RECEIVED
03-24-2021
CLERK OF WISCONSIN
SUPREME COURT

No. 18AP59

IN THE

Wisconsin Supreme Court

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

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

WISCONSIN LEGISLATURE,
Intervenor.

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

REPLY BRIEF OF INTERVENOR THE WISCONSIN LEGISLATURE

ERIC M. MCLEOD, 1021730
KIRSTEN A. ATANASOFF, 1116561
HUSCH BLACKWELL LLP
P.O. Box 1379
33 East Main Street, Ste. 300
Madison, WI 53701-1379
eric.mcleod@huschblackwell.com
kirsten.atanasoff@huschblackwell.com

LISA M. LAWLESS, 1021749
HUSCH BLACKWELL LLP
511 N. Broadway, Ste. 1100
Milwaukee, WI 53202
lisa.lawless@huschblackwell.com

Attorneys for the Wisconsin Legislature

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutory Authorities

Additional Authorities

INTRODUCTION

Act 21's clear directive supplies an unavoidable answer in this case: no statute or rule "explicitly require[s]" Petitioners'[1] desired environmental review for the high capacity wells at issue. Wis. Stat. § 227.10(2m). Lacking any textual basis to rebut this conclusion, Petitioners instead wage a turf war. They argue that DNR has authority to enforce its own preferences because Act 21 somehow does not apply. They contend that DNR has free reign to act outside its legislatively granted authority in the name of the Public Trust Doctrine. And by extension, they assert that the Legislature is powerless to limit agency authority through legislation.

All of Petitioners' notions contravene both Act 21 and longstanding principles of administrative law. There is no basis to elevate DNR's preferences above the Legislature's comprehensive scheme regulating high capacity wells or Act 21's mandate that all agency requirements and thresholds be explicitly required or explicitly permitted. Both of these legislative directives are

[1] "Petitioners" refers to DNR and Clean Wisconsin collectively.

indisputably within the Legislature's prerogative and are dispositive in this case. The Court should reverse.

ARGUMENT

I. Petitioners cannot avoid Act 21's plain text.

Act 21 prohibits agencies from enforcing any "standard, requirement, or threshold . . . unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule." Wis. Stat. § 227.10(2m). Petitioners assert that DNR had authority[2] to require additional environmental review for wells falling outside the statutes and rules for which such review is explicitly authorized. Plainly, Act 21 rejects this argument.

Aware that Act 21 dooms their case, Petitioners attempt to avoid it entirely. They assert that "Act 21 simply has no bearing" here for a multitude of reasons spanning from DNR's purported

[2] Petitioners focus on whether DNR *could have* conducted environmental review for high capacity wells. But that's the wrong question. They are challenging *approved* permits and thus have the burden to show that DNR's approvals must be reversed. Here, their theory must necessarily prove that conducting an environmental review was *required*. This requirement means that Act 21 is in play. It also means that, because Petitioners seek to reverse approved permits, even a showing that environmental review was "explicitly *permitted*" would not be enough. Wis. Stat. § 227.10(2m) (emphasis added). The only way Petitioners can win is by proving that the environmental-review "requirement" is "explicitly *required*" by statute or rule. *Id.* (emphasis added). They cannot.

extra-statutory authority over high capacity wells, to the assertion that DNR does not actually seek to enforce a standard, requirement, or threshold here. DNR-Br.17. In the alternative, Petitioners erect a strawman of Act 21 that bears no resemblance to the Legislature's asserted plain meaning analysis. Petitioners argue that the plain statutory meaning exceeds the Legislature's authority and requires such a strict construction of enabling statutes that DNR lacks authority to even approve well permits. These arguments are simply wrong.

DNR erroneously posits that Act 21's textbook exercise of the legislative function oversteps the Legislature's prescribed role and encroaches on the separation of powers. It relies on a dubious analogy to *Patchak v. Zinke*. DNR-Br.29–30 (citing 138 S. Ct. 897, 905 (2018)). But *Patchak* was about whether Congress had encroached on judicial power by instructing the *result* in *pending litigation*. This case, by contrast, is about the Legislature's grant (or restriction) of authority bestowed on creatures of its own creation—agencies. *See State v. Whitman*, 196 Wis. 472, 220 N.W. 929, 942 (1928). Far from being an encroachment upon other branches' roles, Act 21 involves the quintessential exercise of legislative

authority to correct previous judicial interpretations of the law and to clearly circumscribe legislative delegations to administrative agencies. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring) ("legislation" is the constitutionally "prescribe[d]" "remedial process" when the Legislature "disagree[s] with a judicial interpretation of existing law"); *State v. Lambert*, 68 Wis. 2d 523, 528, 229 N.W.2d 622 (1975) ("The issue is . . . whether the legislature has sufficiently limited and defined its delegation of power to an administrative agency[.]").

The Legislature makes delegations of agency authority in the first instance, and accordingly has the prerogative to provide courts with tools to assist in deciphering these delegations. *See, e.g.*, Wis. Stat. § 227.57(11) (directing courts not to defer to agency interpretations of law); Wis. Stat. § 990.01 (requiring certain constructions of words and phrases in Wisconsin law). Act 21 exemplifies the Legislature's role within the political process by directing courts to change course regarding their interpretation of delegation statutes.

Shifting gears, Petitioners assert that the Court should "not even reach Act 21" or its "so-called 'explicit authority' requirement" because DNR is not seeking to enforce or implement any standard, requirement, or threshold. DNR-Br.31–32. Here, Petitioners laser-focus on the desired environmental reviews *themselves* as the sole potential standard, requirement, or threshold, and concludes they do not trigger Act 21's explicitness requirement. But Petitioners' challenge here is to *approved* permits; they must show DNR was statutorily *required* to conduct additional environmental reviews before granting those permits. This implicates two "requirements" or "thresholds" triggering Act 21's scrutiny. Wis. Stat. § 227.10(2m). First, DNR seeks to impose environmental review on the wells at issue as a requirement for obtaining permit approvals; that's "enforc[ing]" a "requirement." *Id.* Second, DNR seeks to "impose" a "threshold," *id.*, contending it has a "duty to consider the environmental impact of a well" whenever an application features "sufficient concrete evidence of potential harm to waters of the state." DNR-Br.42 (quoting *Lake Beulah*). Each of these is a requirement or threshold that must be explicitly required.

II. Petitioners cite no statute or rule that explicitly requires or explicitly permits environmental review.

Petitioners cite various statutes in an attempt to argue that DNR must require environmental review here. But these statutes reference environmental review for *other* types of wells. They thus do not explicitly require or explicitly permit environmental review for *these* wells. Other statutes DNR cites do not speak to DNR's authority over well permits at all. Obviously, they don't explicitly require or explicitly permit environmental review, either.

Petitioners also argue that sections 281.11 and 281.12 delegate "explicit" authority to conduct environmental review here. They rely on *Lake Beulah* to argue these statutes may confer regulatory authority. But *Lake Beulah* "d[id] not address" Act 21,[3] which directly rejects the propositions in *Lake Beulah* on which Petitioners rely. First, Act 21 specifically denies general provisions like sections 281.11 and 281.12 the broad authority imbued by

[3] Petitioners' assertion that *Lake Beulah* controls this case is wrong. Op.Br.13–14. The Court made clear that it was not engaging the substance of Act 21, stating it "agree[d] with the parties that 2011 Wisconsin Act 21 does not affect our analysis in this case." *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, ¶ 39, n.31, 335 Wis. 2d 47, 799 N.W.2d 73. The fact that Act 21 appears nowhere in the text of the opinion further shows that Act 21's explicit-authority requirement, which this Court later acknowledged "significantly altered [its] administrative law jurisprudence," was not accounted for. *Legislature v. Palm*, 2020 WI 42, ¶ 51, 391 Wis. 2d 497.

Lake Beulah. Second, these statutes do not expressly permit the review demanded by Petitioners here, and only by implication can they be argued to provide authority for that review. That is a far cry from the *explicit* authority now required by Act 21.

First, section 227.11(2)(a) identifies provisions like sections 281.11 and 281.12 as incapable of delegating regulatory authority. Provisions that "contain[] a statement or declaration of legislative intent, purpose, findings, or policy" and provisions that "describ[e] the agency's general powers or duties" are insufficient to confer regulatory authority on an agency. Wis. Stat. § 227.11(2)(a)1.–3. Section 281.11, which provides DNR's "[s]tatement of policy and purpose" and section 281.12, which provides DNR's "[g]eneral department powers and duties," qualify as such. Therefore, they do not confer regulatory authority under Act 21.

Petitioners contend that section 227.11(2)(a)'s effect on general statutes is irrelevant because DNR's rulemaking authority is not at issue. CW-Br.28. While it is true that section 227.11(2)(a) applies to rulemaking authority, it is entirely relevant to the explicit-authority analysis of section 227.10(2m). As this Court has already explained, sections 227.10(2m) and 227.11(2)(a) both play

a role in the explicit-authority analysis. While section 227.10(2m) "codifie[s]" the "explicit authority requirement," section 227.11(2)(a) "prevents agencies from circumventing [that] requirement by simply utilizing broad statutes describing the agency's general duties or legislative purpose as a blank check for regulatory authority." *Palm*, 2020 WI 42, ¶ 52, 391 Wis. 2d 497, 942 N.W.2d 900. As *Palm* acknowledged, these statutes work together to establish that agency regulatory authority must be explicit and that broad, vague statutes certainly do not meet that test. *See* Leg. Reply Br. 16AP1688, 6–8.

Further, Petitioners' point requires the absurd conclusion that although section 227.11(2)(a) may prohibit DNR from using sections 281.11 and 281.12 as the source of authority to promulgate a *rule* articulating DNR's requirement of environmental review for certain wells, these provisions nevertheless authorize DNR to *enforce* that same requirement on an ad-hoc basis. In other words, they assert that these statutes may "explicitly require[] or explicitly permit[]" an agency to enforce a requirement directly but not authorize an agency to adopt that same requirement through a rule. This reading contradicts the plain language of Chapter 227.

See Kalal v. Circuit Court, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

Petitioners also cite section 281.34(4), which provides explicit authority for environmental review of certain wells. But Petitioners do not dispute that the wells here fall *outside* of those categories. *See* Op.Br.2. Rather, they recite all the different instances in which the statutes require environmental review, ostensibly showing that because the statutes provide explicit authority in these other areas, that same authority must apply here. But the statutes' identification of certain categories where DNR is authorized to conduct additional environmental review shows that the Legislature did not choose to require environmental review outside those categories. *Jefferson v. Dane Cty.*, 2020 WI 90, ¶ 29, 394 Wis. 2d 602, 951 N.W.2d 556 ("When the legislature explicitly includes certain conditions in meeting a statutory standard, we may presume that the legislature purposefully excluded others.")

DNR further argues that because sections 281.34 and 281.35 *require* additional environmental review for certain types of wells, they "do not somehow revoke DNR's authority" to do so in other situations. DNR-Br.22; *see also* CW-Br.23 ("Section 281.34(4)

provides mandatory but not exclusive authority to regulate."). That does not resolve the point. At most, these statutes implicitly permit environmental review for the wells here. Even if implicit authority were sufficient—Act 21 says it is not—these statutes do not show that DNR was *required* to conduct that review. *See above at p. 2, n.2.*

Relatedly, Petitioners argue that adhering to the Legislature's high-capacity well statutory standards would produce "absurd results." DNR-Br.22. Specifically, they cite section 281.34(4)(a)1., which requires environmental review for wells proposed in a groundwater protection area, statutorily defined as an area within 1,200 feet of an outstanding or exceptional resource water or certain trout streams. *Id.*; § 281.34(1)(a). It would be "absurd," they argue, for the statutes to require additional environmental review for wells located in a groundwater protection area but forbid such review for wells a few feet away. But this is merely line-drawing, a necessary component of regulation; it is not absurd. Petitioners' argument ignores the reality that standards are necessarily part of regulation. Indeed, as Petitioners note, a standard is a "measurable limit[]." DNR-Br.31. There must be clear, explicit standards

to provide parties notice of the requirements and establish what standards agencies may enforce. Agencies cannot simply make up standards as they go along. To serve this end, Act 21 mandates that standards must be set forth explicitly. This prohibits agencies from inferring authority to enforce standards on an ad-hoc basis.

Petitioners would have this Court toss Act 21 aside and allow agencies to create their own standards out of whole cloth by finding some thin connection by implication to statutes. But agencies are creatures of the Legislature and have only those powers delegated to them. It would be a gross expansion of power to allow agencies to expand or re-write the delegations specifically provided to them by statute. It is for the Legislature to make policy choices drawing lines, and then delegate authority to agencies. This Court may not revisit the wisdom of those lines or redefine agency power established by the Legislature.

Petitioners argue that accepting the Legislature's argument would mean DNR lacks any authority to *approve* well applications because no statute mandates "that DNR 'shall approve' the application if certain criteria are met." DNR-Br.36–37. This is a strawman argument that does not undercut the Legislature's

interpretation of Act 21, which is mandated by the statutes' plain language and has already been adopted by this Court. *See Palm*, ¶¶ 51–52. Petitioners' argument is silly and reveals they have no real way around Act 21. The statutes provide for well permitting, pursuant to explicit standards and requirements. DNR administers this program and issues permits, applying the mandated standards. The act of approving wells that comply with explicit statutory requirements is proper and Act 21 does not change that.

III. Petitioners' Public Trust Doctrine arguments lack merit.

While running away from the plain language of Act 21, Petitioners generally invoke the Public Trust Doctrine to displace the statutory scheme governing high capacity wells with their own preferences. But the Public Trust Doctrine does not establish the boundaries of permissible agency regulation—statutes do. There is no basis to immunize agency actions performed under the banner of public-trust concerns from Act 21's explicit authority requirement. This Court should decline Petitioners' invitation to turn this straightforward application of Act 21's plain text into a meandering inquiry of which party's (proposed) standards best protect

public-trust resources. The Legislature, as trustee, has already expressed its judgment in the statutes it has enacted, and that judgment is dispositive.

Further, Petitioners' arguments about the Public Trust Doctrine are wrong on the merits. Any analysis of the issue begins at looking where the State Constitution vests public-trust duties. The indisputable answer is the Legislature. *Hilton v. DNR.*, 2006 WI 84, ¶ 19, 293 Wis. 2d 1, 717 N.W.2d 166. Next comes the question of whether the Legislature delegated to DNR the public-trust authority it claims. Specifically, DNR claims authority to decide high capacity well applications in accordance with what DNR determines best protects public-trust resources, even when the statutory scheme does not empower it to decide an application on that basis. To do so, DNR necessarily would be enforcing requirements or thresholds, triggering section 227.10(2m)'s "explicitly required or explicitly permitted" test. This requirement applies with equal force whether the agency seeks to enforce a requirement in the name of the Public Trust Doctrine or some other noble objective. Concluding otherwise would set the dangerous precedent that invoking the Public Trust Doctrine allows an agency to

accrue authority while bypassing the need for legislative delegation—the exclusive source of authority for legislatively created agencies.

Petitioners argue—outside the questions presented in this case—that the Legislature's application of Act 21 to the high capacity well statutory scheme amounts to a violation of its public-trust obligation. But the detailed and comprehensive scheme established in Chapter 281 reflects the Legislature's reasoned policy choices to carry out its public-trust obligations regarding well permits. Petitioners argue that the Legislature's systematic approach to high capacity well permitting is insufficient because it may, in application, allow a well approval that impacts public-trust resources. DNR-Br.41. But the Public Trust Doctrine does not require that public-trust resources remain in perfect condition, unaltered from the advent of civilization; it requires the trustee to "act in good faith and from proper motives and within the bounds of a reasonable judgment" in fulfilling its duties. *In re Filzen's Estate*, 252 Wis. 322, 326, 31 N.W.2d 520 (1948).

While DNR would prefer to determine which high capacity well requirements best suit the Public Trust Doctrine, the rules

laid out by Chapter 281 already make that determination. That statutory scheme bears no resemblance to other cases where this Court considered violations of the Public Trust Doctrine. Op.Br.45–47. Here, the Legislature has exercised its duty and its resulting determination is not subject to DNR's approval.

IV. Petitioners' claims are barred by Wis. Stat. § 281.34(5m).

Petitioners assert that their claims are not barred by section 281.34(5m) because DNR did "consider" the wells' cumulative impacts. DNR issued the permits even with that consideration. Further, the permits cannot be set aside based upon cumulative impacts, as the statute bars "challenge[s] . . . based on the lack of consideration of the cumulative environmental impacts." § 281.34(5m). Petitioners argue for reversal of the permit decision because "proper" consideration of the cumulative effects required the permits' denial. Section 281.34(5m) necessarily precludes setting aside a permit where DNR gave no thought to cumulative impacts *or* where DNR's consideration of those impacts was deficient. "Lack" means "to be deficient or missing"; "to be short or have need of something." Lack, *Merriam-Webster Dictionary*

(2021), https://bit.ly/2P0bY08. Therefore, Petitioners' challenge based on cumulative impacts must be rejected.

CONCLUSION

The Court should reverse the judgment of the circuit court.

Dated this 24th day of March, 2021.

HUSCH BLACKWELL LLP
Attorneys for Intervenor
The Wisconsin Legislature

By: *s/Kirsten A. Atanasoff*

Eric M. McLeod
State Bar No. 1021730
Kirsten A. Atanasoff
State Bar No. 1116561
HUSCH BLACKWELL LLP
P.O. Box 1379
33 East Main Street, Suite 300
Madison, WI 53701-1379
608.255.4440
608.258.7138 (fax)
eric.mcleod@huschblackwell.com
kirsten.atanasoff@huschblackwell.com

Lisa M. Lawless
State Bar No. 1021749
HUSCH BLACKWELL LLP
511 North Broadway, Suite 1100
Milwaukee, WI 53202
414.273.2100
414.223.5000 (fax)
lisa.lawless@huschblackwell.com

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2883 words.

Dated this 24th day of March, 2021.

By: *s/Kirsten A. Atanasoff*
Kirsten A. Atanasoff

CERTIFICATE OF COMPLIANCE WITH

RULE 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 § 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 24th day of March, 2021.

By: *s/Kirsten A. Atanasoff*
Kirsten A. Atanasoff

CERTIFICATE OF SERVICE

I certify that on March 24, 2021, I caused three copies of this brief to be mailed by first-class postage prepaid mail to counsel for the other parties.

Dated this 24th day of March, 2021.

By: *s/Kirsten A. Atanasoff*
Kirsten A. Atanasoff