No. 18AP59

In the Wisconsin Supreme Court

CLEAN WISCONSIN, INC. AND PLEASANT LAKE MANAGEMENT DISTRICT,
Petitioners-Respondents,
v.
WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondent-Appellant,

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

WISCONSIN LEGISLATURE,
Intervenor.

On Certification by Court of Appeals, Dis. II, January 16, 2019, Upon Appeal from Dane County Circuit Court, Hon. Valerie Bailey-Rihn Presiding, Case Nos. 16-cv-2817, 16-cv-2818, 16-cv-2819, 16-cv-2820, 16-cv-2821, 16-cv-2822, 16-cv-2823, 16-cv-2824

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ISSUES PRESENTED

1. Did the Department of Natural Resources ("DNR") lawfully approve eight high capacity wells without requiring an additional environmental impact review, where no statute explicitly authorizes such review for these wells?

The circuit court answered no.

2. Is Petitioners' claim that DNR failed to "consider … cumulative impacts" of the high capacity wells precluded by Wis. Stat. § 281.34(5m), which prohibits any person from "challeng[ing] an approval . . . of a high capacity well based on the lack of consideration of the cumulative environmental impacts"?

The circuit court answered no.

INTRODUCTION

It is axiomatic that agencies possess only that authority which is conferred upon them by the Legislature. Through Act 21, the Legislature made plain how it confers such authority—through explicit delegation. Accordingly, an agency may no

longer "enforce" "any" "requirement" not "explicitly required or explicitly permitted by statute or by a rule . . . ." Wis. Stat. § 227.10(2m).[1] Yet, Petitioners claim that DNR had not only the authority, but the *duty* to impose an extra-statutory requirement on the well applications at issue in this case.

Through Wis. Stat. Ch. 281, the Legislature laid out a statutory framework governing the permitting of wells and delegated to DNR the powers that it deemed appropriate to administer that framework. One such power is acting upon applications for proposed wells that fit the statutory definition of a "high capacity well." Sections 281.34 and 281.35 explicitly authorize DNR to conduct environmental impact reviews for proposed high capacity wells falling into specific categories. Yet, it is undisputed that the wells in this case fall outside of those statutorily defined categories.

In fact, Petitioners can point to no statute explicitly authorizing DNR to require environmental impact reviews for

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

these wells. Rather, they assert that even in the absence of explicit statutory authorization, this Court's decision in *Lake Beulah Management District v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, requires DNR to consider environmental impacts before approving the wells. They contend *Lake Beulah* held that Wis. Stat. §§ 281.11 and 281.12 amount to a substantive and virtually limitless delegation to DNR of regulatory authority under the State's public trust doctrine. But in *Lake Beulah*, which was briefed and argued before Act 21 was enacted, the Court made clear that Act 21 "d[id] not affect [its] analysis[.]" 2011 WI 54, ¶ 39 n.31. This is significant because Wis. Stat. § 227.11(2)(a), enacted through Act 21, pointedly rejects the proposition that statutes like Wis. Stat. §§ 281.11 and 281.12 may be construed as conferring such general and undefined authority upon an agency.[2]

[2] Wis. Stat. § 227.11(2)(a)1. and 2. provide that statutory provisions "containing a statement . . . of . . . purpose . . . or policy" or "describing the agency's general powers or duties" "do[] not confer rule-making authority on the agency." Wis. Stat. § 281.11 is a prefatory statute entitled "Statement of policy and purpose[,]" followed by Wis. Stat. § 281.12, entitled "General department powers and duties."

Therefore, to the extent *Lake Beulah* concluded that DNR possesses *implied* authority to conduct environmental impact reviews for wells falling outside of the expressly defined statutory categories in Wis. Stat. §§ 281.34 and 281.35, that conclusion has been superseded by Act 21 and its "explicit authority requirement." *See Legislature v. Palm*, 2020 WI 42, ¶ 51, 391 Wis. 2d 497, 942 N.W.2d 900.

To the extent there were any lingering suspicions that, even after the passage of Act 21, DNR retains a roving commission to perform ad hoc environmental review outside the statutorily prescribed categories, the Legislature removed all doubt by passing another law on point. Section 281.34(5m) bars any "person [from] challeng[ing] an approval … of a high capacity well based on the lack of consideration of [ ] cumulative environmental impacts . . . ." Because Petitioners rely on cumulative impacts to challenge DNR's well approvals, their claims should be dismissed.

Petitioners' arguments ultimately invite this Court to engage in a search for *implied* authority through general statutes and uncover undefined duties on the part of a state agency to administer the State's public trust obligations. But this invitation directly contravenes Act 21's proclamation that agencies may impose only those requirements *explicitly* authorized by a statute enacted by the Legislature. Not only do Petitioners ask this Court to ignore this explicit authority requirement and unmoor DNR from its statutorily prescribed authority, they demand that DNR be required to act according to their preferred policy judgments in lieu of legislative directives.

STATEMENT OF THE CASE

Chapter 281 governs DNR's approval of high capacity well applications. This case concerns DNR's approval of eight high capacity wells without requiring an environmental impact review. The statutory provisions applicable to those eight wells do not explicitly authorize or require environmental impact review. Petitioners nevertheless argue that DNR's well

approvals should be set aside on the ground that environmental impact review was required even in the absence of statutory authorization.

I. Statutes Governing High Capacity Wells.

Wisconsin law divides wells into three categories: small, medium, and large. Small wells are wells with a pumping capacity of less than 100,000 gallons per day ("gpd"), whereas medium wells and large wells all have a pumping capacity exceeding 100,000 gpd. Wis. Stat. § 281.34(1)(b), (2). Medium and large wells are considered "high capacity wells" that require DNR approval. *Id.* Small wells do not require DNR approval; the owner must simply "notify" DNR "of the location of [the] well." Wis. Stat. § 281.34(3)(a).

Medium wells and large wells are distinguished by their water loss. A large well has "water loss"[3] exceeding 2 million gpd in any 30-day period, whereas a medium well has water loss of equal to or less than 2 million gpd in that period. *See* Wis. Stat.

[3] "Water loss" is defined as "a loss of water from the basin from which it is withdrawn as a result of interbasin diversion or consumptive use or both." Wis. Stat. § 281.34(1)(g).

§ 281.35(4)(b). Small wells never require environmental impact review; large wells always require environmental impact review; and medium wells sometimes require such review.

Large Wells. DNR may approve a large well only if it finds, among other things, that "no public water rights in navigable waters will be adversely affected[,]" Wis. Stat. § 281.35(5)(d)1., and that "the proposed withdrawal will not have a significant detrimental effect on the quantity and quality of the waters of the state[,]" Wis. Stat. § 281.35(5)(d)6. In approving a large well, DNR may impose "[a]ny [ ] conditions . . . necessary to protect the environment . . . and to ensure the conservation and proper management of the waters of the state." Wis. Stat. § 281.35(6)(a)7. That includes "specif[ying]" "the authorized base level of water loss[,]" "the uses for which water may be withdrawn[,]" and "reporting" "requirements[,]" *id.*; § 281.35(6)(a)2., (6)(a)4., (6)(a)6.

Medium Wells. By statute, medium wells—those with capacity over 100,000 gpd and water loss less than 2 million

gpd—require environmental impact review only if they fall into one of three subcategories. Wis. Stat. § 281.34(4).

First, an environmental impact review is required for medium wells "located in a groundwater protection area." Wis. Stat. § 281.34(4)(a)1. A "groundwater protection area" is any area "within 1,200 feet of" an "outstanding resource water[,]" an "exceptional resource water[,]"[4] or a "class I, class II, or class III trout stream."[5] Wis. Stat. § 281.34(1)(am).

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[4] "Outstanding" and "exceptional" waters are waters so designated by DNR, *see* Wis. Admin. Code §§ NR 102.10–11, that "provide outstanding recreational opportunities, support valuable fisheries and wildlife habitat, have good water quality and are not significantly impacted by human activities," *see* Wis. DNR, *Outstanding and Exceptional Resource Waters* (Oct. 20, 2016), http://dnr.wi.gov/topic/SurfaceWater/orwerw.html (all websites in this Brief were last visited on Jan. 27, 2021) (The websites cited in this Brief provide background information that is judicially noticeable as "legislative facts." *See State v. Barnes*, 52 Wis. 2d 82, 87 & n.2, 187 N.W.2d 845 (1971); *e.g.*, *Andersen v. DNR*, 2011 WI 19, ¶ 31, 332 Wis. 2d 41, 796 N.W.2d 1 (citing DNR website)). Of the approximately 42,000 miles of streams and rivers in Wisconsin, 7.6% are designated "outstanding" and 11% "exceptional." Wis. DNR, *Outstanding and Exceptional Resource Waters*. Of Wisconsin's 15,000 lakes and impoundments, 103 are designated "outstanding." *Id.*

[5] Trout stream classifications depend on a stream's natural ability to support trout—class I streams have a "self-sustaining population of trout," while class III streams require "annual stocking[.]" Wis. Stat. § 281.34(8)(a); Wis. Admin. Code § NR 1.02(7)(b). Approximately 15.7% (13,175 miles) of Wisconsin's rivers and streams (84,000 miles total) are classified trout streams. Wis. DNR, Trout Stream Maps, https://bit.ly/2c1dDgt.; Wis. DNR, River Facts and Resources, https://dnr.wisconsin.gov/topic/Rivers/FactsResources.html.

Second, an environmental impact review is required for medium wells that will result in "a water loss of more than 95 percent of the amount of water withdrawn." Wis. Stat. § 281.34(4)(a)2.

Third, an environmental impact review is required for medium wells "that may have a significant environmental impact on a spring." Wis. Stat. § 281.34(4)(a)3.[6]

Environmental Impact Review Required for Medium Wells Falling into One of the Three Categories. If a medium well falls within any of these three categories, DNR *must* conduct an "environmental review" under the Wisconsin Environmental Policy Act ("WEPA"), Wis. Stat. § 1.11. Wis. Stat. § 281.34(4)(a); *see also* Wis. Admin. Code § NR 150.20(4)(a). That review consists of DNR "evaluat[ing] [ ] the probable . . . direct, secondary and cumulative effects of the [well.]" Wis. Admin.

[6] The Wisconsin Geological and Natural History Survey conducted an inventory of Wisconsin's springs, and surveyed 415 springs in Wisconsin. Susan K. Swanson, Grace E. Graham, & David J. Hart, *An Inventory of Springs in Wisconsin, Wis. Geological and Natural History Survey Bulletin* 113, 4 (2019); UW Extension, Springs, *Wis. Geological and Nat. History Survey*, https://bit.ly/2h14c2K; UW Extension, 2016 Year in Review at 4, *Wis. Geological and Nat. History Survey*, https://bit.ly/2ranmau.

Code § NR 150.30(2)(g). DNR may approve the well only if it will "not cause significant environmental impact." Wis. Stat. § 281.34(5)(b), (c), (d). Finally, DNR may impose conditions, including "as to location, depth, pumping capacity, rate of flow, and ultimate use," to ensure that a proposed medium well "does not cause significant environmental impact." *Id.*

Environmental Impact Review Not Required for Medium Wells Outside the Three Categories. Wisconsin Statutes do not authorize or require an environmental impact review for medium wells that fall outside the above three categories. *See* Wis. Stat. § 281.34; *Lake Beulah Mgmt. Dist. v. DNR*, 2010 WI App 85, ¶ 23, 327 Wis. 2d 222, 787 N.W.2d 926, *aff'd in part, rev'd in part*, 2011 WI 54. Thus, for purposes of compliance with WEPA, DNR considers medium wells outside these categories to be "minor actions." Wis. Admin. Code § NR 150.20(1m)(h).

II. High Capacity Well Applications and Approvals

It is undisputed that the eight medium wells at issue do not fall into any of the three statutory environmental impact review categories.

Each well application was submitted between March 2014 and April 2015. R.1—4; R.2—4; R.3—4; R.4—5; R.5—5; R.6—4; R.7—4; R.8—4; App.33, 47, 66, 80, 97, 109, 122, 136.[7] Initially, three of the wells were delayed by concerns about nearby waters, but no formal analysis was conducted before they were approved. *See* R.77—12-13; R.78—17; R.79—1-3, 16-18. For one well, DNR staff initially recommended approval with a limited capacity, R.142—3-5, but then delayed the application with further evaluation and discussion, R.76—7-20. For four of the applications, DNR staff recommended denial based on some cumulative-impact analysis, R.70—17; R.72—4; R.73—18; R.80—14–15; R.142—2, 6–7; App.148, 152-53. But the applications were ultimately placed "on hold" because "the Legislature [was]

[7] The administrative record is contained in the appeal record at R.70–R.80 and R.132–R.134.

[ ] discussing legislation that [could] affect the review of the[] applications." R.142—2; App.148.

Eventually, a backlog of well applications developed at DNR. This backlog arose in part from confusion about the interaction between 2011 Wis. Act. 21, § 1R, which created Wis. Stat. § 227.10(2m), and this Court's decision in *Lake Beulah*.

A. *Lake Beulah*

Citing the public trust doctrine,[8] *Lake Beulah* held that "DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state." *Id.* ¶¶ 3 (footnote omitted), 62. The Court explained that this duty is "triggered" by "evidence of potential harm" "to waters of the state." *Id.* ¶¶ 5, 63–64. The implication of that holding was that there could be situations where DNR would need to conduct an environmental impact review on medium wells, even if those wells did not fall into one of the three categories of Wis. Stat. § 281.34(4)(a).

[8] Under that doctrine, "the State holds the navigable waters and the beds underlying those waters in trust for the public." *Lake Beulah*, 2011 WI 54, ¶ 32.

This Court's decision in *Lake Beulah* was issued on July 6, 2011. Oral argument in that case had been held on April 13, 2011 and Act 21 was enacted just over a month later on May 23, 2011. Act 21 expressly prohibits agencies from "implement[ing] or enforc[ing] 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 . . . ." Wis. Stat. § 227.10(2m). It also establishes that any statutory provisions "containing a statement [ ] of legislative intent, purpose, [ ] or policy" and any provisions "describing [an] agency's general powers or duties" "do[ ] not confer rule-making authority … beyond … [that] explicitly conferred . . . ." *Id.* § 227.11(2)(a)1.–2.; *see* 2011 Wis. Act 21, §§ 1R, 3.

On May 31, 2011, one of the six amici in *Lake Beulah* filed a letter with the Court raising Act 21. App.182–87. The parties, however, responded that Act 21 did not affect the DNR's

authority in the case. For example, DNR argued, among other things, that Act 21 applied only prospectively. App.193-94.

This Court dispatched Act 21 in a footnote, emphasizing that "[n]one of the parties argue[d] that [Act 21] affect[ed] [ ] DNR's authority in this case." *Lake Beulah*, 2011 WI 54, ¶ 39 n.31. The Court offered no additional explanation, simply "agree[ing] with the parties that [ ] Act 21 does not affect [its] analysis . . . ." *Id.*

B. Attorney General Opinion

Moving forward, however, confusion arose about the interplay between *Lake Beulah* and Act 21. So the Wisconsin State Assembly, through the Committee on Assembly Organization, requested a formal opinion from the Attorney General on whether, in light of Act 21, DNR still had the authority under *Lake Beulah* to consider environmental impacts for wells outside the statutorily defined categories. App.154–58.

The Attorney General issued his opinion on May 10, 2016, concluding that Act 21 "precluded" "any type of environmental review" for wells outside the "limit[ed] [ ] types of wells" specified

in §§ 281.34 and 281.35 (outlined above at pages 6-10). *See* Wis. Op. Att'y Gen., OAG-01-16 (May 10, 2016); App.159, 175-77. The Attorney General first considered whether *Lake Beulah* had "address[ed] the newly enacted Act 21," concluding that it did not. *Id.*; App.160-66. Given the lack of any analysis of Act 21, the Attorney General considered whether the new law undermined *Lake Beulah*'s reasoning going forward. *Id.*; App.166-68.

The Attorney General explained that *Lake Beulah* had "rel[ied] on [DNR's] implied agency authority" through preamble language in sections 281.11 and 281.12, which applied prior to Act 21's enactment when "explicit authority was not required" by statute. *Id.*; App.171-72. By enacting Act 21, the Legislature "sought to regain and maintain control of . . . agency authority" by requiring "explicit authority" to impose requirements, and it prohibited agencies from relying on "broad statements of policy or duty" as a source of authority. *Id.*; App.172-73.

Thus, the Attorney General concluded that Act 21 governs, and the holding in *Lake Beulah*, which concerned pre-Act 21 well approvals, is no longer controlling. As for any constitutional component of *Lake Beulah* based on the public trust doctrine, the Attorney General reasoned that "the Legislature maintains the duty of trustee," whereas DNR "has only the level of public trust duty assigned to it by the Legislature, and no more." *Id.*; App.180-81. Through Act 21, the Legislature "revert[ed]" any residual public trust duty "back to [itself]," taking "responsib[ility] for making rules and statutes necessary to protect the waters of the state." *Id.*; App.181.

After DNR adopted the Attorney General Opinion, it reopened the eight well applications at issue here and reviewed them based solely on the explicit statutory criteria outlined above. See above at pages 6 to 10. During its review, DNR produced a map of the area surrounding each proposed well to identify other wells and water resources nearby. *E.g.*, R.70—15; R.73—6; R.74—11; R.77—8; R.78—13; R.79—12; R.80—11. It

then evaluated the local aquifer and nearby municipal wells to determine if the anticipated drawdown would impact the "water supply of a public utility." Wis. Stat. § 281.34(5)(a); *e.g.*, R.71—1-3. DNR also conducted "engineering and hydrogeological review[s] to determine compliance with the well construction and pump installation requirements of ch. NR 812, Wis. Adm. [*sic*] Code and Ch. 281, Wis. Stats." *E.g.*, R.70—10.

C. Decisions on the Well Applications

DNR then carefully reviewed each application to determine whether an environmental review was statutorily required. It considered whether the proposed pumping capacity would cause a water loss of over 2 million gpd, triggering an automatic environmental review and heightened application requirements, see above at page 7, and whether each well was within 1,200 feet of an outstanding or exceptional water or designated trout stream, see above at page 8, would cause a 95% water loss, see above at page 9, or would significantly affect a spring, see above at page 9. *E.g.*, R.71—2-3. In one case, DNR conducted an extensive investigation to determine whether certain wetlands

near Pleasant Lake contained a "spring." R.75—3-30; R.76—1-20.

DNR then approved the wells, concluding that they met all requirements and did not trigger an environmental review. R.1—8-13; R.2—8-17; R.3—8-12; R.4—9-13; R.5—8-12; R.6—8-12; R.7—8-12; R.8—8-12;[9] App.37-42, 51-60, 70-74, 84-88, 100-04, 113-17, 126-30, 140-44. As required,[10] all of the approvals confirmed the well's location, set the "approved pump capacity," and imposed construction and reporting conditions, among others. *E.g.*, R.8—8-12; App.140-44.

[9] These permit approvals are found in the administrative record at R.70—10-14; R.71—10-14; R.72—25-29; R.73—7-11; R.74—6-10; R.77—3-7; R.78—8-12; R.79—7-11; R.80—5-9.

[10] A few requirements apply to all high capacity wells. An applicant for a high capacity well must provide its "location, construction or reconstruction features, pump installation features, [ ] proposed rate of operation and [ ] distance to nearby public utility wells," Wis. Admin. Code § NR 812.09(4)(a), which DNR uses to determine which requirements apply and whether they are met. Also, the physical pumps must comply with certain construction and operation requirements, tailored to the specific type of well, aquifer, and subsurface geology, to "[p]rotect[ ] groundwater and aquifers from contamination." Wis. Admin. Code §§ NR 812.01(1)(b); 812.10–.26. And each well owner must "identify the location of the high capacity well and submit an annual pumping report." Wis. Stat. § 281.34(5)(e)2.

III. Chapter 227 Judicial Review Proceedings

On October 28, 2016, Petitioners filed petitions for judicial review of all eight well approvals, R.1–R.8; App.30-146, which were then consolidated. R.66. The petitions make identical claims, namely, that in issuing the well approvals DNR incorrectly applied applicable law and failed to issue decisions required by law.

Petitioners did not challenge DNR's determination that under Wis. Stat. § 281.34 each of the eight wells fell outside the three categories for which environmental review was explicitly required (see above at pages 7 to 10). Rather, Petitioners asserted that under *Lake Beulah* and the public trust doctrine, DNR was "delegated the authority and duty to manage the water resources of the state" and it would carry out that duty by "evaluating and protecting waters of the state from the individual and cumulative impact of high capacity wells . . . ." R.1—6; R.2—6; R.3—6; R.4—7; R.5—6; R.6—6; R.7—6; R.8—6; App.35, 49, 68, 82, 98, 111, 124, 138.

The parties briefed Petitioners' claims in the circuit court, briefing a motion to dismiss[11] and then the merits of the claims. R.114; R.118; R.122; R.131; R.135. The circuit court denied the motion to dismiss and on October 11, 2017, issued a decision vacating DNR's well approvals and remanding one back to DNR for an environmental impact analysis. R.143—13; App.25.

The circuit court concluded that *Lake Beulah* had already addressed Act 21 and, thus, "its reasoning [was] binding on th[e] Court." R.143—10; App.22. The court also reasoned that "the Public Trust Doctrine is an affirmative duty to protect the waters of the state," and "if the legislature did not delegate authority [to DNR] . . . there would be no protection." R.143—11; App.23.

DNR and the intervenors appealed. On January 16, 2019, the court of appeals certified the appeal to this Court, "as all [cases] address 2011 Wis. Act 21 (Act 21) and its application to

[11] DNR moved to dismiss Petitioners' "claims related to cumulative impacts" because they were "barred by Wis. Stat. § 281.34(5m)." R.49—R.64. Wis. Stat. § 281.34(5m) bars any "person [from] challeng[ing] an approval, or an application for approval, of a high capacity well based on the lack of consideration of the cumulative environmental impacts of that high capacity well together with existing wells."

the regulatory permit approval process relating to 'waters of the state.'" App.2. On April 9, 2019, this Court accepted the certification.

On April 25, 2019, the Joint Committee on Legislative Organization on behalf of the Wisconsin Legislature ("the Legislature") moved to intervene in this appeal. After initial briefing of the intervention motion this case was stayed on September 6, 2019 pending further order of the Court. After supplemental briefing on intervention in August and October 2020, the Court granted the Legislature's motion on January 5, 2021.

STANDARD OF REVIEW

In this Chapter 227 proceeding, the Court reviews the DNR's approval decisions, 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 eight high capacity well approvals. 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).

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.").

SUMMARY OF ARGUMENT

I.A. Act 21 prohibits agencies from "implement[ing] or enforc[ing] any standard, requirement, or threshold" that is not "explicitly required or explicitly permitted by statute or [ ] by a rule . . . ." Section 227.10(2m). Chapter 281 requires environmental review for certain clearly defined categories of high capacity wells but does not authorize environmental review outside of those categories. It is undisputed that the eight medium wells at issue fall outside the three medium well categories that explicitly require environmental review under Wis. Stat. § 281.34(4)(a). Thus, DNR lacked the authority to require the applicants to conduct an environmental review as a condition of permit approval.

B. This Court's decision in *Lake Beulah* is no longer controlling in light of Act 21. *Lake Beulah* concluded that DNR's "general" grant of authority in sections 281.11 and 281.12 "to manage, protect, and maintain waters of the state" was sufficient to include, implicitly, the more specific authority to conduct

environmental review. 2011 WI 54, ¶¶ 27–44. The Court relied heavily on its finding that no other statutory language "expressly revok[ed] or limit[ed]" DNR's general grant of authority. *Id.* ¶¶ 41–42. But Act 21 now does "expressly limit" DNR's general authority by providing that DNR may enforce only requirements that are "explicitly permitted." Wis. Stat. § 227.10(2m).

The circuit court's reasons for disregarding the straightforward application of Act 21 are unavailing. Although Act 21 predated *Lake Beulah* by one month, the Act came after (and most likely in response to) the court of appeals decision with nearly identical reasoning. And while this Court mentioned Act 21 in a cursory footnote, the lack of any clear holding from the Court, along with the timing of the Act, the context in which it was raised to the Court, and the parties' brief responses (including an argument that the Act had no effect on the case at all), all reveal that the Court in *Lake Beulah* did not actually address Act 21's substance.

Moreover, 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 v. Dep't of Indus., Labor & Human Relations*, 165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992). While, in the past, agency authority was found by implication in general agency-related statutes, the Legislature put a stop to that with the adoption of Act 21. *Palm*, 2020 WI 42, ¶ 51.

C. The public trust doctrine does not require DNR to conduct environmental review for every high capacity well. The Wisconsin Constitution vests the public trust duty in the Legislature, which need not (but may) broadly delegate that responsibility (and its attendant powers) to DNR. *Lake Beulah* is not to the contrary. Rather, there the Court clearly recognized that agencies "have only those powers" given to them. 2011 WI 54, ¶ 23 (citation omitted). The Court concluded that the Legislature *had* delegated broad public trust authority to DNR

through sections 281.11 and 281.12, but it also acknowledged that other statutory language could "revoke" that delegation, which Act 21 has since done.

Lake Beulah aside, there is no defensible claim that the Legislature has violated its public trust duties by limiting DNR's delegated authority. The public trust doctrine imposes some broad outer bounds on the Legislature, but within those bounds, the Legislature has significant leeway to resolve complicated water issues systematically. For high capacity wells, the Legislature has carefully designed a graduated framework of environmental review, and it continues to review and make improvements to that scheme.

II. Section 281.34(5m) prohibits any "person [from] challeng[ing] an approval . . . of a high capacity well based on the lack of consideration of the cumulative environmental impacts of that high capacity well together with existing wells." Petitioners raised exactly that claim, and the circuit court vacated the approvals for failing to take cumulative environmental impacts

into account. Petitioners and the circuit court's strained interpretation of the word "consideration" is unreasonable.

ARGUMENT

I. DNR Properly Approved the Eight Wells at Issue.

A. Act 21 Prohibits Environmental Review Except Where Specifically Authorized.

Act 21 prohibits agencies from "implement[ing] or enforc[ing] any standard, requirement, or threshold" that is not "explicitly required or explicitly permitted by statute or by [ ] rule . . . ." Wis. Stat. § 227.10(2m).

Requiring an environmental impact review for well approval clearly involves "implement[ing] or enforc[ing] a[ ] standard, requirement, or threshold." The "standard" or "requirement" would be whatever level of impact on nearby waters DNR deems too much (up to and including a standard forbidding an impact above zero percent), and DNR would be "enforcing" it by denying applications for wells that crossed the line. Measuring impact consistently also requires DNR to "implement" some "threshold" metric, as the record here

demonstrates. For example, DNR initially applied a threshold of "30% [cumulative] depletion" to certain well applications, R.142—2; App.148, and later implemented a model "derived for the State of Michigan" to assign an "allowable depletion" level—in other words, a "threshold"—to individual waters, *see* R.80—15; R.142—4-5; App.150-51.

There is no question that, for wells outside a defined set of categories, environmental review is neither "explicitly required [n]or explicitly permitted by statute," *see* Wis. Stat. § 227.10(2m); App.175.[12] The statute requires environmental review only for large wells (water loss over 2 million gpd), Wis. Stat. § 281.35(4)(b), and for medium wells (between 100,000 gpd and 2 million gpd water loss) that are near "outstanding" or "exceptional" waters or trout streams, Wis. Stat. § 281.34(1)(am),

[12] Attorney General opinions that interpret new statutes "may be given persuasive effect." *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 41, 341 Wis. 2d 607, 815 N.W.2d 367. To correctly apply the law, DNR properly relied upon the Attorney General opinion in issuing the well approvals. On May 1, 2020, Attorney General Kaul withdrew the Attorney General Opinion (OAG-01-16), citing the circuit court's ruling in this case, without issuing a replacement opinion. See Letter from Att'y Gen. Josh Kaul to DNR Secretary Preston Cole (May 1, 2020), *https://www.doj.state.wi.us/sites/default/files/news-media/5.1.20_High_Cap_Wells_Letter.pdf*.

(4)(a)1, that "may have a significant environmental impact on a spring," Wis. Stat. § 281.34(4)(a)3., or that will result in a "95 percent" "water loss," § 281.34(4)(a)2. See above at pages 6 to 10. This Court and the court of appeals in *Lake Beulah* recognized that "[f]or the remaining wells, §§ 281.34 and 281.35 are silent as to whether the DNR may review or consider the well's potential environmental effects." *Lake Beulah*, 2010 WI App 85, ¶ 23; *see Lake Beulah*, 2011 WI 54, ¶¶ 40-41.

Environmental review is also not "explicitly required or [ ] permitted by . . . *rule*." *See* Wis. Stat. § 227.10(2m) (emphasis added). Rather, consistent with section 281.34(4), DNR regulations deem wells outside the defined categories to be "minor actions" that "do not require environmental analysis under [WEPA]." Wis. Admin. Code § NR 150.20(1m)(h). Nor could DNR adopt a rule to allow environmental review outside the statutorily defined categories. Section 227.11(2)(a) confines agencies' rulemaking authority to that "explicitly conferred" by statute and provides that statutory provisions "containing a

statement [ ] of legislative intent, purpose, [ ] or policy" or "describing [an] agency's general powers or duties" "do[ ] not confer rule-making authority." Wis. Stat. § 227.11(2)(a)1., 2. There is no statutory provision that "explicitly confer[s]" upon DNR the authority to require environmental review outside the defined categories. In any event, section 227.11(2)(a)3. makes clear that "[a] statutory provision containing a specific standard [or] requirement" like the environmental review standards for certain categories of wells in sections 281.34 and 281.35—"does not confer on the agency the authority to promulgate . . . a rule . . . that is more restrictive" than the statute. Wis. Stat. § 227.11(2)(a)3. So, for several independent reasons, DNR cannot rely on sections 281.34 and 281.35 to expand the categories of environmental review.

Given Act 21's clear mandate, DNR properly approved the wells at issue here without considering environmental impact. It is undisputed that none of the wells at issue fall within any of the statutory categories that authorize or require environmental

review. See above at pages 8 to 11. Since environmental review is not "explicitly permitted" by "statute or rule" for any other wells, DNR cannot "enforce" any environmental impact "standard" or "requirement" without violating Act 21.

B. General Statutes Describing Agency Subject Matter or Statements of Policy Do Not Satisfy the "Explicit Authority Requirement."

Chapter 281 contains no independent delegation of regulatory authority specifically authorizing DNR to impose an environmental review requirement upon the eight wells in this case. Because the wells clearly fall outside the specific categories for which such requirement is explicitly authorized (see above at pages 6 to 10), DNR could only impose the requirement if there is explicit authority in another statute specifically authorizing it to impose the requirement upon those wells. There is no such specific statute.

Petitioners' reliance on Wis. Stat. §§ 281.11 and 281.12 to support their contrary position is untenable in light of Act 21. Those general statutes do not confer explicit authority to require environmental review for the eight wells at issue. Section 281.11

(entitled "Statement of policy and purpose") and section 281.12 (entitled "General department powers and duties") are merely general statements of DNR's subject matter jurisdiction, setting forth DNR's general powers and duties to supervise and manage the waters of the State. These general subject matter statutes, standing alone, do not provide the necessary "explicit authority" authorizing DNR to enforce or implement specific requirements such as the environmental review requirement here. Wis. Stat. § 227.10(2m).

As the Court recently explained, Wis. Stat. § 227.11(2)(a)1. and 2.—which provide that "statement[s] . . . of . . . purpose . . . or policy" and "descri[ptions] [of an] agency's general powers or duties" do not "confer rule-making authority" beyond that "explicitly conferred"—"prevent[ ] 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). Statutory statements of purpose or general powers and duties provide at most *implicit* authority. Those statements are not stand-alone enabling statutes giving rise to explicit regulatory powers. By virtue of section 227.10(2m)'s "explicit authority requirement," agencies can no longer infer specific regulatory authority from such general provisions.

The application of Act 21's statutory rules of construction in this case also track another well-established canon of statutory construction. Under the doctrine of *expressio unius est exclusio alterius*, the fact that the Legislature expressly authorized environmental review only for specific categories of medium-sized high capacity wells means that it chose not to authorize such review for other medium wells. *Wisconsin Citizens Concerned for Cranes & Doves v. Wisconsin Dep't of Nat. Res.*, 2004 WI 40, ¶ 17 n.11, 270 Wis. 2d 318, 677 N.W.2d 612 (Under the doctrine of

expressio unius est exclusio alterius, "the expression of one thing excludes another.").

If a statute does not specifically authorize an agency to impose a requirement, it would require the Court to essentially rewrite the statute to conclude that a generalized policy or subject matter statute sets forth that authority. *See State v. Iverson*, 2015 WI 101, ¶ 29, 365 Wis. 2d 302, 871 N.W.2d 661 ("Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language.") (citation omitted).[13]

Further, to infer regulatory requirements would give agencies a blank check to regulate, with no stopping point. The

[13] It is presumed that the Legislature chose its words carefully. *In re Michael J.K.*, 209 Wis. 2d 499, 503, 504-05, 564 N.W.2d 350 (Ct. App. 1997) ("We presume that the legislature 'cho[o]se[s] its terms carefully and precisely to express its meaning' . . . ."). A court may not, in the guise of interpretation, expand the meaning of a statute to the point where the court is rewriting the statute. *State v. Briggs*, 214 Wis. 2d 281, 288, 571 N.W.2d 881 (Ct. App. 1997) (citation omitted) ("We assume that the legislature deliberately chooses the language it uses in a statute. . . To accept Briggs's interpretation of § 943.395, Stats., is to expand the meaning of the statute to the point that we engage in rewriting the statute, not merely interpreting it.").

Court rejects attempts to find agency authority to regulate where the statutes provide no specific authority to the agency. For example, in *Myers*, the Court declined to allow DNR to infer authority not provided by statute. 2019 WI 5. 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. In *Myers*, the Court considered whether DNR has authority to unilaterally amend a pier permit after placement of the pier. DNR had granted the Myers a permit to build a pier at their property on Lake Superior but included language providing that the permit "can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest." *Id.* ¶¶ 1, 2, 7, 8. Considering the specific pier statutes, the Court held that DNR "lacked authority to amend the Myers' permit." DNR could not reserve itself the authority to amend the permit because Wis. Stat. § 30.12(3m)(d)2. did not provide statutory authorization to insert the condition into the permit. *Id.* ¶¶ 6, 37.

C. *Lake Beulah* is Superseded by Statute, Wis. Stat. §§ 227.10(2m) and 227.11(2)(a).

In *Lake Beulah*, this Court held that "DNR has the authority and a general duty to consider [environmental impact] when reviewing a[ny] high capacity well permit application." 2011 WI 54, ¶ 44. The Court explained that this duty is grounded in the Legislature's general grant of public trust authority conferred upon DNR by Wis. Stat. §§ 281.11 and 281.12. *Id.* ¶ 34. However, Act 21 nullifies the underlying premise for the holding in *Lake Beulah* and therefore that case is no longer controlling.

According to *Lake Beulah*, section 281.11 "set[s] forth the purposes and policies of that subchapter," *id.* ¶ 28, stating that DNR "serve[s] as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state," Wis. Stat. 281.11, and section 281.12 "outlin[es] [ ] DNR's duties," *Lake Beulah*, 2011 WI 54, ¶ 28, providing it with "general supervision and control over the waters of the state," Wis. Stat. § 281.12(1). The court explained that these two

provisions "explicitly provide[ ] the DNR with the broad authority and a *general duty* … to manage, protect, and maintain waters of the state." *Lake Beulah*, 2011 WI 54, ¶ 39 (emphasis added). The Court then found that this "broad" and "general" duty *implicitly* contained the more specific power to "consider the environmental impact of a proposed high capacity well." *Id.*

Because this specific environmental review power was merely implied by a general grant of authority—the general statement of policy and purpose in section 281.11 and the general duties to supervise and control the waters of the State in section 281.12—the Court noted that it must also examine whether any other statute expressly "limit[ed] the DNR's authority . . . to only those wells for which minimum review standards are prescribed." *Lake Beulah*, 2011 WI 54, ¶ 40. The Court reviewed sections 281.34 and 281.35, which authorize environmental review only for certain "special categories," *id.*, but found "nothing in either [section] that limit[ed] the DNR's [general] authority." *Id.* ¶ 41. "Finding no [other] language expressly revoking or limiting the

DNR's authority and general duty to protect and manage waters of the state," the Court concluded that DNR "retain[ed] [ ] authority . . . to consider whether a proposed high capacity well may impact waters of the state." *Id.* ¶ 42.

This analysis is directly contrary to Wis. Stat. § 227.10(2m) and therefore *Lake Beulah* is superseded by statute.[14] The rule posited by *Lake Beulah* has been replaced by Act 21's "explicit authority requirement." *Lake Beulah* suggests that implied agency authority to regulate is conferred by policy statements and broad descriptions of subject matter unless there is express language revoking the agency's authority in that area. Act 21 eliminated this approach.

Act 21 prohibits DNR or any administrative agency from enforcing any requirement—like an environmental impact requirement—that is not "explicitly permitted." Wis. Stat. §227.10(2m). And there is nothing in Chapter 281 that explicitly

[14] *E.g.*, *State v. Endicott*, 2001 WI 105, ¶ 13, 245 Wis. 2d 607, 629 N.W.2d 686 (case law can be superseded by statute); *State v. Johnson*, 2020 WI App 73, ¶ 27, 394 Wis. 2d 807, 951 N.W.2d 616 ("Case law can be superseded by statute or constitutional amendment.").

permits environmental review outside the statutorily defined categories. While *Lake Beulah* presumed that a general grant of authority could imply more specific powers, Act 21 eliminated that presumption, replacing it with the explicit authority requirement. Pursuant to Act 21, general grants of authority do not confer upon agencies specific, implied powers. Thus, even if the general grant of authority in sections 281.11 and 281.12 previously was sufficient to allow DNR to require additional environmental impact review before Act 21, it no longer is.

The Legislature has made clear that any such requirement must be explicitly authorized by statute. The general grant of agency authority is insufficient to confer such a specific power. More recent decisions of this Court have confirmed this plain legislative directive. 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.

Palm, 2020 WI 42, ¶ 51 (citations omitted).

D. The Public Trust Doctrine Does Not Require Environmental Review for Every Well.

Notwithstanding Act 21, the Petitioners argued below, and the circuit court appeared to accept, that DNR is constitutionally required, under the public trust doctrine, to conduct environmental review of every high capacity well. *See* R.114—13-16. But *Lake Beulah* never held that environmental review by DNR is a constitutional mandate; rather, *Lake Beulah* recognized that DNR's public trust authority depends entirely on the degree to which "the legislature has delegated *the State's* public trust duties to the DNR" because "it is primarily the State's duty to protect and preserve [Wisconsin's] resources." *Lake Beulah*, 2011 WI 54, ¶¶ 33–34 (emphasis added). Through Act 21, the Legislature has now limited DNR's delegated public trust duties. Contrary to what the circuit court apparently believed, this limited delegation does not mean "there [will] be no protection" of the State's water resources. *See* R.143—11; App.23. In fact, the

Legislature has taken back "responsib[ility] for … protect[ing] the waters of the state," App.181, and has fulfilled, and is continuing to fulfill, its public trust duties, albeit in a systematic rather than an ad hoc way.

1. *Lake Beulah* Did Not Hold That DNR is Constitutionally Required to Conduct Environmental Review of All Wells.

The public trust doctrine is rooted in Article IX, section 1 of the Wisconsin Constitution, which provides that "the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free." Wis. Const. art. IX, § 1. The Court has interpreted this provision to impose a duty on the State "to promote navigation [and] to protect and preserve [Wisconsin's] waters for fishing, hunting, recreation, and scenic beauty." *Rock-Koshkonong Lake Dist. v. DNR*, 2013 WI 74, ¶ 87, 350 Wis. 2d 45, 833 N.W.2d 800 (citations omitted, emphasis removed).

Importantly, "[t]he primary authority to administer this [duty] rests with the legislature." *State v. Bleck*, 114 Wis. 2d 454,

465, 338 N.W.2d 492 (1983); *Hilton ex rel. Pages Homeowners' Ass'n v. DNR*, 2006 WI 84, ¶ 19, 293 Wis. 2d 1, 717 N.W.2d 166. The Legislature may delegate its public trust authority (or some portion thereof) to agencies to assist the Legislature in fulfilling its duty, *Lake Beulah*, 2011 WI 54, ¶ 33, but as "creatures of statute, [agencies] have 'only those powers'" given to them by statutory provisions, *id.* ¶ 23 (quoting *Brown Cty. v. Dep't of Health & Soc. Servs.*, 103 Wis. 2d 37, 43, 307 N.W.2d 247 (1981)).

In *Lake Beulah* the Court concluded that the Legislature had "delegated the State's public trust duties to the DNR in the context of its regulation of high capacity wells" "through Wis. Stat. § 281.11 and § 281.12." 2011 WI 54, ¶ 34. But the Court then considered whether any more specific statutory language "expressly revok[ed] or limit[ed] the DNR's authority . . . to protect and manage waters of the state." *Id.* ¶ 42. Although the Court "[found] no [such] language," *id.*, its recognition that a statute *could* "revok[e]" or "limit[ ]" DNR's delegated public trust

authority shows that the Court did not find the delegation to be constitutionally required. *Id.*

The second reason this reading of *Lake Beulah* is unsound is that it cannot be reconciled with the Court's deliberate decision to leave open "[w]hether the DNR has the authority to consider the environmental impact of proposed wells with a capacity of less than 100,000 gpd." *Id.* ¶ 39 n.30. If the Constitution demands a full delegation of the Legislature's public trust authority to DNR, the Court could not have left that question open without drawing some constitutional distinction between wells below a 100,000-gpd capacity and those above. Yet, nowhere in the Constitution can such a distinction be found.

So, in *Lake Beulah*, the public trust doctrine served as a source of authority for DNR only to extent that the Legislature had delegated it—and not as an independent constitutional mandate on DNR. Through Act 21, the Legislature has "revok[ed]" part of its prior public trust delegation to DNR, thereby "limiting" DNR's public trust authority to those areas

"explicitly required or explicitly permitted by statute." Wis. Stat. § 227.10(2m); *see also* Wis. Stat. § 227.11(2)(a). In other words, the Legislature "revert[ed]" any residual public trust authority "to [itself]," taking back "responsib[ility] for making rules and statutes necessary to protect the waters of the state." App.181.

2. The Legislature Has Fulfilled, and Continues to Fulfill, Its Constitutional Duty to Protect Wisconsin's Waters.

In briefing below, Petitioners argued that without a total delegation of public trust authority to DNR, the Legislature would somehow breach its constitutional duty. R.114—24-27. That is not so.

To begin with, recent precedent casts considerable doubt on Petitioners' assumptions about the scope of the public trust duty. The Supreme Court's (post–*Lake Beulah*) decision in *Rock-Koshkonong*, 2013 WI 74, suggests that the public trust doctrine does not even apply in this case. The Court there held that "[t]here is no constitutional foundation for public trust jurisdiction over land . . . that is not below the [ordinary high water mark] of a navigable lake or stream." *Id.* ¶ 86 (emphasis

removed). The wells at issue here are clearly located on land far outside the ordinary high water mark of navigable waters. So there is good reason to think that this case does not even implicate the Legislature's public trust authority, as opposed to its conventional police powers. *Id.* ¶¶ 95–103 (discussion of police powers).

But even if the public trust doctrine applies, the Legislature has not violated it by limiting DNR's authority. Under the public trust doctrine, the "state holds the beds underlying navigable waters in trust for all of its citizens." *Muench v. Pub. Serv. Comm'n*, 261 Wis. 492, 501, 53 N.W.2d 514 (1952). The doctrine is most frequently invoked to resolve disputes between private parties, preventing claims of exclusive rights to Wisconsin's waters. *See, e.g.*, *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914). The doctrine also imposes a general duty on the Wisconsin Legislature—as the "trustee of navigable waters"—"to protect and preserve [those waters]." *Lake Beulah*, 2011 WI 54, ¶ 33 (citation omitted); *Rock-*

Koshkonong, 2013 WI 74, ¶ 87. But, as with a standard trust, the trustee has "broad discretion" to "exercise reasonable care and judgment" in fulfilling its duties. *See In re Tr. Salimes*, 43 Wis. 2d 140, 145, 168 N.W.2d 157 (1969); *In re Filzen's Estate*, 252 Wis. 322, 326, 31 N.W.2d 520 (1948) (trustees must "act in good faith and from proper motives and within the bounds of a reasonable judgment"). And "the trustee of the public," even more so, "is necessarily vested [with] a wide field of discretion in the carrying out of its duties[ ] and . . . determining the questions of legitimate general public policy in matters that affect the community as a whole." *Wagner v. City of Milwaukee*, 180 Wis. 640, 192 N.W. 994, 996 (1923).

That does not mean that the Legislature's discretion is unbounded. The Legislature cannot, for example, authorize "draining [a] lake" solely for the purpose of "convert[ing] the bed of the lake [into] private [property]." *Priewe v. Wis. State Land & Improvement Co.*, 103 Wis. 537, 79 N.W. 780, 781 (1899). Nor can the Legislature "change navigable waters into agricultural fields"

in a way that "entirely destroy[s] [an] interstate ferry route." *In re Crawford Cty. Levee & Drainage Dist. No. 1*, 182 Wis. 404, 196 N.W. 874, 878 (1924).

The public trust doctrine does not, however, require the Legislature to prohibit all economic activity that would have any impact whatsoever on a lake or stream. The Legislature need not preserve all waters "in the same condition and contour as they existed prior to the advent of the [non-indigenous] civilization in the territorial area of Wisconsin." *City of Milwaukee v. State*, 193 Wis. 423, 451-52, 214 N.W. 820 (1927). Rather, "[t]here must be a realistic and sane legal approach to this problem, namely a balancing of public need and convenience against the interference with the navigation involved." *State v. Pub. Serv. Comm'n*, 275 Wis. 112, 119, 81 N.W.2d 71 (1957) (citations omitted) (authorizing filling part of Lake Wingra in Madison to construct Vilas Park); *see also Town of Ashwaubenon v. Pub. Serv. Comm'n*, 22 Wis. 2d 38, 49, 125 N.W.2d 647 (1963) ("One does not have to deny [ ]the trust doctrine . . . to determine that an intrusion upon

the navigable waters is permissible."); *Hixon v. Pub. Serv. Comm'n*, 32 Wis. 2d 608, 618–19, 146 N.W.2d 577 (1966); *Bleck*, 114 Wis. 2d at 465-66.

The Legislature's graduated framework for environmental review falls well within the bounds set by the public trust doctrine. That framework is designed to identify those wells most likely to have a negative impact on Wisconsin's waters: the largest wells are always subject to environmental review, medium wells sometimes are, and the smallest wells never are. The criteria triggering environmental review for medium wells are also tailored to protect the environment: wells near outstanding or exceptional water resources or trout streams, Wis. Stat. § 281.34(1)(am), (4)(a)1.; wells "that may have a significant environmental impact on a spring," § 281.34(4)(a)3.; and wells with a "water loss of more than 95 percent," § 281.34(4)(a)2., all require environmental review. These are not narrow categories. Almost 20% of Wisconsin's rivers and streams are designated "outstanding" or "exceptional," and 15.7% are classified trout

streams, and DNR can expand these lists. See above at page 8 n.4. There are also hundreds of springs in Wisconsin. See above at page 9, n.6.

Through Act 21—in addition to the Legislature's request for an Attorney General opinion about the effect of Act 21 on DNR's high capacity well program, see above at pages 14 to 17—the Legislature has made clear that, in its view, this graduated environmental-review framework is generally sufficient to protect Wisconsin's water resources from high capacity wells.

To the extent that framework is insufficient in some way—whether for certain categories of wells or regions of the State—the Legislature continues to review and update its regulation of high capacity wells. In the summer of 2017, for example, the Legislature authorized DNR to study the Central Sands Region (where all but one of the wells in this case are located) and to provide specific legislative recommendations to address the unique water issues there. 2017 Wis. Act 10, § 4. This action demonstrates two things: first, that the Legislature

takes its public trust duties seriously; and second, that the Legislature has decided that well-related water issues should be addressed systematically, rather than by DNR staff on a case-by-case basis, because the prior ad hoc approach had generated confusion and a "backlog" of well applications, App.155; see above at page 12. The Legislature can reasonably choose to resolve the difficult balancing that the public trust duty requires in a systematic way, rather than by delegating to a case-by-case decision-maker like DNR.

II. Section 281.34(5m) Bars Petitioners' Challenge Based on Cumulative Impacts.

In addition to limiting DNR's environmental review authority to the statutorily defined categories, the Legislature also barred certain challenges to well approvals based on cumulative environmental impacts.

Section 281.34(5m) provides that "[n]o person may challenge an approval, or an application for approval, of a high capacity well based on the lack of consideration of the cumulative environmental impacts of that high capacity well together with

existing wells." Wis. Stat. § 281.34(5m). This statute essentially limits the scope of judicial review of well approvals.

"[T]he right of judicial review is entirely statutory," such that "orders of administrative agencies are not reviewable unless made so by the statutes." *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n*, 93 Wis. 2d 650, 657, 287 N.W.2d 737 (1980). So the Legislature can, and has, "prescribe[d] [the] extent" of judicial review of well approvals. *See Clintonville Transfer Line v. Pub. Serv. Comm'n*, 248 Wis. 59, 75, 21 N.W.2d 5 (1945).

Petitioners raised precisely this forbidden challenge. In their petition for review, they complained that DNR "approv[ed] [the] wells without addressing . . . adverse individual or *cumulative* impacts to waters of the state," and argued that they were "directly injured because DNR did not address [such] individual and *cumulative* effects." R.1–5; R.2—5; R.3—5; R.4—5, 6; R.5—5-6; R.6—5; R.7—5; R.8—5; App.34, 48, 67, 80-81, 97, 110, 123, 137 (emphases added). They asked the circuit court to "reverse[ ]" the approvals and to "[d]eclar[e] that DNR has the

authority and duty to address the individual and *cumulative* effects of all high capacity wells on waters of the state." *E.g.*, R.1–6, 7; R.2—6, 7; R.3—6, 7; R.4—7. 8; R.5—6, 7; R.6—6, 7; R.7—6, 7; R.8—6, 7; App.35, 36, 49, 50, 68, 69, 82, 83, 98, 99, 111, 112, 124, 125, 138, 139 (emphasis added). And in their briefing on the merits, Petitioners argued that "DNR's duties include protection from cumulative impacts," R.114–14, and that DNR "must consider [ ] cumulative impacts," R.114–25.

Judicial review should be denied and the well authorizations should be affirmed because Petitioners challenged the well approval based on the lack of consideration of the cumulative environmental impacts of the well together with existing wells. Wis. Stat. § 281.34(5m).

CONCLUSION

This Court should reverse the circuit court's decision and affirm DNR's eight well authorizations.

Dated this 4th day of February, 2021.

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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 9,190 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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Dated this 4th day of February, 2021.

By: s/Eric M. McLeod
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APPENDIX CERTIFICATION

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.

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

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Dated this 4th day of February, 2021.

By: s/Eric M. McLeod
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.

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