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In the
WISCONSIN SUPREME COURT

CLEAN WISCONSIN, INC. and
PLEASANT LAKE MANAGEMENT
DISTRICT,
Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,
Respondent-Appellant,

Appeal No. 2018AP000059

Circuit Court Case No. 2016CV002817,
2016CV002818, 2016CV002819,
2016CV002820, 2016CV002821,
2016CV002822, 2016CV002823,
2016CV002824

WISCONSIN MANUFACTURERS & COMMERCE,
DAIRY BUSINESS ASSOCIATION, MIDWEST
FOOD PROCESSORS ASSOCIATION, WISCONSIN
POTATO & VEGETABLE GROWERS ASSOCIATION,
WISCONSIN CHEESE MAKERS ASSOCIATION,
WISCONSING FARM BUREAU FEDERATION,
WISCONSIN PAPER COUNSEL and
WISCONSIN CORN GROWERS ASSOCIATION,
Intervenors-Co-Appellant,

WISCONSIN LEGISLATURE,
Intervenor.

PETITIONERS-RESPONDENTS' BRIEF AND APPENDIX

On Certification by Court of Appeals, District II, January 16, 2019,
On Appeal from Final Order of the Dane County Circuit Court,
The Honorable Valerie L. Bailey-Rihn, Presiding

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March 10, 2021

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ISSUES PRESENTED

The Intervenors' phrasing of the issues presented: a) is predicated on a misrepresentation of underlying facts; and b) mischaracterizes the issues and arguments raised by the Petitions for Review and argued before the Circuit Court. A more accurate and unbiased phrasing of the issues is as follows:

1. Whether Wis. Stat. § 227.10(2m) prohibited the Department of Natural Resources ("DNR") from denying or conditioning approval of high capacity well applications as necessary to protect Public Trust waters and other waters of the state.

Answered by the Circuit Court: No.

2. Whether any of the cases are barred by Wis. Stat. § 281.34(5m), which prohibits any person from challenging a high capacity well approval based on lack of consideration of cumulative environmental impacts of the proposed well together with existing wells.

Answered by the Circuit Court: No.

INTROUCTION

Wisconsin's lakes and streams belong to the public. The State holds these waters in trust to be protected for the benefit of the public. This "Public Trust Doctrine" ("PTD") has existed since the territorial Northwest Ordinance of 1787, and was incorporated into our Constitution at statehood. Wis. Const., Art. IX, § 1.[1]

For over 120 years, this Court has repeatedly, unanimously held that the PTD broadly protects public rights in, *inter alia*, boating, fishing, swimming, and scenic beauty. The Court also has characterized the trust as an "active" trust, requiring the state to affirmatively protect and enhance the public's right to enjoy our waters. In *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73 ("*Lake Beulah*"), the Court reinforced these principles, unanimously holding that DNR, as designated trustee, has the constitutional and statutory authority and duty to consider impacts to waters of the state when evaluating applications for high capacity wells.

Intervenors would undue all of this jurisprudence, as well as DNR's management of state waters, based on a single statute of general application, for which there is no legislative history pertinent to its application in this case, much less any indication that it was intended to affect delegations of the constitutional

[1] Wisconsin Const. Art. IX, § 1 states in pertinent part:

> [T]he 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, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

PTD in any way. To achieve this outcome, they rely on mischaracterizations of the underlying facts, ignore critical language in relevant statutes and cases, ignore the unique historical and jurisprudential context of the PTD, and disregard multiple canons of statutory construction. Ultimately, they rely on the preposterous argument that Wis. Stat. § 227.10(2m), a statute affecting agency decision-making in an act otherwise devoted to rulemaking, was designed to dramatically alter long-standing practices of agency decision-making and *sub silentio* sweep away over a century of PTD jurisprudence.

This Court should affirm the Circuit Court, requiring DNR to follow its constitutional, statutory, and judicial mandate to protect Public Trust waters when acting on well applications.

STATEMENT OF THE CASE

The Legislature offers a lengthy recitation of the background of this case. Its narrative, however, is colored by its selective use of partial quotes from key cases (including *Lake Beulah*).

Additionally, the Legislature's statement of facts skims over essential facts. For example, it glosses over the underlying, undisputed facts relating to the well applications at issue, including DNR's scientific analyses and staff recommendations to condition approval or deny applications due to unacceptable adverse impacts to public waters.

Petitioners-Respondents therefore offer a more succinct yet complete statement of the case.

I. HIGH CAPACITY WELL REGULATORY PROGRAM

Withdrawals of groundwater, whether for drinking water, agriculture, or other commercial purposes, are governed by Wis. Stat. ch. 281. The statutes create three categories of wells, based on the volume of withdrawal: 1) small wells with a withdrawal capacity of less than 100,000 gallons per day (gpd) (70 gallons per minute); 2) "high capacity" wells, with a withdrawal capacity of more than 100,000 gpd; and 3) high capacity wells with a withdrawal water loss of more than 2 million gpd. *See* §§ 281.34 and 281.35. These cases focus on the second category of wells.

A proposed well (or multiple wells on the same property) with a capacity to withdraw more than 100,000 gpd requires DNR approval. The minimum criteria for approval include consideration of whether the well interferes with an existing public water supply well. § 281.34(5)(a). Additional environmental review is mandatory for three categories of wells: 1) wells located in a "groundwater protection area," *i.e.*, within 1,200 feet of a designated outstanding resource water ("ORW"), exceptional resource water ("ERW")[2], or classified trout stream; 2) wells with a water loss of more than 95% of the water withdrawn (*e.g.*, bottling plants); and 3) wells that may have a significant impact on a large spring (a surface water discharge of at least one cubic foot per second 80% of the time). § 281.34(4).

[2] ORW/ERWs are Wisconsin's most unique and valuable water resources, and are subject to special regulatory protections. Wis. Admin. Code §§ NR 102.10 and 102.11.

II. JUDICIAL DECISIONS AFFECTING THE HIGH CAPACITY WELL PROGRAM

1. *Lake Beulah*

The seminal case regarding DNR's authority and duties when acting on a high capacity well application is *Lake Beulah*. Lake Beulah Management District petitioned for judicial review challenging the approval of a high capacity well for the Village of East Troy. Since the proposed well would not adversely impact a public water supply well and did not meet any of the criteria for additional environmental review in § 281.34(4), DNR approved the well. Lake Beulah Management District argued that DNR should have considered potential impacts to nearby Lake Beulah, even though the well was not within 1,200 feet and the lake was not a groundwater protection area resource. DNR agreed that it had a statutorily delegated, constitutional duty to protect navigable waters from adverse impacts from proposed high capacity wells, but the duty to consider such impacts was triggered only if there were concrete scientific evidence of potential impacts before the agency at the time of its review. The Village argued that DNR's authority was constrained by § 281.34, which did not address impacts to navigable waters unless the well fell under § 281.34(4).

The principal issue before the Supreme Court was the scope of DNR's authority to protect navigable waters under the PTD. In evaluating the scope of DNR's authority, the Court drew from nearly 100 years of unanimous Public Trust decisions, which have recognized that the PTD requires the state to actively "protect

and preserve its waters for fishing, hunting, recreation, and scenic beauty." *Lake Beulah*, ¶ 32 (quoted source omitted). The Court also reiterated that the legislature has delegated this public trust duty to DNR: "The duties of the DNR are comprehensive, and its role in protecting state waters is clearly dominant." *Id.*, ¶ 33 (quoted source omitted). Based on its detailed analysis of both the history of PTD case law and the statutes pertinent to high capacity wells, the Court unanimously held:

> We conclude that, pursuant to Wis. Stat. § 281.11, § 281.12, § 281.34, and § 281.35 (2005-06), along with the legislature's delegation of the State's public trust duties, the **DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state**….
>
> We further hold that to comply with this general duty, **the DNR must consider the environmental impact of a proposed high capacity well when presented with sufficient concrete, scientific evidence of potential harm to waters of the state.** The DNR should use both its expertise in water resources management and its discretion to determine whether its duty as trustee of public trust resources is implicated by a proposed high capacity well permit application, such that **it must consider the environmental impact of the well or in some cases deny a permit application or include conditions in a well permit**.

Id., ¶¶ 3-4 and 62-63 (footnotes omitted; emphasis added).

2. *Richfield Dairy*

A second pertinent case is an administrative decision in a contested case hearing: *In the Matter of a Conditional High Capacity Well Approval for Two Potable Wells to be Located in the Town of Richfield, Adams County Issued to Milk Source Holdings, LLC*, Case Nos. IH-12-03, *et al*. (September 3, 2014) ("*Richfield Dairy*"). Pleasant Lake Management District (one of the Petitioners-Respondents here) and others challenged DNR's approval of high capacity wells for Richfield Dairy, a proposed mega-dairy known as a "confined animal feeding operation," or

"CAFO." Petitioners asserted that the wells should not have been authorized at the approved pumping capacity because of the projected impact, in conjunction with existing wells, on Pleasant Lake and several nearby trout streams and unique wetlands. DNR argued that it had no duty or authority to consider cumulative impacts of a proposed well with existing wells, even though its own staff testified that DNR could not protect Public Trust resources unless it considered and addressed cumulative impacts.

After a two-week evidentiary hearing at which multiple scientists and regulators testified, the administrative law judge agreed with petitioners, holding:

> To fulfill its obligations under Wis. Stat. §§ 281.11, 281.12, 281.34 and 281.35, its public trust duties, the *Lake Beulah* … decision and to protect public waters both surface and groundwater the Department must consider cumulative impacts to prevent "potential harm to waters of the state." Numerous water resources experts testified that one could not properly evaluate the "concrete scientific evidence" (as required by *Lake Beulah*) without considering existing and reasonably anticipated cumulative impacts…."

Richfield Dairy at 3. R.App. 203. The ALJ's decision further states:

> The Department of Natural Resources took an unreasonably limited view of its authority to regulate high capacity well permit applications to reach the conclusion that it lacks the authority to consider cumulative impacts in connection with its review of high capacity wells…. [I]t was incumbent upon the Department to consider "the concrete, scientific evidence of potential harm to waters of the state" caused by this high capacity well application and existing and reasonably anticipated cumulative impacts. *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73. As numerous experts on all sides testified in the instant case, **to properly consider the concrete scientific evidence one has to consider the cumulative impacts of groundwater withdrawals upon surface waters and springs consistent with the DNR's clear legal duty** to "protect, maintain and improve the quality and management of the waters of the State, ground and surface, public and private." *Id*.

Id. at 14 (emphasis added). R.App. 214. After reviewing the evidence, the judge imposed more restrictive limits on the well's pumping capacity. No party appealed.

III. DNR RESPONSE TO *LAKE BEULAH* AND *RICHFIELD DAIRY*

In 2011, as a result of the *Lake Beulah* decision, DNR began evaluating environmental impacts of proposed wells as part of its review of high capacity well applications. In 2014, DNR added review of cumulative impacts based on *Richfield Dairy*, as a reasonable and necessary step to satisfy its Public Trust duties. It also would take action based on those reviews, *e.g.*, including conditions to monitor impacts or lowering pumping limits. For applications for which DNR scientists identified adverse impacts that rendered the applications un-approvable, however, DNR did not deny the applications. Rather, it withheld decisions, creating the appearance of a backlog of well applications. *See, e.g.*, R.App. 226-27. In the cases at bar, several of the applications date back to 2014. App. 033, 047, 066, 080, 122.

DNR's Public Trust reviews continued until June 2016. In May 2016, the then-Attorney General issued an opinion stating that DNR did not have the authority to consider cumulative impacts of proposed and existing high capacity wells on Public Trust resources, or to include in its permit decisions conditions necessary to protect those resources. OAG-01-16 (the "AG Opinion"). DNR immediately adopted the AG Opinion, and ceased evaluating environmental impacts of proposed wells except for the narrow categories described in § 281.34(5)(b)-(d). For those applications that DNR previously deemed un-approvable due to anticipated adverse impacts to Public Trust waters, it began issuing approvals, without conditions

necessary to protect Public Trust waters, in September 2016. See, e.g., App. 037-42, 051-62.[3]

IV. FACTS SPECIFIC TO THE CASES AT BAR

The eight well approvals at issue here were applied for after *Richfield Dairy* but before the AG Opinion. For each of those applications, DNR staff considered environmental impacts. As discussed below, those evaluations varied from raising questions about potential impacts to nearby lakes and streams to detailed modeling and calculations of both individual and cumulative impacts on Public Trust resources. R.App. 226-37. The adverse impacts led to DNR management withholding action on the applications, even when DNR's scientists proposed denial. *See, e.g.*, R.App. 226, 227, 234.

After adopting the AG Opinion, DNR asked the well applicants whether they wanted DNR to act on their applications. In several instances, DNR acknowledged that the well would compromise Public Trust resources, but indicated that based on the new policy, it would approve the well as requested, without conditions necessary to protect Public Trust waters. *Id*.

On September 30, 2016, DNR issued approximately twenty new well approvals, most of which were in the Central Sands.[4] Being in the Central Sands is

[3] On May 1, 2020, Attorney General Kaul withdrew the AG Opinion, and DNR resumed case-by-case determinations of whether a proposed well, when combined with existing wells, would result in significant adverse environmental impacts to a navigable water. http://dnr.wi.gov/topic/wells/HighCapacity.html.

[4] The Central Sands" is comprised of parts of six counties in central Wisconsin, east of the Wisconsin River, extending approximately from Portage to Stevens Point. Its geology is dominated

significant, as that area already hosts the highest concentration of high capacity wells in the state;[5] and its lakes and streams already were severely damaged by associated reductions in lake levels and stream flows.

Several salient facts are repeated in the records of each of the eight cases at bar, including the following:

1. There was concrete, scientific evidence that triggered DNR's duty to consider and potentially act on adverse impacts to Public Trust waters, pursuant to *Lake Beulah*.
2. DNR scientists identified potential adverse impacts that would compromise public rights in navigable waters.
3. DNR management withheld any action on the application until after issuance of the AG Opinion.
4. DNR then offered to approve the proposed well.
5. DNR approved the well without necessary conditions, despite evidence of potential or anticipated adverse effects on Public Trust waters.

In these cases, DNR scientists identified adverse impacts due to individual proposed wells; the impact of the proposed well together with existing or proposed wells; or other types of cumulative impacts.

1. Case Nos. 16-CV-2817, 2818 and 2819 (Lutz, Gordon, Peplinski)

DNR evaluated adverse impacts associated with applications for four proposed wells in Portage County. Each proposed well (none of which existed at

by sandy soils and a single groundwater aquifer with a shallow water table. Its "seepage" lakes and streams are predominantly fed by groundwater, contributing to high water quality and temperatures conducive to trout and other game fish.

[5] DNR 2017 Water Use Report, 2-3. https://dnr.wi.gov/topic/WaterUse/documents/WithdrawalReportDetail2017.pdf

the time) would impact multiple Public Trust waters, including Stoltenberg Creek – a designated ERW and Class I trout stream[6] – and several nearby lakes. The record reflects a substantial investigation and evaluation of potential impacts to Stoltenberg Creek, the Tomorrow River, and Lake Emily, including hydrologic modeling and fisheries evaluation. R.App. 226.

DNR determined that Stoltenberg Creek in particular had already suffered a "substantial" depletion of over 30% of stream flow from existing wells, and that each proposed well would further deplete the creek by nearly 3% (collectively almost 9%). A DNR email dated May 11, 2015, stated that it was "not yet clear" whether this depletion would be significant. *Id*. DNR also stated that it would place the application "on-hold" because of potential legislation affecting cumulative impact review. On September 30, 2016 (the date of well approval), the same DNR scientist stated: "As part of the review process I did some groundwater flow modeling that showed that the cumulative impacts from pumping on Stoltenberg Creek were substantial." R.App. 227.

2. Case No. 16-CV-2820 (Frozene)

The proposed well is close to Pleasant Lake, and affects several of the same resources impacted by the proposed well in *Richfield Dairy*. The affected streams

[6] Trout streams are classified based on their ability to maintain a sustainable population without stocking, and are specially regulated to maintain temperature, dissolved oxygen, flow, and other attributes necessary "to ensure adequate protection and proper management of this unique resource." Wis. Admin. Code § NR 1.02(7)

are all Class I trout streams and designated as either ERWs or ORWs.[7] Although the application requested authority to pump 38.9 million gallons **per month**, DNR modeled the impact based on a "conditioned rate" of one inch per week, equating to 36.3 million gallons **per year**. R.App. 228. Even at this substantially reduced rate, DNR staff calculated a 1.3 inch drawdown in a calcareous fen[8] from the proposed well alone, further noting that a 1-1.5 inch drawdown could cause a loss of about 10% of the fen area and adversely alter the wetland. R.App. 229. DNR further noted that the 1.7-inch modeled drawdown at Pleasant Lake, coupled with the calculated drawdown for the not-yet-constructed Richfield Dairy well, "would reach the level the ALJ considered a significant impact for the lake (more than 2.5-3 inches)." R.App. 230. Notwithstanding these impacts, DNR approved the well for more than 7.5 times the pumping rate considered in its modeling and evaluation.

3. Case No. 16-CV-2821 (Turzinski)

The application stated that it is 1,300 feet from Buena Vista Creek, an ERW and trout stream. A DNR scientist observed that the proposed well is near the headwaters of the creek, and that the application "should be evaluated to what, if

[7] Wis. Stat. § 281.34(5)(b) requires additional evaluation and potential conditions for wells within 1,200 feet of an ERW, ORW, or classified trout stream. Several of the well applicants identified their wells as being 1,250 or 1,300 feet from such protected waters. DNR never verified these estimated distances, or considered whether the difference between 1,200 feet and the identified distance was hydrologically meaningful to protecting affected Public Trust resources.

[8] Calcareous fens are rare and sensitive wetland resources, whose flora are dependent on water rich in calcium. Wetland law accords special consideration and protection to calcareous fens. Wis. Stat. § 281.36(3g)(d)7.

any, impacts to the headwaters can be expected." R.App. 232. The record includes no evidence of any evaluation.

4. Case No. 16-CV-2822 (Laskowski)

The applied-for well is near two Class I trout streams. The DNR scientist stated that it "is too close to the headwaters of Ditch 4, especially near reproduction area for trout." R.App. 233.[9] He noted that the ditch is already heavily used by cranberry operations,[10] and stated that "[t]he stream is too impacted already for another well." *Id*. DNR ignored this opinion, conducted no further evaluation, and approved the well without protective conditions.

5. Case No. 16-CV-2823 (Lauritzen)

The proposed well is a fourth well on the same property. (All wells on the same property are treated as one well under Wis. Stat. § 281.34(1)(b), not as a cumulative impact.) The DNR scientist stated that he was "concerned that the combined impact from the 4 wells will add to a significant adverse impact to the temperature and fish community of Radley Creek" (a Class 1 trout stream and ORW). R.App. 234. He then requested information on how much impact is projected from this set of wells and existing wells. Although there was no response, a subsequent DNR email indicates that DNR had placed the application "on hold" "due to predicted impacts to Radley Creek…." *Id.* The same email stated that the

[9] Many trout streams are identified as "ditches" due to historic channelization.

[10] Cranberries typically are grown in marshes and bogs. Heavy water use is during harvesting, when the bogs are flooded by stream diversion to float the fruit to the surface. *See, e.g.*, www.wiscran.org/media/1347/cranproduction08.pdf.

well may be approvable despite its adverse impacts under the AG Opinion. It was approved without protective conditions a week later.

6. Case No. 16-CV-2824 (Derousseau)

This is the only challenged well outside the Central Sands, located near Rice Lake in Barron County. DNR's hydrogeologist initially expressed concern due to the proposed well's proximity to the wetlands and headwaters of Roux Creek, a Class II trout stream, as initial modeling showed "unacceptable impact to Roux Creek." R.App. 236. DNR staff undertook substantial evaluation, including site visits and additional monitoring. DNR's hydrogeologist then wrote:

> My assessment … concluded that the combination of existing irrigation wells with the proposed irrigation well in the sand/gravel aquifer would have a direct impact on the surrounding wetlands and the headwaters of Roux Creek, a class II trout stream.… I have informed the applicant's consultant that they can either voluntarily withdraw their application or the WDNR can issue a formal denial.

R.App. 237.

After the AG Opinion, DNR offered to revisit the application, which had been placed on hold. It was approved without protective conditions.

ARGUMENT

I. THIS COURT REVIEWS THE CIRCUIT COURT DECISION *DE NOVO*.

The parties agree that the issues before this Court are subject to *de novo* review, *i.e.*, no deference is afforded either party's legal interpretations. WMC Br. at 2; Legis.Br. at 21. WMC argues that DNR's decisions are entitled to "due weight" based on DNR's experience, technical competence or specialized knowledge and expertise. WMC Br. at 2. However, § 227.10(2m) applies to all state agencies and

DNR does not possess any specialized experience or expertise that would warrant due weight in this case. The second issue, relating to § 281.34(5m), is a novel issue that also requires no technical expertise or experience. Moreover, these issues address DNR's statutory authority, for which courts afford no deference to the agency's interpretation. *Grafft v. DNR*, 2000 WI App 187, ¶ 4, 238 Wis. 2d 750, 618 N.W.2d 897.[11]

II. DNR'S APPROVAL OF THE WELL APPLICATIONS VIOLATED ITS PARAMOUNT DUTY TO PROTECT WATERS OF THE STATE.

Although Intervenors focus on Wis. Stat. §§ 227.10(2m) and 281.34(5m), the fundamental issue is whether DNR has fulfilled its constitutional and statutory obligations to protect waters of the State. Prior to the DNR decisions under review, there was no dispute that DNR had the constitutional and statutory mandate to protect waters of the State when acting on well applications.

The Supreme Court repeatedly has held: "When considering actions that affect navigable waters in the state, one must start with the public trust doctrine, rooted in in Article IX, Section 1 of the Wisconsin Constitution." *Hilton ex rel. Pages Homeowners' Ass'n v. DNR*, 2006 WI 84, ¶ 18, 293 Wis. 2d 1, 717 N.W.2d 166, quoted in *Lake Beulah*, ¶ 30. Accordingly, this analysis requires consideration

[11] The Legislature dwells on the now-withdrawn AG Opinion (Legis.Br. at 12-16), suggesting that it may be treated as persuasive. *Id*. at 28, n.12. However, an opinion of the attorney general is only valuable to the extent it is substantively persuasive, *i.e*., the same as any other non-judicial opinion. *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶37, 312 Wis. 2d 84, 752 N.W.2d 295; *Wood Cty. v. State Bd. of Vocational, Tech. & Adult Educ.*, 60 Wis. 2d 606, 613, 211 N.W.2d 617, 620 (1973). Here, the AG Opinion is unpersuasive and entitled to no deference because, *inter alia*, it attempted to overrule *Lake Beulah*, based on a flawed discussion that ignores significant language confirming that DNR has "explicit" authority to protect Public Trust waters.

of § 227.10(2m) in the context of existing constitutional, statutory and jurisprudential law.

A. DNR Is the Trustee of Public Trust Waters, with the Duty to Protect Waters of the State when Acting on High-Capacity Well Applications.

Wisconsin appellate courts repeatedly have held that DNR is the trustee of State waters under the PTD, and is charged with protecting those public water resources. *See, e.g., ABKA Ltd. P'ship v. Wis. Dep't of Natural Res.*, 2002 WI 106, ¶ 12, 255 Wis. 2d 486, 648 N.W.2d 854; *State v. Town of Linn*, 205 Wis. 2d 426, 444-45, 556 N.W.2d 394 (Ct. App. 1996), *rev. den.* 207 Wis. 2d 287 (1996); *Borsellino v. DNR*, 2000 WI App 27, ¶ 18, 232 Wis. 2d 430, 443-44, 605 N.W.2d 255. In *Borsellino*, the court referred to DNR as "trustee under the public trust doctrine …." *Id.*, ¶ 19.

DNR's Public Trust obligations are broad and comprehensive. Nearly forty-five years ago, the Supreme Court stated:

> In furtherance of **the state's affirmative obligation as trustee of navigable waters**, the legislature has delegated substantial authority over water management matters to the DNR. The **duties of the DNR are comprehensive**, and its role in protecting state waters is clearly dominant….

Wis. Environmental Decade, Inc. v. DNR, 85 Wis. 2d 518, 527, 271 N.W.2d 69 (1978) (footnote omitted; emphasis added). While the courts have held that Public Trust duties ultimately are the responsibility of the Legislature, it is an "affirmative" obligation. *Id*. The Legislature cannot merely decline to administer it.

The courts frequently have reiterated the importance of protecting the Public Trust, and that DNR's authority must be construed liberally to protect those waters.

See, e.g., Muench v. Public Service Comm., 261 Wis. at 512; *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983); *Hilton*, 2006 WI 84, ¶¶ 18-20; *Town of Linn*, 205 Wis. 2d at 442-43. Just a few years ago, this Court reaffirmed that the PTD "should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits." *Movrich v. Lobermeier*, 2018 WI 9, ¶44, 379 Wis. 2d 269, 905 N.W.2d 807 (quoting *Diana Shooting Club v. Husting*, 156 Wis. 261, 271, 145 N.W. 816, 820 (1914)). The Legislature has reinforced this responsibility in Wis. Stat § 281.11, which requires the delegation of Public Trust duties to be "liberally construed …." Notably, that specific statutory requirement was not modified at the time of or since enacting the more general 2011 Wisconsin Act 21.

DNR's Public Trust duties include protection from cumulative impacts. As this Court stated in *Hixon v. PSC*, 32 Wis. 2d 608, 632-33, 146 N.W.2d 577 (1966):

> A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist. Our navigable waters are a precious natural heritage; once gone, they disappear forever.

In *Lake Beulah*, the Supreme Court did not alter or expand DNR's Public Trust responsibilities. Rather, it addressed how DNR's existing statutory and constitutionally-based trust responsibilities apply to the high capacity well program. Relying on a long history and plethora of Public Trust case law, the Court held unequivocally that: a) DNR has the statutory and constitutional authority and duty

to consider impacts to Public Trust resources; and b) whether DNR's duty has been triggered is determined on a case-by-case basis.

> We conclude that, pursuant to Wis. Stat. § 281.11, § 281.12, § 281.34, and § 281.35 (2005-06), along with the legislature's delegation of the State's public trust duties, the DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state. Upon what evidence, and under what circumstances, the DNR's general duty is implicated by a proposed high capacity well is a highly fact specific matter that depends on what information is presented to the DNR decision makers ….

2011 WI 54, ¶ 3 (footnotes omitted).

In *Lake Beulah*, the Village/well applicant, like the Intervenors here, argued that DNR may not consider impacts to Public Trust resources because that authority is not found in §§ 281.34 and 281.35. *Id.*, ¶ 29. DNR argued that it had broad authority to consider impacts to those water resources, and that its authority derives from both the Public Trust Doctrine and ch. 281. *Id.*, ¶¶ 27-28.

The Supreme Court adopted the broad authority and duty as articulated by DNR. It characterized the statutory scheme for high capacity wells as combining DNR's "overarching authority and duty to manage and preserve waters of the state" with certain specific requirements. *Id.*, ¶ 35. The Court specifically relied upon Wis. Stat. §§ 281.11 and 281.12. Wisconsin Stat. § 281.11 provides in pertinent part:

> The department shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private…. The purpose of this subchapter is **to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state**, ground and surface, public and private. To the end that these vital purposes may be accomplished, this subchapter and all rules and orders promulgated under this subchapter **shall be liberally construed in favor of the policy objectives** set forth in this subchapter….

(Emphasis added.) Similarly, Wis. Stat. § 281.12(1) provides in pertinent part:

> The department shall have general supervision and control over the waters of the state. It shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter….

The Court made clear that these statutes constitute a substantive delegation of the State's constitutional trustee duties to DNR:

> [W]e conclude that, through Wis. Stat. § 281.11 and § 281.12, **the legislature has delegated the State's public trust duties to the DNR in the context of its regulation of high capacity wells** and their potential effect on navigable waters such as Lake Beulah.

Lake Beulah, ¶ 34 (emphasis added). The Court also relied upon other statutes and a wealth of precedential cases to conclude that DNR's duty is grounded in the Constitution. *Id.*, ¶ 3 fn. 6 and ¶ 33 (quoting *WED v. DNR*, 85 Wis. 2d at 527).

The Court concluded, consistent with prior cases, that DNR has a "broad authority and a general duty" to "manage, protect, and maintain waters of the state." *Id.*, ¶ 39 (footnotes omitted). It expressly rejected the argument that § 281.34 limits DNR's authority: "To the contrary, there is nothing in either Wis. Stat. § 281.34 or § 281.35 that limits the DNR's authority to consider the environmental impacts of a proposed high capacity well." *Id.*, ¶ 41. That is, while §§ 281.34 and 281.35 provide certain mandatory requirements, they do not limit DNR's broad Public Trust responsibilities derived from other delegating statutes.

B. DNR Has Violated Its Duty to Protect Public Trust Waters.

There can be no dispute that here, DNR did not perform its Public Trust responsibilities to protect our lakes and streams. In each case, DNR had scientific evidence, typically generated by its own scientists, that triggered its duty to protect

surface waters under *Lake Beulah*, Wis. Stat. ch. 281, and the Wisconsin Constitution. Additionally, these cases involved impacts to ERWs, ORWs, and trout streams.

In some cases, DNR staff specifically recommended further investigation because of the risk to Public Trust waters, but DNR never undertook the necessary evaluation. R.App. 232, 234. In other cases, DNR conducted a detailed investigation and concluded that the affected streams were already too compromised for another well. R.App. 226-27, 233. In one case, the hydrogeologist specifically recommended denial of the application due to unacceptable impacts. R.App. 237. In another, DNR's scientists acknowledged that even at a fraction of the approved capacity, the proposed well would exceed a prior determination of adverse impacts on Pleasant Lake and would substantially impact a calcareous fen. R.App. 230.

Despite these acknowledged adverse impacts to sensitive, highly valued Public Trust waters, DNR approved each well without any pertinent conditions.

III. INTERVENORS' INTERPRETATION OF WIS. STAT. § 227.10(2M) IS GROSSLY FLAWED, DEFIES BASIC CANONS OF STATUTORY CONSTRUCTION, AND CONTRAVENES A CENTURY OF PUBLIC TRUST JURISPRUDENCE.

Intervenors argue that DNR is prohibited from protecting Public Trust resources when acting on high capacity well applications by § 227.10(2m) for two interrelated reasons: a) there is no explicit authority for such review and action under § 281.34 (an argument expressly rejected in *Lake Beulah*); and b) *Lake Beulah*

has been superseded by § 227.10(2m).[12] They argue that § 227.10(2m) fundamentally and dramatically changed the scope of administrative decision-making, based on a narrow definition of "explicit" that would essentially eliminate any agency judgment or discretion in the decision-making process. We first address the ruling in *Lake Beulah*, because it is dispositive of the application of § 227.10(2m).

A. *Lake Beulah* Addressed Wis. Stat. § 227.10(2m), and Concluded that DNR Had "Explicit" Authority to Regulate Impacts to Public Trust Waters from High Capacity Wells.

Intervenors' argument that *Lake Beulah* did not address § 227.10(2m) is primarily based on selectively quoting only one line in *Lake Beulah*, suggesting that the Court did not provide any analysis or rationale. Legis.Br. at 13-14.

Section 227.10(2m) was created by 2011 Act 21, which otherwise exclusively addressed rulemaking under Subchapter II of ch. 227, the Administrative Procedures Act. That subsection states in pertinent part:

> 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 rule that has been promulgated in accordance with this subchapter ….

Intervenors acknowledge that § 227.10(2m) was raised in *Lake Beulah* by WMC, which argued that it "is merely a restatement of existing law." App.186.

[12] The Legislature briefly argues that this case does not implicate the PTD, based on the erroneous statement that *Lake Beulah* was overruled *sub silentio* in *Rock-Koshkonong Lake Dist. v. State*, 2013 WI 74, 350 Wis. 2d 45, 833 N.W.2d 800. Legis.Br. at 44-45. *Rock-Koshkonong*'s discussion of the PTD related to the potential management of lake levels to protect upland, non-PTD resources. This appeal involves the opposite: management of groundwater to protect PTD resources.

They also acknowledge that the Supreme Court discussed the effect of the statute in footnote 31. However, WMC dismisses the Court's consideration of § 227.10(2m) as insufficient. WMC Br. at 23, n.13.

Intervenors err, in part, by ignoring relevant language in footnote 31:

> None of the parties argues that the amendments to Wis. stat. ch. 227 in 2011 Wisconsin act 21 affect the DNR's authority in this case. **The DNR responds that Wis. Stat. ch. 281 does explicitly confer authority upon the DNR to consider potential environmental harm presented by a proposed high capacity well**. **The conservancies agree.** The Village maintains that the DNR lacks such authority under Wis. Stat ch. 281 but states that "Wis. Stat. § 227.10(2m) does not change the law as it relates to the authority of the [DNR] to issue high capacity well approvals under Wis. Stat. § 281.34." **We agree with the parties** that 2011 Wis. Act 21 does not affect our analysis in this case. Therefore we do not address this statutory change any further.

2011 WI 54, fn. 31 (emphasis added).

Contrary to Intervenors' argument, this Court did not give this statute short shrift. Rather, the Court addressed § 227.10(2m) on its merits.

In *Lake Beulah,* DNR and petitioners argued that § 227.10(2m) did not affect the outcome because ch. 281 "does explicitly confer authority upon DNR to consider proposed environmental harm …."; *i.e.*, DNR's authority under ch. 281 satisfies the "explicit" language in § 227.10(2m). *Id.*, fn. 31. The Court determined not to engage in more elaborate analysis because it expressly agreed with DNR and the other parties that it did not affect the outcome.

Importantly, the Supreme Court's analysis in footnote 31 ties to and is reinforced by its conclusion in the text of the decision that DNR has "explicit" authority to regulate high capacity wells to protect Public Trust resources:

> We conclude that, through Wis. Stat. ch. 281, **the legislature has explicitly provided the DNR** with broad authority and a general duty, in part

> through its delegation of the State's public trust obligations, to manage, protect, and maintain waters of the state…. Specifically, for all proposed high capacity wells, **the legislature has expressly granted the DNR** the authority and general duty to review all permit applications and to decide whether to issue the permit, to issue the permit with conditions, or to deny the application….

Lake Beulah, ¶ 39 (footnotes and citations omitted; emphasis added.) The Court further held that "the meaning of these provisions is clear …." *Id.*, ¶ 44. Intervenors ignore this significant holding in *Lake Beulah*; they also repeatedly misstate *Lake Beulah* as holding that DNR's authority was implied, when the Court plainly held that it is "explicitly provided". *Compare Id.*, ¶ 39 *with* Legis.Br. at 23-24, 37-38.

B. Wis. Stat. § 227.10(2m) Does Not Prohibit Agencies from Exercising Discretion or DNR from Fulfilling Its Statutory and Constitutional Mandates.

Based on its unanimous holding in *Lake Beulah*, the Court need not reevaluate whether § 227.10(2m) affects DNR's high capacity well authority. However, Intervenors' arguments also must be rejected independently of *Lake Beulah*.

The Legislature argues that DNR has no explicit authority in § 281.34 to consider or act on adverse environmental impacts to Public Trust waters unless the well falls within the categories in § 281.34(4). However, the Supreme Court in *Lake Beulah* did not rely exclusively on § 281.34. It held that DNR has "explicit" authority through delegation of constitutional Public Trust responsibilities, including §§ 281.11, .12, .34 and .35. *Lake Beulah*, ¶¶ 3, 39, and 62. Section 281.34(4) provides mandatory but not exclusive authority to regulate.

Intervenors argue that § 227.10(2m) radically changed administrative decision-making to overrule *Lake Beulah*, relying on a narrow and often inconsistent interpretation of "explicit" and an overstatement of subsequent case law. WMC also relies on statements by the then-governor and one legislator, which do not constitute legislative history. *See* discussion at 27-28, below. Furthermore, Intervenors' interpretation of § 227.10(2m) violates multiple canons of statutory construction and creates a constitutional predicament.

1. The Court Must Liberally Construe DNR's Authority to Protect Waters of the State.

In evaluating the effect of § 227.10(2m) on statutes relating to DNR water management programs, two principles are significant. First, DNR's authority to protect state waters is statutorily required to be liberally construed in favor of such protection. Wisconsin Stat. § 281.11 specifically states that "this subchapter and all rules and orders promulgated under this subchapter **shall be liberally construed** in favor of the policy objectives set forth in this subchapter…." (Emphasis added.) Wisconsin Stat. § 281.12(1) further states that DNR "shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter…."

Second, under basic canons of statutory construction, these specific statutes govern over § 227.10(2m), which is a general statute applicable to all state agencies. *See, e.g.*, *Belding v. Demoulin*, 2014 WI 8, ¶ 17, 352 Wis. 2d 359, 843 N.W.2d

373.[13] Intervenors' argument also creates a conflict between § 227.10(2m) and the grant of authority and liberal construction required by § 281.11, and would render that language meaningless, violating two other canons of statutory construction. *Id*. The Court therefore must "liberally construe" DNR's statutory authority to "protect, maintain and improve" water quality and management, including groundwater. Intervenors' inexplicably ignore this language.

2. Chapter 281 Provides DNR Explicit Authority, Consistent with Wis. Stat. § 227.10(2m).

WMC proposes a narrow definition of "explicit," citing statements by the governor and one legislator in support of this interpretation. WMC Br. at 16-19. WMC then dismisses § 281.11 as only a policy and purpose statement, and § 281.12 as a general grant of authority, suggesting that these statutes are "preambles" that do not convey sufficiently "explicit" authority. WMC Br. at 19-21. WMC is wrong for several reasons.

WMC defines "explicit" as "clearly stated and leaving nothing to be implied." WMC Br. at 16. It then argues that this term precludes an agency from acting on the basis of "general" authority, suggesting (without expressly stating) that "general" means "implied."

There is nothing that supports this definitional leap. On the contrary, WMC's quoted definition, like other dictionary definitions, focuses on clarity of expression,

[13] WMC posits that Act 21 eliminated this canon of statutory construction but cites no supporting history. WMC Br. at 9-10. Moreover, this canon applies to all statutory construction, not just where agency action is at issue, as this Court has repeatedly articulated since enactment of Act 21. *See, e.g.*, *Belding*; *State v. Wilson*, 2017 WI 63, ¶ 22, 376 Wis. 2d 92, 896 N.W.2d 682.

not breadth of scope. For example, the American Heritage Dictionary (2nd Coll. Ed.) at 478 defines "explicit" as:

> **1.a.** Expressed with clarity and precision. **b.** Clearly defined or formulated. **2.** Forthright and unreserved in expression …."

There is nothing in § 227.10(2m), the definition of "explicit," or case law that supports WMC's conclusion that a conveyance of general authority is an insufficient basis to regulate. "Explicit" relates to clarity, synonymous with "express;" and its antonym is "implied." "General" relates to scope; and its antonyms are "limited" or "detailed." The terms simply address different concepts.

This Court already has expressly held that the legislature has "explicitly" provided DNR with "broad authority and a general duty" to regulate high capacity wells to protect Public Trust resources. *Lake Beulah*, ¶ 39. Intervenors' argument relies on the flawed notion that "generally" is incompatible with "explicitly." WMC Br. at 13, fn. 7. That is, they are not arguing that *Lake Beulah* has been superseded by Act 21, but that the Court decided *Lake Beulah* incorrectly at the time.[14]

Moreover, the suggestion that "explicit" means that statutory authority must be so specific as to leave nothing to the discretion of the agency is inimical to the structure of administrative law and the Administrative Procedures Act. By definition, a "rule" means:

> a regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency **to implement, interpret, or make specific legislation** enforced or administered by the agency ….

[14] WMC also argues that the Court erroneously substituted its judgment for the legislature's. WMC Br. at 35-36.

Wis. Stat. § 227.01(13) (emphasis added). Enabling legislation is necessarily limited to the grant of authority in somewhat general terms, and agencies are accorded authority through rulemaking to add specificity. Wis. Stat. §227.19(1). If statutes fully addressed their subject matter, as WMC argues, there would be no need for rules. *See, e.g.*, *Grafft*, 2000 WI App 187, ¶ 7 ("if an enabling statute needed to spell out every detail of a rule in order to expressly authorize it, no rule would be necessary").

This analysis is more compelling for decision-making, authorized under Ch. 227, Subch. III. Statutes provide the delegation of authority, and rules may provide additional specificity and detail that apply to all actions within their scope. Decisions apply those statutes and/or rules to specific factual circumstances, tailoring conditions as appropriate to fulfill legal requirements.

WMC relies on statements by the governor and one legislator as evidence of legislative intent to equate implied authority with general authority. However, a governor's statement of intent is not evidence of intent of the legislature, a separate, co-equal branch of government. Selective excerpts of statements or testimony of a single legislator also are unavailing. "It is inappropriate, however, for a court to rely on the statements of a member of the legislature as to what the legislature intended when enacting a statute." *Labor & Farm Party v. Elections Board*, 117 Wis. 2d 351, 356, 344 N.W.2d 177 (1984) (citations omitted). The Court explained in *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 52, 271 Wis. 2d 633, 681 N.W.2d 110:

> "[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated…. It is the law that governs men, not the intent of the lawgiver…."

(Quoted source omitted.) WMC's citations to friendly individual officials are unpersuasive and should not be considered.

Intervenors recognize by their silence that there is no legislative history applicable to § 227.10(2m). Instead, they erroneously conflate §§ 227.10(2m) and 227.11(2)(a).

Act 21 represented a broad revision of the rulemaking provisions in Subch. II of ch. 227, creating new procedures and limitations in the agency rulemaking process. The governor's statement quoted by WMC relates to rulemaking. WMC Br. at 17. Likewise, the case WMC cites as a trigger for Act 21 addressed agency rulemaking authority. *Wisconsin Builders Ass'n v. State Dep't of Commerce*, 2009 WI App 20, 316 Wis. 2d 301, 762 N.W.2d 845, *rev. den.* 2009 WI 34.[15]

Section 227.11 relates exclusively to rulemaking, and expressly provides that a statute containing a "statement or declaration of legislative intent, purpose, findings or policy" or "describing the agency's general powers or duties does not confer rule-making authority…." Wis. Stat. § 227.11(2)(a)1 and 2. That statute does not preclude an agency from issuing decisions under a grant of general

[15] WMC's assertion that Act 21 was enacted in response to the Court of Appeals decision in *Lake Beulah*, 2010 WI App 85, is not supported by any cited legislative history. WMC Br. at 14, n. 8, 19.

authority. If it did so, general statutory delegations of duties would be rendered meaningless.[16] Indeed, this Court addressed this issue in Lake Beulah, ¶43:

> Contrary to the Village's argument, this does not create a permit system without standards. The Village's argument ignores the reality of how the DNR exercises its authority and complies with its duty within the statutory standards. As with many other environmental statutes, within the general statutory framework, the DNR utilizes its expertise and exercises its discretion to make what, by necessity, are fact-specific determinations. General standards are common in environmental statutes and are included elsewhere in the high capacity well statutes. *See, e.g.*, Wis. Stat. § 281.35(5)(d)1. (requiring the DNR to make a finding "[t]hat no public water rights in navigable waters will be adversely affected" before issuing a permit). **The fact that these are broad standards does not make them non-existent ones.**

(Emphasis added; footnote omitted).

Section 227.10(2m), which addresses decision-making, does not include the same limitations as § 227.11(2)(a). Where a word or words are used in one subsection of a statute but not in related subsection, the court "must conclude that the legislature specifically intended a different meaning." *RURAL v. PSC*, 2000 WI 129, ¶ 39, 239 Wis. 2d 660, 619 N.W.2d 888 (quoted source omitted). One must draw from the distinction between these two sections of Act 21 that the legislature chose not to apply the rulemaking limitations to decision-making.

This Court has held that chapter 281 provides "explicit" authority to DNR to consider adverse impacts to waters of the state under the high capacity well program. Sections 281.11 and 281.12 express "with clarity and precision" that DNR is granted the authority "to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private"; that

[16] A court may not interpret a statute in a way that renders it (or any part of it) meaningless. *Belding*, 2014 WI 8, ¶ 17.

DNR "shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose"; and that DNR's authority is to be "liberally construed" to achieve those purposes. Decades of unanimous Supreme Court decisions have reinforced the delegation of these Public Trust duties. There is nothing in § 227.10(2m), a general statute applicable to all state agencies, that abrogates those duties.

3. Cases Decided Since *Lake Beulah* Do Not Alter this Outcome.

Intervenors argue that several cases decided in the past two years reinforce their argument that § 227.10(2m) was intended to rewrite the law on agency decision-making. In *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, this Court principally decided that the challenged COVID-related order was an improperly promulgated rule. *Id.*, ¶ 42. While admittedly not required, the Court then discussed whether the order exceeded Palm's statutory authority. *Id.*, ¶ 43. In reiterating the Legislature's argument, the Court referenced a student Comment for the proposition that the "explicit authority" requirement is effectively a new canon of construction requiring a narrow construction of imprecise statutory delegation. *Id.*, ¶ 52. The Court ultimately decided not to define the scope of the pertinent statute because "clearly Order 28 went too far"; and further that the Legislature had provided "plausible readings" of the statute. *Id.*, ¶ 56. The *Palm* Court's reading of § 227.10(2m) is both dictum and inconclusive as to the issue at bar. Moreover, the underlying general canon, that imprecise delegation is to be

construed narrowly, contravenes § 281.11, which expressly requires a liberal application.

Intervenors' argument is also not supported by *Papa v. Dep't of Health Services*, 2020 WI 66, 393 Wis. 2d 1, 946 N.W.2d 17. The Court there reiterated the "explicit" requirement in § 227.10(2m), holding that a statute granting DHS explicit authority to recoup Medicaid payments in three specific situations did not authorize DHS's broader "Perfection Policy." *Id.*, ¶ 42. It is insufficiently analogous to provide any guidance here.[17]

The *SEIU* decision is significant because it undermines Intervenors' arguments, particularly their conflation of rulemaking and decision-making statutes. In *Service Employees International Union v. Vos*, 2020 WI 67, 393 N.W.2d 38, 946 N.W.2d 35, the Court addressed whether lame-duck legislation following the 2018 gubernatorial election violated the separation of powers clause in the Wisconsin Constitution. *Id.*, ¶ 3. In two majority opinions, the Court focused on the constitutional allocation of power among the three branches of government, specifically whether such powers are "core" or "shared" powers. In the first opinion, the Court held that in some instances, the authority to participate in litigation, address Capitol security, and suspend administrative rules are shared powers for which the legislature has a substantial interest. *Id.*, ¶¶ 71, 77, and 80-83.

[17] WMC also quotes from this Court's preliminary injunction order in *St. Ambrose Academy v. Parisi*, 2020AP1446-OA. That limited, interlocutory order, focusing on the likelihood of success, illustrates why unpublished, un-authored orders cannot be cited as authority. Wis. Stat. § 809.23(3)

The second majority opinion focused on the legislative interest in executive guidance documents, concluding that portions of the challenged legislation unconstitutionally intruded on executive core powers. *Id.*, ¶ 88. The Court distinguished between the shared rulemaking power and the core executive decision-making power:

> The constitutional authority of the executive encompasses determining what the law requires as well as apply it (preferably in that order). Because the executive's power is supplemented by a legislatively-delegated authority to promulgate rules that have the force and effect of law, we must determine what manner of authority an agency uses to create guidance documents before we can evaluate the legislature's right to control them. If it is a delegated rulemaking authority, then the legislature's power to dictate their content and manner of promulgation would be almost beyond question. If, however, the authority to create guidance documents is executive, then we must consider whether the legislature's reach extends far enough to control how members of the executive branch explain statutes and provide guidance or advice about how administrative agencies are likely to apply them.

Id., ¶ 99. The Court concluded that creating guidance documents fell within the executive's core authority, as interpretations that guide decision-making. *Id.*, ¶¶ 105-06.

This analysis reinforces the distinction between §§ 227.10(2m) and 227.11(2)(a), and Intervenors' error in piggy-backing the rulemaking statute onto the decision-making statute.

IV. INTERVENORS' APPLICATION OF §227.10(2M) HERE IS UNCONSTITUTIONAL.

The core holding of *Lake Beulah* is that DNR's responsibility to protect Public Trust waters from the impacts of high-capacity wells is grounded in Art. IX, § 1 of the Wisconsin Constitution. The State has an affirmative duty to protect Public Trust waters; and DNR is the delegated trustee of that duty. In *Richfield*

Dairy, the administrative law judge applied that duty in the context of a well in an area where high capacity wells are cumulatively ravaging Public Trust resources, concluding that where the close proximity of wells creates a cumulative impact – a "death of a thousand straws" – DNR must consider those cumulative impacts. Neither DNR nor the well applicant appealed that decision; and DNR began to consider cumulative impacts as part of its Public Trust responsibilities.

Intervenors' argument, that DNR does not have the authority to condition approvals except in the narrow areas identified in § 281.34(5)(b)-(d), raises this constitutional question: if DNR no longer has the authority to protect Public Trust waters from high capacity wells, who does?

Intervenors argue that *Lake Beulah* does not require DNR to conduct environmental review for "all" wells, based on quotes from *Lake Beulah*: a) suggesting that the legislature could revoke DNR's authority; and b) stating that the decision did not address wells smaller than the high capacity threshold. Legis.Br. at 40-48. Neither of these arguments is meaningful. First, the constitutional requirements of the Public Trust Doctrine rest with the State and are implemented by the legislature delegating the trust responsibilities to the executive branch. *See, e.g., Lake Beulah*, ¶ 32-33. The legislature has delegated that authority to DNR. The legislature can modify that delegation by enacting new or amended laws.[18] However, the legislature cannot simply ignore or refrain from fulfilling that

[18] The legislature has not modified ch. 281 to withdraw the delegation of PTD authority to DNR, either in Act 21 or since; and the Court should reject Intervenors' request to do so here.

responsibility. The State's duty is an affirmative duty, and it cannot be abrogated by the legislature or an attorney general's opinion:

> The legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose. It is supposed that this doctrine has been so firmly rooted in our jurisprudence as to be safe from any assault that can be made upon it.

Priewe v. Wis. State Land & Improv. Co., 103 Wis. 537, 549-50, 79 N.W. 780, 781 (1899). Intervenors ignore this bedrock principle.

The fact that the Court in *Lake Beulah* did not address wells below the high capacity threshold also has no significance. Regulation of smaller wells was not before the Court, and the Court traditionally does not address constitutional issues unnecessarily. *See, e,g., Labor & Farm Party v. Elections Bd., Wis.*, 117 Wis. 2d 351, 354, 344 N.W.2d 177 (1984); *Waushara County v. Graf*, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992).

Intervenors argue that the legislature has satisfied its constitutional duties through enactment of 2017 Wisconsin Act 10, which: a) relaxed regulatory requirements for high capacity wells; and b) authorized DNR to study certain lakes in Central Wisconsin over the subsequent three years. Legis.Br. at 49-50; WMC Br. at 31-32. This argument is a nonstarter because Act 10 was enacted in June 2017, more than a year after the AG Opinion and nine months after the well approvals under review here. Intervenors do not explain how the State's constitutional duty in September 2016 was satisfied by an enactment in June 2017.

Their suggestion that Act 10 prohibited DNR from following *Lake Beulah* also fails, as Act 10 is silent on that matter. *See, e.g., Honthaners Restaurants, Inc. v. LIRC*, 2000 WI App 273, ¶ 24, 240 Wis. 2d 234, 621 N.W.2d 660, *rev.den*. 2001 WI 15 (intent to abrogate case law must be clear). The legislature is presumed to understand existing law and, "'in the absence of its changing the law, the construction put upon it by the courts will remain unchanged.'" *Scace v. Schults*, 2018 WI App 30, ¶ 15, 382 Wis. 2d 180, 913 N.W.2d 189 (quoted source omitted). Act 10 is silent on DNR's duties articulated in *Lake Beulah*.

Furthermore, labeling a legislative enactment as "comprehensive" does not make it so. Intervenors do not – and cannot – argue that Act 10 would protect the Public Trust resources jeopardized by the challenged well approvals or supplement any deficiencies in the existing well program. The state does not fulfill its Public Trust duties by enacting legislation that covers the field: it meets its duty by enacting and implementing measures that actually protect Public Trust waters.

Intervenors' suggestion that the enactment of Act 10 reflects a comprehensive approach to water management is unavailing. The constitutionality of Act 10 is not before this Court. Were it before the Court, however, Intervenors would be hard-pressed to explain how a statutory enactment that relaxes the regulation of wells remedies the state's failure to protect Public Trust waters under a more rigorous program.

The study commissioned by Act 10 is not relevant to this proceeding, and does not correct DNR's failure to address unambiguous evidence that the wells at

issue would cause adverse impacts to Public Trust waters. Act 10 authorized DNR to study a handful of watersheds for impacts from groundwater withdrawals. When the study is completed, DNR may recommend "special measures" to the legislature to address impacts to Public Trust waters caused by groundwater pumping. The legislature is not statutorily required to adopt any DNR recommendations. Further, Act 10 states that no well permit applications in the area covered by the study shall be impacted by DNR's evaluation of impacts to waters in the Central Sands. Wis. Stat. § 281.34(7m)(h). That is, while DNR is evaluating exactly how bad things are in the Central Sands, it is prohibited from using that knowledge to address adverse impacts when processing new well applications in the Central Sands. Again, this legislation plainly does not fully satisfy the State's Public Trust duties.[19]

Critically, for the well permits that are actually at issue in this litigation, scientific evidence of harm **already** exists, and DNR failed to respond to the undisputed evidence that these wells would cause unacceptable adverse impacts to Public Trust waters. That the legislature directed DNR to study a handful of watersheds does not absolve DNR of the duty to act now, in the face of concrete scientific evidence that these wells would harm Public Trust waters.

[19] WMC misrepresents the status of the study, implying that water level measurements mean that wells have not impacted waters in the study area. WMC Br. at 33. The study remains incomplete, and WMC's reference to lake levels do not address the purpose of the study: how pumping is affecting those levels. In wet years, like those we have recently had, lake levels may rise despite high levels of pumping (and pumping rates decrease because less groundwater is needed for irrigation). Snapshot lake level data for three lakes do not illuminate how pumping is affecting protected waters.

Lest there be any doubt, Intervenors do not argue that the existing program, either before or since enactment of Act 10, adequately protects Public Trust resources. The facts in the cases at bar are comparable to – and in some cases worse than – *Richfield Dairy*, in which the administrative law judge found that the well as approved violated DNR's Public Trust duties. *See* discussion at 6-7, 9-14.

The constitutional duty to take action to protect these lakes and streams was invoked by DNR scientists. Intervenors' interpretation of § 227.10(2m) would prohibit DNR from protecting Public Trust resources despite undisputed evidence of harm. No other state agency has been delegated the authority to protect those resources. Accordingly, Intervenors' interpretation of § 227.10(2m) as applied here is an unconstitutional abrogation of DNR's Public Trust responsibilities.

This Court should avoid the constitutional issue created by the Intervenors' flawed interpretation of § 227.10(2m), and instead reaffirm that the *Lake Beulah* decision meant exactly what it said when the Court unanimously determined that this provision does not affect DNR's explicit authority and affirmative duty to protect Public Trust waters from impacts caused by groundwater withdrawals.

V. PETITIONERS-RESPONDENTS' CHALLENGES ARE NOT PRECLUDED BY WIS. STAT. § 281.34(5M).

A. Petitioners-Respondents Are Not Challenging DNR's "Lack of Consideration" of Cumulative Impacts.

The Legislature erroneously argues that § 281.34(5m) prohibits a challenge to a well approval that in any way relates to cumulative impacts. Section 281.34(5m) states in its entirety:

> CONSIDERATION OF CUMULATIVE IMPACTS. No person may challenge an approval, or an application for approval, of a high capacity well **based on the lack of consideration of cumulative environmental impacts** of that high capacity well **together with existing wells.**

(Emphasis added.)

Several canons of statutory construction are pertinent to the Legislature's interpretation of § 281.34(5m). Words in a statute are to be accorded their common, ordinary and accepted meaning (unless they are specifically defined or technical terms). *Dep't of Justice v. Dep't of Workforce Dev.*, 2015 WI 114, ¶ 22, 365 Wis. 2d 694, 875 N.W.2d 545; *Kalal*, 2004 WI 58, ¶ 45. If the plain meaning of the statute is evident, no further analysis is required. However, a court may consider the context in which the statute was created. *Kalal*, ¶ 46.

Additionally, a statute designed to promote the public interest is to be liberally construed in favor of its beneficiaries. *See, e.g.*, *Heyde v. Dove*, 2002 WI 131, ¶ 15, 258 Wis. 2d 28, 654 N.W.2d 830. Similarly, procedural statutes are to be liberally construed to permit a determination on the merits. *See, e.g.*, *All Star Rent A Car v. Wisc. Dept. of Transp.*, 2006 WI 85, ¶ 42, 292 Wis. 2d 615, 716 N.W.2d 506; *Outagamie County v. Town of Greeneville*, 2000 WI App 65, ¶ 11, 233 Wis. 2d 566, 608 N.W.2d 414.[20]

[20] Other rules of statutory construction also warrant a narrow construction of § 281.34(5m). Our courts have long recognized the important public interest in access to the courts to scrutinize administrative decisions. *See, e.g., Stacy v. Ashland Cty. Dep't of Pub. Welfare*, 39 Wis. 2d 595, 601, 159 N.W.2d 630, 633 (1968) ("We have consistently held there must be some judicial review of administrative orders."). Courts have expressed their preference that such cases be reviewed on the merits over "outright dismissal of the action without a review of the merits of the underlying decision." *Wagner v. State Med. Exam. Bd.*, 181 Wis. 2d 633, 642, 511 N.W.2d 874 (1994). It is the "legislative policy in Wisconsin to favor judicial review of administrative decisions at the

The plain language of § 281.34(5m) does not support the Legislature's broad interpretation or application. It only precludes a challenge based on a "lack of consideration" of cumulative impacts. The common and accepted meaning of "consideration" is "careful thought; deliberation." *The American Heritage Dictionary* (2nd Coll. Ed.) at 312. The Court in *Lake Beulah* recognized that the duty to "consider" impacts is distinct from the duty to act on them, stating that DNR "must consider the environmental impact of the well or in some cases deny a permit application or include conditions in a well permit." *Lake Beulah*, ¶ 4.

Petitioners-Respondents do not assert that DNR failed to consider cumulative impacts. On the contrary, DNR in each case considered cumulative and other impacts, and in some cases undertook detailed evaluations of the anticipated impacts of the wells. For example, in Frozene, DNR performed modeling and calculations to determine the individual and cumulative impacts of the proposed well on three affected trout streams, Pleasant Lake, and a sensitive calcareous fen and spring pond. R.App. 228-31. Rather, Petitioners-Respondents challenge DNR's failure to protect the affected waters from the effects of those impacts.

B. Petitioners' Challenges Are Not Based Exclusively on Cumulative Impacts as Defined in Wis. Stat. § 281.34(5m).

Section 281.34(5m) also is limited in scope by defining "cumulative impacts" to mean only consideration of the proposed well "together with existing wells." Intervenors incorrectly assume that all of these cases involve impacts

timely instance of any person whose substantial interests are adversely affected." *Kegonsa Jt. Sanit. Dist. v. City of Stoughton*, 87 Wis. 2d 131, 152, 274 N.W.2d 598 (1979).

together with other existing wells. Legis.Br. at 51-52. As discussed in Section III, above, Petitioners' challenges also include impacts due to individual wells, the proposed wells with other proposed wells, and the effect of other impacts (*e.g.*, stream diversions). In fact, Paragraph 21 in each Petition begins: "Petitioner's interests are directly injured because DNR did not address the **individual and cumulative effects** of pumping from the proposed well …." (emphasis added); *see also*, ¶ 16.[21] For this reason as well, Intervenors' arguments must fail.

Intervenors' argument is also frivolous because they know that DNR evaluated both individual and cumulative impacts in review of the challenged wells, and evidence of those evaluations is included in each Petition as Exhibit B. App. 30-146; R.App. 226-37. Petition Exhibits B reveal, for example:

> 16-CV-2817, 2818 and 2819: DNR evaluated and identified the adverse impacts associated with those three proposed wells (none of which existed at the time) on the same water resources.
>
> 16-CV-2820: DNR staff opined that the 1-1.5 inch drawdown in the Chafee Creek calcareous fen from the proposed well alone could cause a loss of about 10% of the fen area and adversely alter the type of wetland.
>
> 16-CV-2822: DNR staff recommended denial to an already impacted stream due to the potential impact of an additional well.
>
> 16-CV-2823: DNR staff expressed concern about the impact of the proposed well together with others on the property (which are considered together under § 281.34(1)(b)).

Since the foundational premise of Intervenors' argument is false, its argument must fail.

[21] In case No. 16-CV-2820, these allegations are set forth in ¶¶ 22 and 17.

CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court's Order.

Dated this 10th day of March, 2021.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) as to form and certification for a brief and appendix produced with a proportional serif font.

The length of this brief is 10,857 words.

Dated this 10th day of March, 2021.

/s/ Carl A. Sinderbrand
Carl A. Sinderbrand

CERTIFICATION OF COMPLIANCE WITH § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this Brief, which complies with the requirements of § 809.19(12).

This electronic Brief is identical in content and format to the printed form of the Brief filed as of this date.

A copy of this certificate has been served with the paper copies of this Brief filed with the court and served on all opposing parties.

Dated this 10th day of March, 2021.

/s/ Carl A. Sinderbrand
Carl A. Sinderbrand

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, as a part of this brief, is a supplemental appendix that complies with § 809.19(2)(a) and that contains portions of 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 no portion of the record is required by law to be confidential.

Dated this 10th day of March, 2021.

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