STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP0059

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.

APPEAL FROM A DECISION AND ORDER
ENTERED IN THE DANE COUNTY CIRCUIT COURT,
THE HONORABLE VALERIE BAILEY-RIHN, PRESIDING

BRIEF OF THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES

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INTRODUCTION

Through Wis. Stat. ch. 281, the Department of Natural Resources (DNR) is explicitly directed to carry out measures the agency deems *necessary* "to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private," including assessing whether proposed high-capacity wells will adversely impact those state waters. Wis. Stat. §§ 281.11, .12, .34, .35. This was true when this Court decided *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, and is no less true today. Nothing has changed in the statutes governing high-capacity wells or water resources, nor has the Wisconsin Constitution been amended to alter the state's public-trust obligations.

On the current record, the wells at issue should not have been approved. In each case, DNR was faced with evidence that the proposed wells would adversely impact nearby surface waters, including some trout streams and other "outstanding resource waters." As this Court made clear in *Lake Beulah*, under the controlling statutes and the public trust doctrine, DNR had the duty and authority to undertake further analysis to assess whether and how the proposed wells would impact navigable waters. The approval process that was followed in these cases abdicated that statutory and constitutional duty, and the circuit court was correct to reverse and vacate the approvals.

Act 21—an amendment to Wisconsin's Administrative Procedure Act—did nothing to change the meaning or effect of Wisconsin's water laws. Nor could that enactment somehow direct the judiciary how to interpret other statutes, as Intervenors propose. And on its terms, Act 21 simply is not applicable to the environmental assessments that should have occurred here. But even if the Act's terms were

applicable, the controlling water statutes and constitutional obligations provide the same, explicit authority that they did ten years ago. Act 21 changes nothing.

Intervenors' arguments about the purportedly sweeping effect of Act 21 are contrary to the plain language of that Act and the controlling statutes, contrary to bedrock principles of statutory interpretation, and contrary to common sense. As just one example, under Intervenors' interpretation of Act 21, DNR would no longer have authority even to *approve* well applications, since no statute mandates that DNR "shall" approve applications if certain criteria are met. This and other absurd results are avoided by simply applying the controlling statutes as written.

Finally, contrary to Intervenors' argument, Wis. Stat. § 281.34(5m)'s bar on judicial review is inapplicable here. That provision purports to bar judicial review when review would be based on DNR's failure to consider cumulative impacts of a proposed well in connection with other wells in the area. But, here, DNR *did* consider those impacts before issuing the approvals at issue. In light of this, this Court need not determine when this provision might apply, and can also avoid reconciling the potential conflict that this provision would cause with other statutes authorizing actions to enforce public rights in navigable waters.

The circuit court was correct to heed this Court's decision in *Lake Beulah* and was correct to reverse the approvals at issue. This Court should affirm.

ISSUES PRESENTED

1. The statutes governing high-capacity wells provide that "no person may construct or withdraw water from a high capacity well without" DNR's approval. The statutes do not require DNR to issue an approval when any particular criteria are met. The same water-resources

chapter further provides that DNR "shall carry out the planning, management and regulatory programs necessary" "to protect, maintain, and improve the quality and management of the waters of the state, ground and surface, public and private." In *Lake Beulah*, this Court interpreted these provisions and Wisconsin's public trust doctrine as imposing on DNR an explicit duty and authority to assess well applications on a case-by-case basis and decide whether to approve, approve with conditions, or deny the application, taking into account whether there was concrete, scientific evidence that the proposed well could adversely impact waters of the state.

In these cases, despite evidence that the proposed wells would adversely impact navigable waters, DNR approved the wells without fully assessing those potential impacts and without including any conditions to address potential impacts. The agency's decision to do so purportedly was based on an amendment to Wisconsin's Administrative Procedure Act providing that "standards, requirements, or thresholds" that the agency "implements or enforces" must be "explicitly required or explicitly permitted."

In light of DNR's explicit duty and authority to assess wells' impacts to navigable waters under the water-resources statutes and the public trust doctrine, did the circuit court correctly reverse and vacate the well approvals at issue?

2. Wisconsin Stat. § 281.34(5m) provides that "[n]o person may challenge 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." Before DNR issued the approvals at issue here, agency staff began to assess and consider the proposed wells' impacts to navigable waters, both individually and together with existing wells. Given that

DNR did consider cumulative impacts in these cases, can Wis. Stat. § 281.34(5m) preclude judicial review here?

ORAL ARGUMENT AND PUBLICATION

By accepting certification from the court of appeals, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

I. Legal framework governing high-capacity well applications.

Applications for high-capacity wells in Wisconsin are governed by statutes and administrative rules, and also by the state's constitutional duties and authority under the public trust doctrine.

A. Statutes and administrative code provisions governing water resources and high-capacity wells.

Four statutes directly control DNR's authority and duty to regulate high-capacity wells.[1] *See* Wis. Stat. §§ 281.11, .12, .34, .35.

First, the water resources statutes mandate that DNR "shall have general supervision and control over the waters of the state" and "shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter"—namely, "to protect, maintain and improve the quality and management of the

[1] A high-capacity well is a well that, together with all other wells on the same property, has a pumping capacity of more than 100,000 gallons of water per day. Wis. Stat. § 281.34(1)(b).

waters of the state, ground and surface, public and private." Wis. Stat. §§ 281.12(1), .11.

Relevant here, multiple subsections of Wis. Stat. § 281.34 pertain to DNR's authority and duty regarding groundwater withdrawals. As a baseline, "no person may construct or withdraw water from a high capacity well without the approval of the department." Wis. Stat. § 281.34(2). High-capacity well applications must include, at a minimum, "the location, construction or reconstruction features, pump installation features, the proposed rate of operation and the distance to nearby public utility wells." Wis. Admin. Code NR § 812.09(4)(a).[2] DNR uses this information to determine if further review is necessary, as is required in multiple circumstances.

For example, for wells near certain types of resources DNR "shall" conduct an environmental-impact review in accordance with the agency's procedures under the Wisconsin Environmental Policy Act (WEPA), Wis. Stat. § 1.11(2)(c). *See* Wis. Stat. § 281.34(4). This includes wells proposed in groundwater protection areas[3] and wells that may have a significant impact on a spring. Wis. Stat. § 281.34(4)(a)1., 3. For wells in these categories, DNR must

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[2] DNR has promulgated rules governing applications and approvals for well construction and withdrawals. *See* Wis. Admin. Code NR § 812.09; *see also* Wis. Admin. Code NR ch. 820.

[3] A groundwater protection area is an area within 1,200 feet of certain surface waters that have been classified as "outstanding" or "exceptional" based on their "fisheries, hydrologically or geologically unique features, outstanding recreational opportunities, unique environmental settings," and the absence of significant impact from human activities. Wis. Stat. § 281.34(1)(am)1., 2.; Wis. Admin. Code NR § 102.11(1); *see generally* Wis. Admin. Code NR §§ 102.10, .11.

conduct comprehensive environmental analyses to determine whether the proposed well would result in significant adverse environmental impacts. *See* Wis. Stat. § 281.34(4)(a)1., 3.; *see also* Wis. Admin. Code NR §§ 150.20(1m)(h), (i), (4)(a), 820.30(2), (3).

If that analysis shows that the well could cause significant adverse impacts, the agency must either deny the application or impose conditions to prevent any adverse impacts. *See* Wis. Stat. § 281.34(5)(b), (d); *see also* Wis. Admin. Code NR §§ 820.30(2)(a), (3), .31(3). Conditions "may include [those] as to location, depth, pumping capacity, rate of flow, and ultimate use." Wis. Stat. § 281.34(5)(b)1., (d)1.

Additional review is also required for at least two other categories of wells. First, for high-capacity wells that may impair a public utility's water supply, DNR "may not approve" the well unless the agency can ensure, through conditions, that the utility's water supply "will not be impaired." Wis. Stat. § 281.34(5)(a). Similarly, for wells that will result in a water loss averaging more than 2 million gallons per day, DNR "may not approve" the well unless the agency can ensure, through conditions, that the proposed well "does not cause significant adverse environmental impact." Wis. Stat. § 281.34(5)(c); *see also* Wis. Stat. § 281.34(4)(a)2. As with wells proposed in groundwater protection areas and near springs, conditions may include those "as to location, depth, pumping capacity, rate of flow, and ultimate use." Wis. Stat. § 281.34(5)(c); *see also* Wis. Stat. § 281.35(5)(d)1. (requiring DNR to determine that "no public water rights in navigable waters will be adversely affected" before issuing an approval for these high-water-loss wells).

For all high-capacity wells, DNR "may specify more stringent" approval conditions "[w]hen deemed necessary and appropriate for the protection of public safety, safe

drinking water and the groundwater resource." Wis. Admin. Code NR § 812.09(4), (4)(a). These include conditions on "well and heat exchange drillhole locations, well and heat exchange drillhole construction or pump installation specifications." Wis. Admin. Code NR § 812.09(4).

B. The public trust doctrine; duty and authority to protect and regulate navigable waters.

Regulation and management of the state's waters also implicates the state's constitutional obligations under the public trust doctrine. *See* Wis. Const. art. IX, § 1. This Court is familiar with Wisconsin's public trust doctrine and the doctrine's primacy in all questions related to navigable waters. *See, e.g.*, *Lake Beulah*, 335 Wis. 2d 47, ¶¶ 29–33; *see also Mouvich v. Lobermeier*, 2018 WI 9, ¶ 27, 379 Wis. 2d 269, 905 N.W.2d 807; *Rock-Koshkonong Lake Dist. v. DNR*, 2013 WI 74, ¶¶ 71–94, 350 Wis. 2d 45, 833 N.W.2d 800. Three principles embodied in the doctrine are relevant to the high-capacity well applications here.

First, the doctrine is grounded in traditional trust principles and imposes an affirmative, constitutional duty on the state to "hold navigable waters in trust for the public." *Rock-Koshkonong Lake Dist.*, 350 Wis. 2d 45, ¶ 71; *see also, e.g.*, *Angelo v. R.R. Comm'n*, 194 Wis. 543, 217 N.W. 570, 575 (1928) (recognizing "express trust" with which state is charged in managing navigable waters). The state thus has a constitutional obligation to ensure that activities affecting navigable waters will not materially impair the public's rights in those waters. *See Rock-Koshkonong Lake Dist.*, 350 Wis. 2d 45, ¶ 81. The state "cannot abdicate" its obligations as trustee for public rights in navigable

waters. *Id.* (quoting *Ill. Steel Co. v. Bilot*, 109 Wis. 418, 426, 84 N.W. 855 (1901)); *see also ABKA Ltd. P'ship v. DNR*, 2001 WI App 223, ¶ 39, 247 Wis. 2d 793, 635 N.W.2d 168 (doctrine "imposes strict responsibilities upon the government as trustee of these public resources," which the government "cannot relinquish"), *aff'd on other grounds*, 2002 WI 106, 255 Wis. 2d 486, 648 N.W.2d 854.

Similar to a traditional trust, questions of proper management of Wisconsin's waters are evaluated by reference to the beneficiaries' best interests and not simply by relying on legislative declarations about what best serves Wisconsin's overall interest. *See Priewe v. Wis. State Land & Improvement Co.*, 103 Wis. 537, 79 N.W. 780, 781 (1899). *Priewe* is particularly instructive. That case involved the Legislature's enactment of a law authorizing the draining of Muskego Lake, undertaken "for the ostensible purpose of promoting the public health." *Id.* This Court assessed as a "question of fact" whether the enactment adequately protected the public rights in navigable waters. *See id.* The Court invalidated the enactment: "The legislature has no more authority to emancipate itself from the obligation resting upon it . . . 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." *Id.*; *see also Hilton ex rel. Pages Homeowners' Ass'n v. DNR*, 2006 WI 84, ¶ 22, 293 Wis. 2d 1, 717 N.W.2d 166 (noting that trust obligation "requires the DNR to go beyond the statutory presumption to determine what the 'reasonable use' is in light of the relevant facts particular to each situation").

Second, for over 100 years, the state has exercised its role as trustee through the DNR and its predecessor agencies. *See, e.g., Rock-Koshkonong Lake Dist.*, 350 Wis. 2d 45, ¶¶ 117–22. "In furtherance of the state's

affirmative obligations as trustee of navigable waters, the legislature has delegated substantial authority over water management matters to the DNR," whose duties are "comprehensive, and its role in protecting state waters is clearly dominant." *Wis.'s Envtl. Decade, Inc. v. DNR*, 85 Wis. 2d 518, 527, 271 N.W.2d 69 (1978) (interpreting predecessor of Wis. Stat. §§ 281.11, .12); *see also ABKA Ltd. P'ship*, 255 Wis. 2d 486, ¶ 12 (noting Legislature's delegation of "broad authority to regulate under the public trust doctrine"). The Legislature has conferred this authority through multiple statutes, including the provisions under Wis. Stat. ch. 281 discussed above, as well as Wis. Stat. chs. 29, 30, 31, and 33. *See Lake Beulah*, 335 Wis. 2d 47, ¶ 34; *Wis.'s Envtl. Decade*, 85 Wis. 2d at 527–28; *Hilton ex rel. Pages Homeowners' Ass'n*, 293 Wis. 2d 1, ¶¶ 20–21. Wisconsin courts have consistently reaffirmed the breadth of DNR's public-trust authority under these statutes, recognizing that "DNR should not be straitjacketed when managing the water resources of this state." *Rock-Koshkonong Lake Dist.*, 350 Wis. 2d 45, ¶ 122.

Third, although the state's title under the trust is limited to areas within navigable waters' "ordinary high water mark," the doctrine accounts for the connectedness of navigable and non-navigable waters. The state's duty and authority under the doctrine require consideration of activities outside of navigable waters when determining what is necessary to manage and protect the public's rights in navigable waters. *See Just v. Marinette Cty.*, 56 Wis. 2d 7, 17–19, 23–24, 201 N.W.2d 761 (1972). For example, in *Just* the court relied on the state's public trust obligations in upholding Marinette County's shoreland zoning ordinance, explaining that "[l]ands adjacent to or near navigable waters exist in a special relationship to the state . . . and are subject

to the state public trust powers." *Id.* at 18–19; *see also Rock-Koshkonong Lake Dist.*, 350 Wis. 2d 45, ¶ 103 (recognizing public trust doctrine authorizes regulation "in the interest of public rights in navigable waters") (citation omitted). Relevant here, given that "[g]roundwater and surface water are intrinsically linked," Thomas Harter, et al., *Adjudicating Groundwater: A Judge's Guide to Understanding Groundwater and Modeling* 37 (Alf W. Brandt, et al. 2013),[4] this Court has recognized the state's obligation when assessing well impacts includes ensuring that "no public water rights in navigable waters will be adversely affected." *Lake Beulah*, 335 Wis. 2d 47, ¶ 43 (quoting Wis. Stat. § 281.35(5)(d)1.); *see also id.* ¶¶ 68–69 (Ziegler, J., concurring) (emphasizing significance of proposed well's threat to surface waters).

II. Background and procedural history.

The background here starts with this Court's decision in *Lake Beulah* in 2011. In *Lake Beulah*, this Court held that under the statutes governing navigable waters and high-capacity wells, as well as the public-trust doctrine, "DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state." 335 Wis. 2d 47, ¶ 3 (footnote omitted). Determining when this duty is triggered "is a highly fact specific matter" that will depend on the information presented to the agency in a particular case. *Id.* But where DNR is presented with "sufficient concrete, scientific evidence of potential harm to waters of the state," DNR must

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[4] Judges may obtain a free digital copy of the bench book, https://www.judges.org/dividing_the_waters/adjudicating-groundwater/.

"consider the environmental impact of the well" in deciding whether to approve, approve with conditions, or deny high-capacity well applications. *Id.* ¶ 4.

In the years following this Court's decision in *Lake Beulah*, the Legislature proposed multiple bills seeking to alter the Court's holding in the case. *See, e.g.*, 2013 Senate Bill 302; 2015 Senate Bill 291; 2015 Assembly Bill 477. None of these proposals were enacted.

After *Lake Beulah*, DNR began to screen proposed wells for potential adverse impacts to waters of the state. *See* Anna Henning, et al., Wis. Legis. Council Info. Mem., *Regulation of High Capacity Wells*, IM-2020-11, at 4 (2020), https://docs.legis.wisconsin.gov/misc/lc/information_memos/2020/im_2020_11. Since 2014, this has included assessing a proposed well's potential impacts to nearby waters in relation to current impacts (i.e., existing wells). *See id.* at 5. This approach is sometimes referred to as a "cumulative-impacts analysis." *See id.*

Applications for the wells in this case were submitted in 2014 and 2015. (R. 1–8.) As required under controlling statutes and public-trust obligations, *see Lake Beulah*, 335 Wis. 2d 47, ¶¶ 39, 42, 46, DNR staff screened those applications for possible impacts to waters of the state. (*See, e.g.*, R. 132:25, 28 (Lutz 17, 20); R. 132:47 (Creek 18); R. 134:19 (Pep. 19); R. 133:60 (Laur. 13); R. 133:77–79 (Dero. 15–17).[5]) Through that screening process, DNR staff

[5] The Bates numbering for the administrative record reflects the name of the applicant to whom the various well approvals were issued. For example, pages stamped with "Lutz" are associated with the well approval issued to Wayne Lutz. (*See* R. 132:1–8 (record index).)

determined that some of the proposed wells could result in substantial environmental impacts. (*See, e.g.*, R. 134:14, 19 (Pep. 14, 19) (referring to "substantial" impacts shown in groundwater-flow modelling); *see also, e.g.*, R. 132:25, 28 (Lutz 17, 20); R. 132:47 (Creek 18); R. 133:60 (Laur. 13); R. 133:77–79 (Dero. 15–17).) This included potential impacts to waterways designated as "outstanding" based on their ecological features or environmental integrity. (*See, e.g.*, R. 134:74 (Fro. 54); *see also* R. 133:20 (Turz. 20) (noting proximity to Buena Vista Creek groundwater-protection area).) *See* Wis. Admin. Code NR §§ 102.10, .11 (defining exceptional and outstanding resource waters).

In some instances, DNR concluded that additional modeling or other assessments would be required to accurately determine the proposed well's impacts on navigable waters. (*See, e.g.*, R. 133:20–22 (Turz. 20–22); R. 133:61–62 (Laur. 14–15); R. 132:25 (Lutz 17); R. 134:19 (Pep. 19); R. 137:4.) For others, DNR already had sufficient information to conclude that the proposed well would result in significant adverse impacts. (R. 133:77–79 (Dero. 15–17); R. 137:8.)

While these applications were pending, the Wisconsin Assembly requested an opinion from the Attorney General on the meaning of this Court's *Lake Beulah* decision, focusing on the decision's validity in light of 2011 Wis. Act 21 (hereafter "Act 21"), which amended Wisconsin's Administrative Procedure Act, Wis. Stat. ch. 227. The resulting opinion repudiated this Court's holding in *Lake Beulah*, finding that this Court gave "short shrift" to Act 21. OAG-01-16, ¶ 8 (May 10, 2016), https://www.doj.state.wi.us/opinions/ag-opinions. In light of Act 21, the opinion concluded that *Lake Beulah* should "no longer control[ ]." OAG-01-16, ¶¶ 8, 16. Instead, the opinion

suggested that the Act's amendments to Wis. Stat. ch. 227 prohibited DNR from analyzing most high-capacity well applications for possible environmental impacts. *See* OAG-01-16, ¶¶ 45–50 (discussing Wis. Stat. § 281.34(4), (5)). That opinion has since been withdrawn. *See* Letter from Attorney General Josh L. Kaul, to Secretary Preston Cole (May 1, 2020).[6]

Before the 2016 Attorney General opinion was withdrawn, DNR relied on it when approving the eight high-capacity wells at issue on September 30, 2016. (*See* R. 1–8 (petitions for review); 66 (order for consolidation).) When the Assembly requested the now-withdrawn Attorney General opinion, many well applicants were given the option to put their applications "on hold" rather than being denied due to expected environmental impacts. (*See, e.g.*, R. 132:25 (Lutz 17); R. 134:19 (Pep. 19).) After the Attorney General opinion was issued, DNR finalized modified application reviews that, for most wells, did not assess potential environmental impacts, based on the legal analysis in the Attorney General opinion. (*See, e.g.*, R. 132:25 (Lutz 17); R. 134:19 (Pep. 19).) With the new review process, applications that had previously been placed on hold "became approvable," despite DNR being "aware of the potential for impacts" to navigable waters. (*See, e.g.*, R. 132:25 (Lutz 17); R. 134:19 (Pep. 19); R. 133:61 (Laur. 14).)

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[6] https://www.doj.state.wi.us/sites/default/files/news-media/5.1.20_High_Cap_Wells_Letter.pdf.

After DNR issued the well approvals, Petitioners filed these consolidated challenges in Dane County Circuit Court. DNR moved to dismiss based on Wis. Stat. § 281.34(5m), which provides that "no 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." (*See, e.g.*, R. 62.) The court denied the motion to dismiss, concluding that, because the administrative record in these cases showed that DNR *did* consider environmental impacts, Wis. Stat. § 281.34(5m) was inapplicable. (*See* R. 158:25–29 (hearing transcript).)

Following briefing and oral argument on the merits, the circuit court granted the petitions, reversing and vacating the well approvals based on record evidence demonstrating the wells' expected or potential adverse impacts to navigable waters. (R. 143:14–15.) For one well, the record was unclear whether an environmental assessment had taken place, and the court remanded to DNR to conduct that assessment. (R. 143:15.)

DNR and Intervenor Wisconsin Manufacturers and Commerce, et al. (hereafter "Industry Intervenors") appealed. After briefing to the court of appeals, that court certified the case to this Court, noting that *Lake Beulah* squarely controlled this case and that the court of appeals was not free to disregard that clear, binding precedent. (*See* Order, Jan. 16, 2019 (Case No. 2018AP0059)).

After this Court accepted certification, DNR moved to modify the briefing schedule because the agency had determined that certain positions it had asserted in earlier briefing were "not consistent with controlling law," including arguments about the public trust doctrine; the import of this Court's decision in *Lake Beulah*; and the effect of Act 21 on DNR's authority and duty to administer the high-capacity well program. (*See* DNR Mot. to Modify Br. Schedule, May 2, 2019 (Case No. 2018AP0059)). The Court granted that request. (Order, May 30, 2019 (Case No. 2018AP0059)).

The Joint Committee on Legislative Organization (hereafter "Legislative Intervenors") moved to intervene. After a stay of proceedings, this Court granted their motion and ordered briefing to proceed on the merits.

STANDARDS OF REVIEW

On appeal from a circuit court's review of a final agency decision, this Court reviews the decision of the agency, not the circuit court. *Hilton ex rel. Pages Homeowners' Ass'n*, 293 Wis. 2d 1, ¶ 15.

On legal questions, a reviewing court "shall set aside or modify the agency action" if the court finds that the agency's action is based on an erroneous interpretation 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).

SUMMARY OF THE ARGUMENT

The statutes controlling DNR's water-resource management obligations are clear and explicit: DNR "*shall* carry out the planning, management and regulatory programs *necessary*" to "protect, maintain and improve the quality and management of the waters of the state, ground

and surface, public and private." Wis. Stat. §§ 281.12(1), .11. Equally clear is that, without DNR approval, "no person may construct or withdraw water from a high capacity well." Wis. Stat. § 281.34(2). And before approving an application, DNR "shall determine" "[t]hat no public water rights in navigable waters will be adversely affected." Wis. Stat. § 281.35(5)(d), (d)1.

When the Court interpreted these statutes ten years ago in *Lake Beulah*, the Court concluded that they explicitly provided DNR with authority and a duty to review a high-capacity well application and decide whether to approve, approve with conditions, or deny it. Nothing has changed in these statutes in the past ten years. Their clear language still requires DNR to assess a proposed well's potential impacts on waters of the state, making fact-specific determinations for each well.

Even before DNR could complete those fact-specific inquiries for the wells at issue here, the agency had evidence that the proposed wells would adversely impact navigable waters, including some classified as "outstanding resource waters." Despite that evidence and based on an erroneous interpretation of the agency's authority, DNR did not adequately assess the wells' likely impacts before issuing approvals.

In light of the evidence before the agency and the controlling statutes, the circuit court was correct to reverse and vacate the well approvals at issue. This Court should affirm.

In addition to the clear statutes, the public trust doctrine provides an additional basis to affirm. That constitutional obligation requires the state to ensure that public rights in navigable waters will not be adversely impacted. For over 100 years, the state has delegated its

authority and duty under the trust to DNR. Neither the state nor DNR can abdicate its duty under that trust. Instead, the doctrine requires the state—through DNR—to assess, on a case-by-case basis, possible violations of public rights in navigable waters. Because DNR did not conduct those necessary assessments here, the approvals for these wells are contrary to the public trust, in addition to violating statutory obligations.

Nothing in Act 21 changed these statutory and constitutional obligations. As evident in its text, that amendment to Wisconsin's Administrative Procedure Act did not even purport to alter Wisconsin's water-resource statutes. Likewise, Act 21's text does not—cannot—require a different interpretation of the water-resources statutes than what their language requires.

Act 21's text simply has no bearing on DNR's obligation to assess wells' potential impacts on state waters. And even if the Act's terms were construed to apply to DNR's high-capacity well obligations, those terms are satisfied, as the DNR has explicit authority, and a duty, under the controlling high-capacity well statutes. As this Court correctly recognized ten years ago, nothing in Act 21 alters the analysis of the controlling statutes and the public trust doctrine. Act 21 does not excuse DNR of its obligation to assess these wells' impacts on state waters.

Intervenors' arguments to the contrary are unavailing. They urge this Court to accept a sweeping interpretation of Act 21 that has no support in the statutory text. For example, Intervenors would have courts construe statutes based on whether they can be characterized as "general" or "specific," or based on a statute's title, regardless of what the statutory text requires. Unsurprisingly, Intervenors are unable to point to anything in Act 21's text that supports their sweeping result.

Accepting Intervenors' proposed interpretation also would lead to absurd, unmanageable results, including DNR being prohibited from even *approving* high-capacity well applications, since no statute mandates that DNR "shall approve" these applications. Straightforward interpretation of the controlling statutes and the public trust doctrine easily avoids this absurdity and the others that would flow from Intervenors' proposed interpretation. The circuit court was correct to reject these Act 21 arguments.

Finally, Wis. Stat. § 281.34(5m) does not bar judicial review here. That provision states that no one may challenge well approvals "based on the lack of consideration of the cumulative environmental impacts of that high capacity well together with existing wells." Here, the record demonstrates that DNR did consider the proposed wells' impacts in connection with existing wells, so the statute's bar on judicial review is inapplicable by its terms. In addition, declining to accept Intervenors' judicial-bar arguments also avoids having to construe this statute in context with the multiple other, seemingly conflicting statutes (as well as the public trust doctrine), which secure judicial review of alleged violations of public rights in state waters.

Despite evidence of adverse impacts to state waters, DNR approved these wells without completing necessary assessments of those potential impacts. Those approvals are contrary to controlling law, and the circuit court was correct to reverse and vacate the approvals. This Court should affirm.

ARGUMENT

I. The well approvals were correctly reversed because controlling statutes and the public trust doctrine required DNR to assess the wells for potential impacts to public rights in navigable waters.

Since this Court decided *Lake Beulah*, there have been no material changes to the statutes and regulations governing DNR's authority and duty to protect and manage the state's waters. Nor have the state's public trust obligations been modified. So just as it was in 2011, DNR has the authority and 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*, 335 Wis. 2d 47, ¶ 39. Because those assessments were not completed or considered for these wells, the circuit court was correct to vacate the approvals.

A. The statutes governing high-capacity wells and water resources require DNR to assess a proposed well's potential impacts to state waters.

1. The clear text of Wis. Stat. §§ 281.11, .12, and .34 require DNR to assess a proposed well's potential impacts before approving the well.

Three separate statutes in Wis. Stat. ch. 281 explicitly authorize DNR to assess potential impacts of proposed high-capacity wells: Wis. Stat. §§ 281.11, .12, and .34. This authority is further confirmed in statutes governing DNR's authority over water resources.

Wisconsin Stat. § 281.11 and .12(1) provide that DNR "*shall* have general supervision and control over the waters of the state" and "*shall* carry out the planning, management and regulatory programs *necessary*" to "protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private." As this Court correctly recognized in *Lake Beulah*, these explicit directives require DNR to conduct site-specific assessments to assure that a proposed high-capacity well will not adversely impact state waters. *See Lake Beulah*, 335 Wis. 2d 47, ¶¶ 39, 41, 45–46.

This is mandated under the statutes' directive that DNR undertake all "necessary" measures to "protect, maintain and improve" the state's water resources. By directing DNR to undertake "necessary" measures, the statutes explicitly require DNR to determine what is necessary to fulfill that mandate. *See Wis. Ass'n of State Prosecutors v. WERC*, 2018 WI 17, ¶ 42, 380 Wis. 2d 1, 907 N.W.2d 425 ("[S]tatutory mandates are also statutory authorizations, and 'authorization of an act also authorizes a necessary predicate act.'" (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 192 (2012))).

DNR recognized the necessity of further assessments and modeling to determine whether the proposed wells would adversely impact navigable waters, including some outstanding resource waters. (*See, e.g.*, R. 134:19 (Pep. 19); R. 132:25, 28 (Lutz 17, 20); R. 132:47 (Creek 18); R. 133:60 (Laur. 13); R. 133:77–79 (Dero. 15–17); R. 134:74 (Fro. 54); R. 133:20 (Turz. 20); R. 137:5–8.) At the time the approvals were issued, DNR was aware that nearby water resources

could be adversely affected by existing pumping and was "aware that the wells approved today may add to those impacts." (*E.g.*, R. 134:19 (Pep. 19).) Nevertheless, due to "substantial[ ] change[s]" to the well-approval process following the 2016 Attorney General opinion, DNR determined that the wells "became approvable." (R. 134:19 (Pep. 19).) Those approvals were contrary to the statutory mandate in Wis. Stat. §§ 281.11 and .12.

In addition, Wis. Stat. § 281.34 authorizes DNR's assessment of adverse impacts from proposed wells. That provision states that without DNR approval, "no person may construct or withdraw water from a high capacity well." Wis. Stat. § 281.34(2). But unlike other permit or approval processes, Wis. Stat. § 281.34 does not then mandate that DNR issue an approval whenever certain criteria are met. *See* Wis. Stat. § 281.34. In contrast, multiple other statutes, including within Wis. Stat. ch. 281, do expressly direct that DNR "shall issue" an approval or "shall approve" an application if certain criteria are met. *See, e.g.*, Wis. Stat. §§ 281.34(2m), (7m)(c), 281.48(5m)(a); Wis. Stat. § 30.12(3m)(c) (DNR "shall issue" pier permit if agency determines structure meets certain criteria); *Lake Beulah*, 335 Wis. 2d 47, ¶ 42 (recognizing "legislature can, and in other contexts does, mandate that the DNR issue a permit when certain requirements are met"). The requirement to obtain DNR's approval before constructing or withdrawing from a well necessarily and explicitly authorizes DNR to determine whether to approve or deny the well application, or to approve it with conditions.

Additional provisions in Wis. Stat. § 281.34 confirm DNR's authority and duty to fully assess well applications. For example, Wis. Stat. § 281.34(4) requires that DNR

undertake comprehensive environmental analyses for wells located in certain areas, including within 1,200 feet of designated "outstanding" or "exceptional" waters and most trout streams. *See* Wis. Stat. § 281.34(1)(am), (4)(a)1. Thus, DNR *must* undertake this examination, no matter the other surrounding circumstances, when that criterion is met. However, that mandatory provision does not somehow revoke DNR's authority to undertake an environmental analysis in other situations: requiring action in one scenario does not eliminate discretion to act in others. *See Mallo v. DOR*, 2002 WI 70, ¶ 26, 253 Wis. 2d 391, 645 N.W.2d 853 (recognizing that non-exclusive statutory grant of authority permitted action necessarily included in statutory terms). The requirement just means the former is automatic and the latter will vary depending on the circumstances, as the statutes recognize will be the case when dealing with real-world scenarios. That is consistent with the baseline prohibition on withdrawals from wells without DNR approval, under Wis. Stat. § 281.34(2). This also comports with DNR's obligation to take the necessary steps to "protect, maintain and improve" state waters. *See* Wis. Stat. §§ 281.11, .12.

The alternative reading—prohibiting assessments for wells not in one of the three categories under Wis. Stat. § 281.34(4)(a)—would lead to absurd results. As the most glaring example, that reading would *require* a comprehensive environmental assessment for wells proposed within 1,200 feet of high-quality waters, but would absolutely *prohibit* any assessment of impacts from wells just a few feet further away, regardless of the near-certainty that the well might still impact the same high-quality waters. Courts eschew such absurdity at all

costs.[7] *See Hamilton v. Hamilton*, 2003 WI 50, ¶¶ 38–39, 261 Wis. 2d 458, 661 N.W.2d 832 (noting primary importance of avoiding absurd results in statutory interpretation); *cf. Cty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1473 (2020) (rejecting as unreasonable reading of Clean Water Act that would have allowed owner of discharge pipe, "seeking to avoid the permit requirement, simply [to] move the pipe back, perhaps only a few yards").

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[7] Intervenors' reliance on the *expressio unius* canon on this point does nothing to address this absurdity. (*See* Leg. Br. 33.) For one thing, there is no need to resort to the *expressio unius* canon where explicit statutory authority covers the act in question. *See State v. Engler*, 80 Wis. 2d 402, 406, 259 N.W.2d 97 (1977) (finding it "impermissible to apply rules of statutory construction . . . when the legislation is clear on its face"). The multiple statutes dictating what DNR "shall" do to protect state waters and prohibiting withdrawals without DNR approval make resort to *expressio unius* unhelpful.

But Intervenors' resort to the canon is also unhelpful because Wis. Stat. § 281.34(4) involves a different question than the one presented here. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 107 (discussing canon, emphasizing that "it must be applied with great caution, since its application depends so much on context"). Whereas Wis. Stat. § 281.34(4)(a) answers the question of which wells *must* be subjected to comprehensive environmental assessments, this case involves whether other wells for which heightened review is not required *may* nonetheless undergo additional assessment depending on site-specific need. As explained in the text, exclusion from the mandatory-review provision offers little insight on the latter inquiry, which is instead governed by the language of the statutes discussed in the text.

Similar to Wis. Stat. § 281.34(4), Wis. Stat. § 281.35 *mandates* heightened review for wells that propose to withdraw more than two million gallons per day. *See* Wis. Stat. § 281.35(4)(b). Notably, before approving such a withdrawal, DNR "shall determine" "[t]hat no public water rights in navigable waters will be adversely affected." Wis. Stat. § 281.35(5)(d), (d)1. This further confirms DNR's authority and duty to assess the question of impacts to waters, and does nothing to limit DNR's statutory authority to undertake review for other proposed wells.

DNR's administrative rules further confirm the agency's authority and duty to assess well impacts. For example, regardless of whether a well falls within the statutes' mandatory assessments, DNR may implement certain approval conditions "[w]hen deemed necessary and appropriate for the protection of public safety, safe drinking water and the groundwater resource." Wis. Admin. Code NR § 812.09(4), (4)(a).

2. Additional water-resource statutes, as well as WEPA, confirm DNR's duty to assess a proposed well's impacts to state waters.

In addition to these statutes and regulations governing high-capacity wells and water resources, multiple other statutes and regulations also provide context regarding DNR's authority and duties to "protect, maintain and improve" the state's waters.

For example, DNR is authorized to prevent or remedy "a possible infringement of the public rights relating to navigable waters." Wis. Stat. § 30.03(4)(a). DNR may proceed under that procedure "either in lieu of or in addition to any other relief provided by law," as necessary "to fully protect the interests of the public in the navigable

waters." *Id.* Similarly, under the rules for groundwater quality, DNR "may take *any actions* [pursuant to statute or rule] if those actions are necessary to protect public health and welfare or prevent a significant damaging effect on groundwater or surface water quality." Wis. Admin. Code NR § 140.02(4). The statutes and administrative rules on groundwater, surface water, and wetland water quality standards further confirm DNR's authority to assess and prevent potential adverse impacts to water resources. *See, e.g.*, Wis. Stat. § 160.03; Wis. Admin. Code NR chs. 102, 103, 140.

Further, DNR's duty and authority to assess well impacts also comports with the agency's duties under WEPA. WEPA is triggered when an action by a state agency (such as approving a high-capacity well) will constitute a "major action[ ] significantly affecting the quality of the human environment." Wis. Stat. § 1.11(2)(c). For "major actions," the agency must prepare a "detailed statement" (often referred to as an "environmental impact statement" or "EIS") that evaluates, among other things, the action's expected direct, indirect, and cumulative impacts, as well as possible alternatives to the proposed action. *See id.* To determine whether the in-depth EIS is required, agencies often conduct preliminary assessments to decide whether further inquiry is required. *State ex rel. Boehm v. DNR*, 174 Wis. 2d 657, 665, 497 N.W.2d 445 (1993). Alternatively, some agencies—DNR included—have promulgated rules classifying the level of WEPA analysis expected for common actions.

Two of DNR's rules are applicable here. First, like the statutes, DNR's rules do not mandate an EIS for wells other than those in the three categories included in Wis. Stat. § 281.34(4)(a). *See* Wis. Admin. Code NR § 150.20(1m)(h), (i). However, DNR's rules explicitly permit further

environmental review to determine whether, under particular circumstances, additional analysis is necessary, even where the rules do not automatically require an EIS. *See* Wis. Admin. Code NR § 150.20(4)(b). This rule authorizes DNR to analyze projects to determine whether an EIS might be required based on the "magnitude or complexity" of the project. *Id.* Three relevant considerations in these analyses are whether the project (1) "may result in long-term deleterious effects that are prohibitively difficult or expensive to reverse," (2) "may result in deleterious effects on especially important, critical, or sensitive environmental resources," or (3) "involves broad public controversy." Wis. Admin. Code NR § 150.20(4)(b)5., 6., 7.

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For multiple reasons, DNR has a statutory duty to assess whether proposed wells will adversely impact state waters. As this Court correctly recognized in *Lake Beulah*, whether and how that duty is triggered is a "fact-specific matter" that will depend on the unique circumstances of each proposed well and the information in front of the agency as it evaluates each application. *Lake Beulah*, 335 Wis. 2d 47, ¶ 46.

After *Lake Beulah*, the Court has confirmed DNR's broad authority to act pursuant to the water resource statutes in Wis. Stat. ch. 281. *See Rock-Koshkonong Lake Dist.*, 350 Wis. 2d 45, ¶ 116 & n.37. In *Rock-Koshkonong*, this Court sought to reconcile statutes governing DNR's authority and duty over wetlands and dams, and concluded that it would be "unreasonable" to read the various statutes governing DNR's water-related authorities in a way that would frustrate its "statewide statutory mission" "to protect, maintain and improve" the waters of the state. *Id.*

The circuit court's decision avoided just such an "unreasonable" reading of the governing statutes. Recognizing DNR's authority and duty to assess the impacts of these wells, and the evidence of record indicating likely impacts to navigable waters, that court was correct to reverse and vacate the permits.

B. The public trust doctrine separately authorizes and requires DNR to assess wells' potential impacts on navigable waters.

Under the statutes discussed above, DNR has express authority and the duty to assess potential impacts from high-capacity wells, as necessary to protect state waters. In addition, the public trust doctrine provides a separate constitutional mandate to ensure wells do not adversely impact public rights in navigable waters. The three public-trust principles discussed above control here.

First, because the public trust imposes an affirmative duty on the state, the obligation to protect navigable waters exists irrespective of any statutory mandate or authorization. Any statutory provision purporting to abdicate trust responsibilities is invalid. *See Priewe*, 79 N.W. at 781.

Second, to the extent that activities may be allowed that infringe on public rights in navigable waters, authorization for those activities must be made "in light of the relevant facts particular to each situation." *See Hilton ex rel. Pages Homeowners' Ass'n*, 293 Wis. 2d 1, ¶ 22. And while there is no constitutional command that DNR make that case-specific determination, someone must. *See id.*; *see also Priewe*, 79 N.W. at 781. Under Wis. Stat. ch. 281, the Legislature has explicitly delegated to DNR the authority to make those determinations—the agency's duties

are "comprehensive, and its role in protecting state waters is clearly dominant." *Wis.'s Envtl. Decade, Inc.*, 85 Wis. 2d at 527; *see also Rock-Koshkonong Lake Dist.*, 350 Wis. 2d 45, ¶ 122 ("DNR should not be straitjacketed when managing the water resources of this state.").

Third, the state's obligation—DNR's obligation—extends to considering activities outside of navigable waters if those activities would adversely impact the public's rights in navigable waters. *See Just*, 56 Wis. 2d at 17–19, 23–24. Wisconsin's public trust obligations therefore necessitate consideration of impacts from high-capacity wells when there exists concrete evidence indicating that the wells would adversely impact navigable waters. *See Lake Beulah*, 335 Wis. 2d 47, ¶¶ 39–46; *see also id.* ¶¶ 68–69 (Ziegler, J., concurring) (emphasizing proposed well's threat to surface waters).

All of this is consistent with this Court's decision in *Lake Beulah*, and nothing has changed the state's public trust obligations since then. So whether based solely on the statutory language discussed above, or based also on the state's obligations under the public trust doctrine, this Court should affirm the circuit court's decision reversing and vacating the approvals.

C. Act 21 did not alter the meaning or effect of the relevant statutes or the public trust doctrine.

The central premise of the Intervenors' argument is that Act 21, an amendment to Wisconsin's Administrative Procedure Act, altered DNR's authority and duties relative to high-capacity wells and protection of water resources. (*See, e.g.*, Leg. Br. 16 (suggesting Act 21 "revert[ed]" water-resource management to the Legislature).) This interpretation ignores the text of Act 21, the text of the

high-capacity well statutes, and the longstanding interpretation of the public trust doctrine, in addition to running counter to common sense.

1. Act 21 does not alter other statutes.

The relevant provision of Act 21, Wis. Stat. § 227.10(2m), states that "[n]o agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a [properly promulgated] rule."

Nothing in this language even purports to alter the text or meaning of other statutes. Nor could it. "[A] subsequent legislature cannot by a later act declare the construction which was intended by a former enactment so as to make such construction binding upon a court" interpreting the earlier act. *State ex rel. Larson v. Giessel*, 266 Wis. 547, 555, 64 N.W.2d 421 (1954), *disapproved of on other grounds by Fulton Found. v. Dep't of Taxation*, 13 Wis. 2d 1, 108 N.W.2d 312 (1961); *accord Moorman Mfg. Co. v. Indus. Comm'n*, 241 Wis. 200, 208, 5 N.W.2d 743 (1942). It is one thing for a Legislature to define terms used in statutes and specify the implication of certain words; however, it is "something else for them to prescribe that fair meaning will not govern. That cannot be done." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 233 (discussing interpretive-direction canon). Indeed, legislation purporting to dictate how the judiciary must interpret statutes would pose significant separation-of-powers concerns. *See id.*; *see also Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (recognizing that Congress "cross[es] the line from legislative power to judicial power" when directing how

judiciary must interpret law in particular cases) (per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment).

If the Legislature wanted to change the meaning of the high-capacity well statutes, the water-resource statutes, or any other statutes purportedly wiped away by Act 21, the way to do that would have been by amending or repealing those statutes, not amending the Administrative Procedure Act. *See Moorman Mfg. Co.*, 241 Wis. at 208; *see also Rock-Koshkonong Lake Dist.*, 350 Wis. 2d 45, ¶ 121 (recognizing that if statutory purpose "had ceased to exist, the statute would probably have been amended or eliminated"). Without any such amendment or repeal, the statutes discussed above control this case. This Court was therefore exactly right in *Lake Beulah*, 335 Wis. 2d 47, ¶ 39 n.31, when it explained that Act 21 "does not affect our analysis."

2. Act 21's so-called "explicit authority" requirement does not change DNR's duty and authority to assess and prevent impacts to navigable waters.

As explained, this Court need not even reach Act 21—the statutes discussed above, and the public trust doctrine, control the case by their own force. If, however, the Court were to apply Act 21's terms to this case, the Act's so-called "explicit authority" requirement does not alter DNR's duty and authority to assess impacts from wells. (*Contra* Leg. Br. 31–40.) The inquiry involves three questions of statutory interpretation: (1) whether DNR's assessment of environmental impacts constitutes a "standard, requirement, or threshold"; (2) if so, whether the standard, etc., is "explicitly authorized or explicitly permitted"; and (3) whether it is "implement[ed] or enforce[d]." Wis. Stat. § 227.10(2m).

Here, the environmental assessments that should have occurred are not a "standard, requirement, or threshold" that DNR "implements or enforces"; but even if they were, they are explicitly required and permitted under the controlling statutes and the public trust doctrine, for the reasons discussed above.

a. Assessments of well impacts are not "standards, requirements, or thresholds" that DNR "implements or enforces."

When interpreting statutes, courts may "refer to dictionaries to define those terms not defined by the legislature." *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶ 21, 302 Wis. 2d 358, 735 N.W.2d 30; *see also* Wis. Stat. § 990.01(1) ("All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning."). Dictionary definitions provide useful guidance for the various terms in Wis. Stat. § 227.10(2m).

A "standard" refers to "something set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality." *Standard*, Merriam-Webster Dictionary (2021). A "requirement" is "something essential to the existence or occurrence of something else." *Requirement*, Merriam-Webster Dictionary (2021). Likewise, "threshold" means "a level, point, or value above which something is true or will take place and below which it is not or will not." *Threshold*, Merriam-Webster Dictionary (2021).

Under the dictionary definitions of these terms, both "standards" and "thresholds" refer to measurable limits. In context, then, the associated term "requirement" is most

reasonably understood similarly, to mean a measurable requirement, as opposed to the more general sense of "anything that is required." To read it in that more general sense would be contrary to the associated words, and thus contrary to the principle that courts strive to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *United States v. Howard*, 968 F.3d 717, 722 (7th Cir. 2020) (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015)).

The meaning of those terms is further informed by the statute's use of the terms "implement or enforce," which mean "to give practical effect to" and "to give force to." *Implement*, Merriam-Webster Dictionary (2021); *Enforce*, Merriam-Webster Dictionary (2021).

Together, the terms used in Wis. Stat. § 227.10(2m) do not reasonably apply to the environmental-impact assessments required under Wis. Stat. ch. 281 and *Lake Beulah*. These assessments are not themselves a measurable "standard," etc., nor are they "implemented or enforced" as part of a license. Instead, DNR's assessments are fact-gathering endeavors done when site-specific conditions indicate that a proposed well might impact nearby waters. While the assessments involve quantitative measurements (for example, modeling potential drawdown of nearby water resources), those measurements are not themselves "implemented" or "enforced" in any meaningful sense. Instead, the measurements inform the qualitative inquiry of whether and how the proposed well might impact nearby waters. (*See, e.g.*, R. 137:5–7.)

These assessments thus are not "standard[s], requirement[s], or threshold[s]," that are "implement[ed] or enforce[d]," as contemplated under Wis. Stat. § 227.10(2m).

b. Assessments of impacts to navigable waters are "explicitly required or explicitly permitted."

As explained above, DNR's impacts-assessments are not "standards," etc, that the agency "implements or enforces," so Wis. Stat. § 227.10(2m) is inapplicable. But if this Court were to conclude that Wis. Stat. § 227.10(2m) somehow applies, the statute's terms are nonetheless satisfied for all the reasons previously discussed. (*See supra*, Arg. §§ I.A.–B.)

In particular, Wis. Stat. §§ 281.11 and .12(1) dictate that DNR "*shall* carry out the planning, management and regulatory programs *necessary*" "to protect, maintain and improve the quality and management of the waters of the state." And the high-capacity well statutes—with their baseline of no withdrawals, subject to DNR's authority to approve, condition, or deny any application—likewise authorize DNR to conduct the assessments at issue. For all the reasons discussed above, these statutes "explicitly require" (or at the very least "explicitly permit") DNR's assessment of well applications for adverse impacts to state waters.[8]

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[8] As discussed in the text, the substantive statutes at issue mandate that DNR take those steps "necessary" to protect state waters. Wis. Stat. §§ 281.11., .12(1). For the reasons discussed above, Arg. § I.A., this command to do what is "necessary" is an explicit command to do all "necessary predicate act[s]." *Wis. Ass'n of State Prosecutors*, 380 Wis. 2d 1, ¶ 42 (citation omitted). These statutes thus impose an "explicit requirement"—namely, "do what is necessary"—and this Court need not address when an act is "explicitly permitted" under Wis. Stat. § 227.10(2m). But if the Court were to reach that question, the same mandate to do what is "necessary" meets this standard, in light of the relative meanings of "require" and "permit" (i.e., to command v. to allow). *See id.*

Under WEPA, DNR is also "explicitly required" to assess whether proposed projects will result in significant adverse environmental impacts. *See* Wis. Stat. § 1.11(2)(c); *see also* Wis. Admin. Code NR ch. 150. And while DNR has designated by rule that high-capacity wells will not typically result in impacts sufficient to require in-depth assessments, the agency's rules and statutes nonetheless "explicitly permit" further analysis where a proposed project may, for example, "result in deleterious effects on especially important, critical, or sensitive environmental resources." Wis. Admin. Code NR § 150.20(4)(b)6.

The public trust doctrine imposes yet another "explicit requirement." Under the public trust, DNR, exercising the powers of trustee, is subject to "strict responsibilities" to ensure that activities affecting navigable waters will not materially impair the public's right to access and use those waters. *See ABKA Ltd. P'ship*, 247 Wis. 2d 793, ¶ 39; *see also Rock-Koshkonong Lake Dist.*, 350 Wis. 2d 45, ¶ 81.

So even if this Court were to conclude that Wis. Stat. § 227.10(2m)'s so-called "explicit authority" language has some application here, the statutes and public trust impose the duty and authority to assess the proposed well's potential impacts. Act 21 cannot be read to excuse DNR from assessing them.

D. Intervenors' remaining arguments about *Lake Beulah* and Act 21 misread this Court's decision and are unsupported by the statutory text and common sense.

The statutes, rules, and public trust doctrine all remain unchanged after Act 21 and support the circuit court's decision, as well as the continuing validity of this Court's *Lake Beulah* decision. Intervenors nonetheless argue that Act 21's amendment to Wisconsin's Administrative

Procedure Act effected sweeping changes throughout the statutes, "supersed[ing]" *Lake Beulah* and altering DNR's authority under the state's public trust duty. Intervenors' arguments are contrary to the text of controlling statutes and rules, to the public trust doctrine, and to common sense.

1. *Lake Beulah* remains valid and binding.

Intervenors' first theme is that "*Lake Beulah* is superseded by statute," suggesting that this Court's treatment of Act 21 somehow missed something. (Leg. Br. 36, 36–40.) But Intervenors provide no persuasive explanation for why this Court's analysis of Act 21 then was insufficient or why that analysis should not still control. *See Lake Beulah*, 335 Wis. 2d 47, ¶ 39 n.31. As Industry Intervenors point out, during its consideration of the *Lake Beulah* case, this Court was presented with the same arguments about Act 21's supposed effect that Intervenors now present. (*See* Indus. Br. 23–24 n.13; Joint App. 182–86 (letter from Great Lakes Legal Foundation on purported effect of Act 21).) Just as Act 21 did not affect DNR's authority then, neither does it affect that authority now.

And what's more, even putting aside whether *Lake Beulah* controls of its own force, the statutes, regulations, and the constitution still lead to the same result that this Court reached in *Lake Beulah*. So whether understood in terms of clear, binding precedent, or a matter of de novo statutory interpretation, Intervenors' argument on this point fails.

Equally unavailing are Intervenors' attempts to paint the holding of *Lake Beulah* as one about *implicit* authority. (Leg. Br. 33, 37–38; Indus. Br. 27–28.) This argument ignores the words of the statutory and constitutional provisions at issue, as well as the language of *Lake Beulah*.

Nowhere in *Lake Beulah* did this Court find DNR's authority to be implicit—to the contrary, the Court stated plainly that "the legislature has explicitly provided the DNR with the broad authority and a general duty . . . to manage, protect, and maintain waters of the state." *Lake Beulah*, 335 Wis. 2d 47, ¶ 39; *see also id.* ¶¶ 3, 44. The Court's analysis was consistent with the multiple explicit statutes discussed above.

2. Act 21's amendments to the Administrative Procedure Act do not have the sweeping effects Intervenors propose.

Intervenors' second and broader theme is that Act 21 effected a sweeping change to Wisconsin law and altered how numerous statutes must now be interpreted. (*See, e.g.*, Leg. Br. 27–36; *see generally* Indus. Br.) For example, Intervenors suggest that DNR does not have explicit authority to deny or condition approval, and that the agency must instead simply approve all complete applications other than those for wells under Wis. Stat. § 281.34(4). (*See, e.g.*, Leg. Br. 30–31; *see also* Indus. Br. 27–28.) Any authority to deny or condition approvals is implicit, Intervenors suggest, and therefore does not exist after Act 21.

In addition to falling short as a matter of statutory interpretation, as discussed above, the argument fails on its own premise: if the high-capacity well statutes do not authorize DNR to condition or deny an approval, they also do not authorize DNR *to approve* applications. As noted above, unlike other statutes, there is no mandate in the relevant well statutes that DNR "shall approve" the

application if certain criteria are met. *Compare* Wis. Stat. § 281.34, *with* Wis. Stat. § 281.48(5m)(a) (DNR "shall approve or deny the application"); *Lake Beulah*, 335 Wis. 2d 47, ¶ 42 (recognizing "legislature can, and in other contexts does, mandate that the DNR issue a permit when certain requirements are met"). The absurd result of Intervenors' premise would be that the statutes directing DNR to administer and assess high-capacity well applications do not authorize DNR to do *anything* with those applications. To the contrary, as explained above, the agency has explicit authority to approve, approve with conditions, or deny an application, based on the facts before it in each case. *See Lake Beulah*, 335 Wis. 2d 47, ¶¶ 45–46.

Intervenors also argue that Wis. Stat. §§ 281.11 and .12 are "general statutes" that "do not confer explicit authority to require environmental review for the eight wells at issue." (Leg. Br. 31; *see also* Indus. Br. 14–23.) Based on their titles, the argument goes, 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." (Leg. Br. 32.) Intervenors' argument, at bottom, is that the titles of Wis. Stat. §§ 281.11 and .12 disqualify those statutes from providing explicit authority. As discussed at length, the statutory text shows otherwise.

As a threshold matter, "a title or heading should never be allowed to override the plain words of a text." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 222. Statutory text, not statutory title, controls the inquiry into statutory meaning. *Aiello v. Vill. of Pleasant Prairie*, 206 Wis. 2d 68, 73, 556 N.W.2d 697 (1996).

More to the point, as discussed above, both Wis. Stat. §§ 281.11 and .12 explicitly direct that DNR "shall" take those actions necessary to protect state waters. Whatever might be said about the titles of those statutes, their text unambiguously directs DNR to act. Characterizing these provisions as mere "statements of purpose or general powers and duties," and suggesting that they provide only *implicit* authority simply ignores the statutory language. (Leg. Br. 33.) As Intervenors point out, "[i]t is presumed that the Legislature chose its words carefully." (*Id.* at 34 n.13.) Mandating that DNR "shall" do what is "necessary" to protect state waters must be construed to authorize just that.[9]

Intervenors' related premise also is flawed: that, after Act 21, statutory authority cannot be both broad *and* explicit. (*See, e.g.*, Leg. Br. 37–39 (under Act 21, "general

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[9] For this reason, Intervenors' arguments about DNR exercising "blank check" authority is also misdirected. (Leg. Br. 34–35.) If the Legislature believes that current statutes provide DNR with too much authority, the remedy is to change the statutes, not to ask this Court to rewrite them through "interpretation." *See Rock-Koshkonong Lake Dist.*, 350 Wis. 2d 45, ¶ 121; *see also Wis. Leg. v. Palm*, 2020 WI 42, ¶ 170, 391 Wis. 2d 497, 942 N.W.2d 900 (Hagedorn, J., dissenting) (noting Legislature's possible "buyer's remorse for the breadth of discretion it gave" agency).

Likewise, contrary to Intervenors' reliance on *Myers v. Wisconsin Department of Natural Resources*, 2019 WI 5, ¶ 34, 385 Wis. 2d 176, 922 N.W.2d 47, that decision does not stand for the proposition that courts are responsible for rewriting statutes to limit agency authority. The Court in *Myers* confirmed that its inquiry was driven by "the words chosen by the legislature in the context of the entirety of Wis. Stat. ch. 30 [governing navigable waters]." *Id.* That same methodology defeats Intervenors' arguments here.

grants of authority" like Wis. Stat. §§ 281.11 and .12 do not confer authority to act); *see also* Indus. Br. 27–28.) This reading of Act 21 is contrary to the statutory text, as discussed above. When a statute requires an agency to undertake measures "necessary" to complete a task, the statute authorizes the agency to determine what is "necessary" and to complete those actions. Broad, perhaps; but undeniably explicit. By interpreting broad statutes as meaning nothing, as Intervenors propose, the result is exactly the opposite of what the text mandates. That is not allowed: "The fact that these are broad standards does not make them non-existent ones." *Lake Beulah*, 335 Wis. 2d 47, ¶ 43.

This Court's reasoning in *Wisconsin Association of State Prosecutors* is instructive. *See Wis. Ass'n of State Prosecutors*, 380 Wis. 2d 1, ¶ 42. In upholding the Wisconsin Employment Relations Commission's rules at issue there, the Court recognized that the enabling statute under which WERC was acting "expressly authorized . . . any predicate acts which are necessary to carrying out its mandated duties," despite those predicate acts not themselves being spelled out step-by-step in the enabling legislation. *See id.* ¶¶ 38, 42; *cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (reaffirming EPA's discretion to determine pollutant limits "requisite to protect the public health").

In sum, Intervenors' view of the sweeping effect of Act 21 is a paradigmatic elephant in a mousehole. In addition to not being grounded in the text of the Act, this view assumes that an amendment to the Administrative Procedure Act effected sweeping changes to various regulatory programs, including management of high-capacity

well approvals. The Legislature, however, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468.

3. Act 21 did not alter the public trust doctrine.

Finally, Intervenors also try to minimize DNR's authority and duty under the public trust doctrine, arguing that because the doctrine's constitutional command is first to the Legislature, not DNR, the agency exercises only that public-trust authority that the Legislature delegates. (*See, e.g.*, Leg. Br. 42–43.) This proposition is correct but irrelevant, since there can be no real question that multiple statutes *do* delegate public-trust responsibility to DNR to manage the state's water resources. *See Wis.'s Envtl. Decade, Inc.*, 85 Wis. 2d at 527 (recognizing delegation in predecessor of Wis. Stat. §§ 281.11, .12); *see also ABKA Ltd. P'ship*, 255 Wis. 2d 486, ¶ 12. This Court has consistently recognized DNR's authority and "comprehensive" duties under these statutes. *See Wis.'s Envtl. Decade, Inc.*, 85 Wis. 2d at 527; *see also Rock-Koshkonong Lake Dist.*, 350 Wis. 2d 45, ¶¶ 116–22.[10] So while there is no direct

[10] Contrary to Legislative Intervenors' assertion (Leg. Br. 44–45), this Court's decision in *Rock-Koshkonong Lake Dist. v. DNR*, 350 Wis. 2d 45, ¶¶ 95–103, did not change DNR's duty and authority under the public trust doctrine. Indeed, the Court in *Rock-Koshkonong* recognized that a statute authorizing regulation "'in the interest of public rights in navigable waters' . . . would be seen as a direct enforcement mechanism for the public trust in navigable waters." *Id.* ¶ 103. Wisconsin Stat. § 281.35(5)(d)1. requires DNR to make that very assessment before approving high-capacity wells. Nothing in *Rock-Koshkonong* purported to alter that or any other authority or duty DNR has to assess high-capacity wells' potential impacts to navigable waters.

constitutional command to DNR, the doctrine does command that *the state* fulfill its obligation to protect all navigable waters. And as long as the statutes governing water resources continue to vest the state's authority and duty in DNR, the agency must continue to fulfill that obligation.

Intervenors, however, suggest that the state's obligations to protect public water rights is satisfied by the enactment of a "systematic" approach to high-capacity wells, which the Legislative Intervenors deem "generally sufficient" to protect Wisconsin's waters. (Leg. Br. 49; *see also id.* at 44–50.) This is not how trusts work, and certainly not how this Court has construed the state's obligations under the public-trust. *See, e.g.*, *Priewe*, 79 N.W. at 781; *Hilton ex rel. Pages Homeowners' Ass'n*, 293 Wis. 2d 1, ¶ 23. It would be no answer for a trustee who allowed some trust properties to fall into disrepair to then point to other, better-maintained properties and claim that his management is "generally sufficient." This type of abdication of trust was soundly rejected when the Legislature attempted it before. *See Priewe*, 79 N.W. at 781.

Instead, this Court has consistently required that if an incursion on the public's right in navigable waters is to be permitted, it must be done on a case-by-case basis, supported by factual findings. One of the cases the Legislative Intervenors highlight, *Town of Ashwaubenon v. PSC*, 22 Wis. 2d 38, 50, 125 N.W.2d 647 (1963), confirms this. The Court there confronted a challenge to a decision by the PSC denying a request to establish a bulkhead line in the Fox River. *See id.* In disagreeing with that denial, the Court confirmed, as Intervenors now point out, "One does not have to deny [ ] the trust doctrine . . . to determine that an intrusion upon the navigable waters is permissible." *Id.* at 49.

Intervenors, however, neglect to explain *why* the incursion might have been permissible in that case: the "evidence disclosed by the record" did not show that allowing the bulkhead line would impair the public's rights in the waters. *See id.* at 50–51. That is, the court found the case-specific inquiry sufficient to support adoption of the bulkhead line in that case, based on the facts presented to the agency. *See id.* And perhaps most importantly, the Court acknowledged that on remand the PSC could take additional evidence, which could still conceivably support denial. *See id.* at 51.

So neither *Ashwaubenon* nor any of the other cases Intervenors cite supports the proposition that even a "generally sufficient" statutory scheme is all that the public trust requires, or that DNR is powerless to protect public water rights based on the facts of a given case. (*Contra* Leg. Br. 46–48.) Instead, the state, through DNR, "is required to 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." *Lake Beulah*, 335 Wis. 2d 47, ¶ 46. "Upon what evidence, and under what circumstances, that duty is triggered is a highly fact-specific matter that depends upon the information submitted" in each case. *Id.*

Because DNR did not complete the necessary fact-specific inquiries for the wells at issue, the decision below must be affirmed.

II. Wisconsin Stat. § 281.34(5m) does not bar judicial review in these cases.

In addition to challenging DNR's authority to assess well impacts, Intervenors also argue that DNR's approvals are not subject to judicial review. They point to Wis. Stat. § 281.34(5m), which provides that "[n]o person may

challenge 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."

This provision does not bar judicial review here, since there is no question that DNR *did* initially consider the proposed wells' impacts both individually and in connection with other wells in the area. (*See, e.g.*, R. 134:14, 19 (Pep. 14, 19); R. 132:25, 28 (Lutz 17, 20); R. 132:47 (Creek 18); R. 133:60 (Laur. 13); R. 133:77–79 (Dero. 15–17); R. 134:74 (Fro. 54); R. 133:20 (Turz. 20).) That is, even before DNR's reviews in these cases were cut short following the 2016 Attorney General opinion, DNR staff conducted at least some initial assessments of the cumulative impacts of well "together with existing wells." Wis. Stat. § 281.34(5m).

Moreover, Petitioners do not appear to be challenging the approvals "based on the lack of consideration of [ ] cumulative impact." (*See* R. 1–8.) Instead, Petitioners' arguments seem to be that because DNR did *consider* these impacts, these approvals should not have been issued, given what those assessments indicated.

But this Court need not attempt to parse Petitioners' various intentions in challenging these approvals. In light of DNR's initial assessments, there was at least some "consideration of cumulative impacts," and Wis. Stat. § 281.34(5m) is therefore inapplicable as a bar to judicial review. *See Papa v. DHS*, 2020 WI 66, ¶ 23 n.10, 393 Wis. 2d 1, 946 N.W.2d 17 (recognizing that appellate courts "should decide cases on the narrowest possible grounds," avoiding discussion of "[i]ssues that are not dispositive" (quoting *Maryland Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶48, 326 Wis. 2d 300, 786 N.W.2d 15)).

Rejecting Intervenors' arguments on the threshold also avoids confronting the potential conflicts that Intervenors' position could create with other statutes governing protection of rights in navigable waters. For example, under the navigable-waters statutes, citizens have a private cause of action to enforce incursions on public-trust resources. *See, e.g.*, *Gillen v. City of Neenah*, 219 Wis. 2d 806, 830, 580 N.W.2d 628 (1998). And under Wis. Stat. § 30.03(4)(a), DNR is authorized to bring enforcement proceedings for "a possible infringement of the public rights relating to navigable waters." By holding that Wis. Stat. § 281.34(5m) does not bar the challenges here, this Court can avoid having to reconcile how subsection (5m) might interact or conflict with these provisions.

However, as a final point to note, the mere existence of Wis. Stat. § 281.34(5m) undercuts Intervenors' overarching statutory arguments about DNR's authority to assess impacts from wells like those at issue here. If, as Intervenors suggest (Leg. Br. 27–50), DNR did not have authority and a duty to consider the cumulative environmental impacts of high capacity wells, there would be no need to preclude judicial review in the event that DNR does not consider a proposed well's impacts. This further confirms that the circuit court was correct in its disposition.

CONCLUSION

This Court should affirm the circuit court's decisions reversing and vacating the well approvals at issue here.

Dated this 10th day of March, 2021.

Respectfully submitted,

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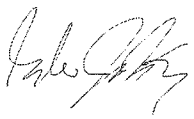

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font, and that the length of the relevant portions of this brief is 10995 words.

Dated this 10th day of March, 2021.

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 10th day of March, 2021.

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