules.

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." R.1—37; App.71. Likewise, the circuit court could not identify any explicit authority in the statutes or administrative code for DNR to set animal-unit maximums.

Section 227.10(2m) therefore bars DNR from implementing or enforcing animal-unit-maximum requirements. Thus, DNR correctly issued the WPDES permit without including animal-unit-maximum requirements. If DNR had included such requirements, the permit would have violated Wis. Stat. § 227.10(2m).

CONCLUSION

This Court should reverse the circuit court's decision and affirm DNR's WPDES permit decision.

Dated this 4th day of February, 2021.

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KEY TO TERMS

Term	Short Reference	Defined at Page
Animal unit		p.44
Concentrated animal feeding operation	CAFO	p.7
Department of Natural Resources	DNR	n.a.
Effluent limitations		p.6, footnote 6
Large concentrated animal feeding operation	Large CAFO	p.7
National Pollution Discharge Elimination System	NPDES	pp.4, 5
Nutrient management plan	NMP	p.9
Point source		pp.5, 6, footnote 4
Waters of the State		p.5
Wisconsin Pollutant Discharge Elimination System	WPDES	pp.4, 5

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 8,007 words.

Dated this 4th day of February, 2021.

By: _s/Eric M. McLeod_____
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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 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.

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By: s/Eric M. McLeod
Eric M. McLeod

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum, if applicable: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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By: __s/Eric M. McLeod_____
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I certify that on February 4, 2021, I caused three copies of this brief and appendix to be mailed by first-class postage prepaid mail to counsel for the other parties.

Dated this 4th day of February, 2021.

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