No. 2024AP458

In the Wisconsin Supreme Court

WISCONSIN DAIRY ALLIANCE INC. and
VENTURE DAIRY COOPERATIVE,
Plaintiffs-Appellants,
v.
WISCONSIN DEPARTMENT
OF NATURAL RESOURCES
and WISCONSIN NATURAL
RESOURCES BOARD,
Defendants-Respondents,
and
WISCONSIN FARMERS UNION
and CLEAN WISCONSIN,
Intervenors-Respondents.

On Appeal from an Order and
Judgment Entered in the
Calumet County Circuit Court,
the Honorable Carey J. Reed,
Presiding

PLAINTIFFS-APPELLANTS' RESPONSE OPPOSING THE PETITION TO BYPASS

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INTRODUCTION

This Court should deny the petition to bypass because this case involves complex, messy issues that the court of appeals should sort out first. This Court cannot perform its law-developing role very well if it must also serve as an error corrector.

This case involves challenges to two administrative rules that apply to certain livestock farms defined as large concentrated animal feeding operations or CAFOs. Owners and operators of point sources (including CAFOs) are liable for unauthorized discharges of pollutants to waters of the state. But these persons are statutorily exempt from point-source liability for agricultural stormwater discharges. One DNR[1] rule—the Stormwater Rule—eliminates this liability protection for one category of livestock farms: unpermitted large CAFOs. The other rule in dispute—the Duty-to-Apply Rule—creates automatic liability for any unpermitted large CAFO. This rule's failure-to-apply liability is in addition to the statutory liability for an unauthorized discharge.[2]

This Court should allow this case to proceed through the usual three-tier judicial system.

[1] This response refers to Appellants as the "Dairy Groups," Respondents as "DNR," and Intervenor-Respondents as "Clean Wisconsin."

[2] The terms "Duty to Apply" and "failure to apply" are misnomers because this rule requires large CAFOs to *have* a permit, not just apply for one. Similarly, "failure-to-apply" liability under this rule is actually liability for not *having* a permit. Nevertheless, the Dairy Groups use this terminology because case law and Clean Wisconsin do.

BACKGROUND

I. Modern livestock farms help feed the world.

"On average 90 percent of meat and eggs raised in the U.S. come from CAFOs."[3] Besides helping to feed the world, "CAFOs generate billions of dollars of revenue every year" nationwide. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 493 (2d Cir. 2005). "CAFOs also promote rural economic development for economically depressed rural communities."[4] And, by achieving production efficiency, "CAFOs can provide a low-cost source of meat, milk, and eggs."[5]

II. The Duty-to-Apply Rule creates failure-to-apply liability.

Under federal and Wisconsin law, CAFOs are included in the definition of "point source." 33 U.S.C. § 1362(14); Wis. Stat. § 283.01(12)(a). Like other point sources, CAFOs are thus subject to the Wisconsin Pollutant Discharge Elimination System (WPDES) regulatory program and its federal counterpart under the Clean Water Act (CWA), the National Pollutant Discharge Elimination System (NPDES) program.

Under Wisconsin law, "[t]he discharge of any pollutant into any waters of the state … by any person is unlawful unless such discharge ... is done under a permit issued by the [DNR] ...." Wis. Stat. § 283.31(1). Wisconsin law defines "[d]ischarge of pollutant" to mean "any addition of any pollutant to the waters of this state from any point source." Wis. Stat. § 283.01(5).

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[3] MOST Policy Initiative, Inc., "Concentrated Animal Feeding Operations," at 2, https://mostpolicyinitiative.org/wp-content/uploads/2021/01/ScienceNote_CAFOs.pdf.

[4] MOST Policy Initiative, *supra* note 3, at 2.

[5] MOST Policy Initiative, *supra* note 3, at 2.

Federal law operates the same way. A federal statute generally bans "the discharge of any pollutant by any person." 33 U.S.C. § 1311(a). Another statute allows the Environmental Protection Agency (EPA) to "issue a permit for the discharge of any pollutant, or combination of pollutants." 33 U.S.C. § 1342(a)(1). "'Discharge of a pollutant,' in turn, is defined as 'any addition of any pollutant to navigable waters from any point source.'" *Froebel v. Meyer*, 217 F.3d 928, 937 (7th Cir. 2000) (quoting 33 U.S.C. § 1362(12)(A)).

"To establish a CWA violation, the plaintiffs must prove that (1) there has been a discharge; (2) of a pollutant; (3) into waters of the United States; (4) from a point source; (5) without a NPDES permit." *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1008 (11th Cir. 2004).

Previously, an EPA rule imposed failure-to-apply liability that was separate from any liability for an unauthorized discharge. This former EPA rule required a CAFO to obtain an NPDES permit if the farm was "constructed, operated, and maintained in a manner such that the CAFO will discharge." *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 750 (5th Cir. 2011). This EPA rule meant "that a CAFO can be held liable for failing to apply for a permit, in addition to being held liable for the discharge itself." *Id.* at 746. Under this rule, "[i]f a CAFO discharges and does not have a permit, the CAFO will not only be liable for discharging without a permit, but also prosecuted for failing to apply for a permit—failure to apply liability." *Id.* at 749.

The Fifth Circuit invalidated this EPA rule. The court held "that the EPA does not have the authority to create this [failure to apply] liability." *Id.* at 751. Although the EPA may assess penalties for

"unlawful discharges of pollutants," the court held that "the imposition of failure to apply liability is an attempt by the EPA to create from whole cloth new liability provisions." *Id.* (citation omitted). Instead, the EPA's "authority to assess monetary penalties by administrative proceeding is limited to unlawful discharges of pollutants." *Id.* at 752-53 (quoting *Serv. Oil, Inc. v. EPA*, 590 F.3d 545, 550 (8th Cir. 2009)). The court recognized, however, that because "discharging without a permit is unlawful" under the CWA, the EPA may "impose a duty to apply on CAFOs that are discharging." *Id.* at 751. Still, the court held that the EPA may not create "liability for failing to apply for an NPDES permit." *Id.* at 752.

Wisconsin's administrative code still imposes such failure-to-apply liability. The Duty-to-Apply Rule provides that, subject to an exception not relevant here, "any person owning or operating a large CAFO that stores manure or process wastewater in a structure that is at or below grade or that land applies manure or process wastewater shall have a WPDES permit." Wis. Admin. Code § NR 243.11(3)(a). To establish liability under this rule, the state need only prove that a person (1) owned or operated a large CAFO, (2) the farm either stored manure or process wastewater in a structure that was at or below grade or land applied manure or process wastewater, and (3) the farm did not have a valid WPDES permit.

So, this failure-to-apply liability is *in addition to* the liability that may be imposed for an unauthorized discharge. If the state cannot prove that a large CAFO had an unauthorized discharge, the farm may still be prosecuted for violating the Duty-to-Apply Rule. And if the state can prove an unauthorized discharge, the farm may be penalized both for the discharge and for the failure to have a valid permit.

III. The Stormwater Rule deprives certain livestock farms of liability protections for stormwater runoff.

Although CAFOs are point sources, agricultural stormwater discharges are exempted from the statutory definitions of "point source." 33 U.S.C. § 1362(14); Wis. Stat. § 283.01(12)(a). An agricultural stormwater discharge is runoff that was primarily caused by the weather. *Waterkeeper Alliance*, 399 F.3d at 507-08; *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 121 (2d Cir. 1994).

Because such discharges are defined as *non*-point source pollution, the CWA "exempt[s] [CAFO] discharges from regulation to the extent that they constitute agricultural stormwater." *Waterkeeper Alliance*, 399 F.3d at 507. More precisely, such discharges are exempt from NPDES permitting requirements and from liability under the CWA. *Id.* at 507-08; *Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002); *Southview Farm*, 34 F.3d at 121.

For runoff to be an agricultural stormwater discharge under federal law, "the manure, litter or process wastewater" must have "been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure." 40 C.F.R. § 122.23(e). Even "*unpermitted* Large CAFOs" may meet this definition and thus receive liability protection for their stormwater runoff. 40 C.F.R. § 122.23(e)(1)-(2) (emphasis added).

Under DNR's Stormwater Rule, by contrast, a large CAFO's runoff may be deemed an agricultural stormwater discharge only if the farm complies with nutrient management requirements "and the terms and conditions of its WPDES permit." Wis. Admin. Code § NR 243.03(2)(b). The Stormwater Rule thus narrows the class of farms eligible for the permitting and liability exemption for stormwater discharges under Wis.

Stat. § 283.01(12)(a). Specifically, the Stormwater Rule deprives an *unpermitted* large CAFO of liability protection for any of its stormwater runoff. Such a farm is liable for any discharge that is caused by rain, even if that same farm would not have been liable if it had a permit. In other words, under the Stormwater Rule, whether a large CAFO is liable for a discharge caused by rain hinges on whether the farm has a valid WPDES permit.

IV. The Dairy Groups filed suit to challenge the liability created by the Duty-to-Apply Rule and the Stormwater Rule.

The Dairy Groups brought this case to protect their members from the liability that these two DNR rules create. As the Dairy Groups have made clear, they are *not* "just challenging a *permitting requirement* in both rules. The Dairy Groups are challenging the failure-to-apply *liability* that the Duty-to-Apply Rule creates and the *liability* that the Stormwater Rule creates for unpermitted large CAFOs' stormwater runoff." (Dairy Groups' Ct. App. Reply Br. 20.) "The Dairy Groups' challenge to the Duty-to-Apply Rule is ultimately about the *failure-to-apply liability* that this rule creates." (*Id.* at 28.) As for the Stormwater Rule, "[t]he Dairy Groups are challenging this rule because it unlawfully narrows the class of livestock farms that may receive liability protection for their stormwater runoff." (*Id.* at 15.)

ARGUMENT

I. This Court would benefit from the court of appeals' analysis of the complex issues in this case.

This Court should deny the bypass petition because analysis by the court of appeals would assist this Court. When this Court engages in

statutory interpretation, it "benefit[s] from the discussions of the court of appeals and the circuit court." *Milwaukee Police Ass'n v. City of Milwaukee*, 2018 WI 86, ¶17, 383 Wis. 2d 247, 914 N.W.2d 597.

The court of appeals' analysis would be highly beneficial to this Court if it were to ultimately grant review in this case. This case raises complex issues of environmental and administrative law, and the circuit court's oral ruling did not analyze these issues in depth. (*See* R. 94:44-48.) DNR and Clean Wisconsin each filed a near-word-limit brief on appeal, but the circuit court's analysis consists of just about five pages of transcript. (*See* R. 94:44-48.) The court of appeals can greatly help untangle the knotty questions in this case and provide clean issues for a petition for review.

II. Clean Wisconsin's justiciability arguments undercut its bypass petition.

In the court of appeals, Clean Wisconsin and DNR both argue that this case is not justiciable. In its bypass petition, Clean Wisconsin acknowledges that its justiciability arguments "would not be an independent basis for granting the [p]etition." (Pet. 8.)[6]

This justiciability dispute weighs in favor of denying the bypass petition. Justiciability "is a necessary prerequisite to reaching the merits of and entertaining a declaratory judgment action." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶32, 309 Wis. 2d 365, 749 N.W.2d 211. If this Court grants review and concludes that this case is not justiciable, then it will not reach the merits of the issues that allegedly warrant review.

[6] The bypass petition does not use "sequential numbering starting at '1' on the cover" as required by Wis. Stat. § (Rule) 809.19(8)(bm). When citing the bypass petition, this response cites the court-stamped number at the top of the page.

This Court should give the court of appeals the first opportunity to resolve the threshold justiciability issues.

III. The court of appeals has the power to decide the issues in this case.

Clean Wisconsin argues that the court of appeals is powerless to decide the Dairy Groups' claims because they "really" ask for precedent to be "modified"—specifically, *Maple Leaf Farms, Inc. v. DNR*, 2001 WI App 170, 247 Wis. 2d 96, 633 N.W.2d 720. (Pet. 19-20.) Along these lines, Clean Wisconsin asserts that "the court of appeals would be left to direct the question of whether and to what extent *Maple Leaf Farms* remains good law to this Court." (Pet. 26.) That argument doesn't justify bypassing the court of appeals—for two reasons.

First, if the court of appeals thinks it is being asked to modify precedent (it isn't), it could certify the appeal to this Court. *See* Wis. Stat. § (Rule) 809.61.

Second, the Dairy Groups didn't ask the court of appeals to modify *Maple Leaf Farms*. The court of appeals may decide the Dairy Groups' claims without modifying any precedent.

Maple Leaf Farms has no bearing on the Dairy Groups' two claims challenging the Stormwater Rule. The court in *Maple Leaf Farms* didn't address this rule or the statutory provision (Wis. Stat. § 283.11(2)(b)) under which the Dairy Groups challenge this rule. "[A]n opinion does not establish binding precedent for an issue if that issue was neither contested nor decided." *Wieting Funeral Home of Chilton, Inc. v. Meridian Mut. Ins. Co.*, 2004 WI App 218, ¶14, 277 Wis. 2d 274, 690 N.W.2d 442 (citation omitted).

Maple Leaf Farms doesn't foreclose the Dairy Groups' two claims challenging the Duty-to-Apply Rule, either. The Dairy Groups argue that this rule violates the uniformity mandate in Wis. Stat. § 283.11(2)(a) and that the court's application of this statutory provision in *Maple Leaf Farms* is distinguishable here. The court of appeals can and often does conclude that precedent is distinguishable. *See, e.g.*, *Malone by Bangert v. Fons*, 217 Wis. 2d 746, 759, 580 N.W.2d 697 (Ct. App. 1998).

The Dairy Groups also argue that the Duty-to-Apply Rule lacks explicit authority as required by Wis. Stat. § 227.11(2)(a)1. and 2. They argue that the enactment of this statute in 2011 abrogated *Maple Leaf Farms* to the extent it suggests that Wis. Stat. § 283.001 contains implicit rulemaking authority. The court of appeals can and often does recognize that "[c]ase law can be superseded by statute." *State v. Johnson*, 2020 WI App 73, ¶27, 394 Wis. 2d 807, 951 N.W.2d 616, *rev'd on other grounds*, 2023 WI 39, 407 Wis. 2d 195, 990 N.W.2d 174; *see also State v. Hayes*, 2015 WI App 71, ¶8 n.3, 365 Wis. 2d 174, 870 N.W.2d 478 (recognizing a statutory amendment superseded case law). Indeed, when the legislature abrogates case law by amending a statute, the court of appeals' "role is to follow that legislative mandate." *Taylor v. City of Appleton*, 147 Wis. 2d 644, 646, 433 N.W.2d 293 (Ct. App. 1988).

Because the court of appeals isn't being asked to modify precedent, this Court should deny the bypass petition.

IV. The bypass petition rests on a misunderstanding of this case.

In the bypass petition, Clean Wisconsin misstates the nature of the Dairy Groups' claims. Clean Wisconsin asserts that the Dairy Groups are arguing that "large CAFOs should not be required to have permits."

(Pet. 28.) This characterization of the Dairy Groups' arguments is a recurring theme in the bypass petition. (*E.g.*, Pet. 26, 27, 29.)

Clean Wisconsin is wrong. As the Dairy Groups have explained, "[e]ven if [the court of appeals] invalidates the [Duty-to-Apply Rule's] failure-to-apply liability, Wis. Stat. § 283.31(1) will still require discharging CAFOs to have WPDES permits." (Dairy Groups' Ct. App. Reply Br. 28.) "Therefore, CAFOs will still be 'strictly liable for discharging without a permit and subject to severe civil and criminal penalties.'" (*Id.* (quoting *Nat'l Pork Producers*, 635 F.3d at 743).)

Clean Wisconsin's mischaracterization of the Dairy Groups' arguments is not a reason to bypass the court of appeals.

CONCLUSION

This Court should deny the petition to bypass the court of appeals.

Dated this 4th day of September 2024.

Electronically signed by

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of the relevant portions of this brief is 2,598 words.

Dated this 4th day of September 2024.

Electronically signed by

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 4th day of September 2024.

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