Nos. 16AP1688 & 16AP2502

In the Wisconsin Court of Appeals
DISTRICT II

CLEAN WISCONSIN, INC., LYNDA COCHART, AMY COCHART, ROGER DEJARDIN, SANDRA WINNEMUELLER AND CHAD COCHART,
PETITIONERS-RESPONDENTS,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
RESPONDENT-APPELLANT,

and

KINNARD FARMS, INC.,
INTERVENOR-CO-APPELLANT

On Appeal From The Dane County Circuit Court,
The Honorable John W. Markson, Presiding,
Case No. 15-cv-2633

REPLY BRIEF OF THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES

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INTRODUCTION

The question in this case is whether the Department of Natural Resources (DNR) can impose standards as conditions of a license that no statute or rule "explicitly require[s] or explicitly permit[s]." Wis. Stat. § 227.10(2m). Act 21 unequivocally answers no. Yet Petitioners insist that the effect of Act 21 here is not "central," Resp. Br. 15–16, faulting DNR for focusing on that statute and its "far-reaching consequences," Resp. Br. 15 (quoting DNR's Opening Brief). More to it, they imply that Act 21 is entirely irrelevant—which explains why they do not cite the Act's controlling provision, much less address the legal context of its enactment or offer a competing interpretation of its text.

Although Petitioners invoke a handful of statutes and rules that they read to "explicitly" provide for off-site groundwater-monitoring requirements and animal-unit maximums, Petitioners fundamentally misunderstand what it means for a law to speak "explicitly." "Explicit" means "[d]istinctly expressing all that is meant; leaving nothing merely implied or suggested." 5 *Oxford English Dictionary* 572 (2d ed. 1989). An "[i]mplicit" standard, on the other hand, is one "not plainly expressed" but "naturally or necessarily involved in, or capable of being inferred from," relevant language. 7 *Oxford English Dictionary* 724 (2d ed. 1989). So a statute or rule that does not "distinctly" require or permit imposition of a given licensing standard does not confer power

to impose that standard at all—*even if* the standard is "naturally or necessarily involved in," or is a logical consequence of, the provision's language. Opening Br. 24. To illustrate, a grant of power to "include conditions . . . that are necessary to achieve compliance with surface water and groundwater quality standards," Wis. Admin. Code § NR 243.13(1), is not enough—after Act 21—to authorize all that such language "necessarily" implies. Petitioners' contrary arguments do not, and could not, answer this outcome-determinative point.

ARGUMENT

I. Act 21 Forbids DNR From Imposing The Permit Conditions That The Circuit Court Ordered

A. Wisconsin law explicitly requires or permits DNR to impose a number of specific conditions on permits issued under the Wisconsin Pollution Discharge Elimination System (WPDES). One rule states, for example, that all concentrated animal feeding operations (CAFOs) must have 180 days' worth of storage capacity set aside for all of the liquid manure that they produce. Wis. Admin. Code § NR 243.14(9); *see also* Wis. Stat. § 283.31(3); Wis. Admin. Code § NR 243.17(3)(a). Another allows DNR to require installation of groundwater-monitoring wells around the storage facilities to ensure manure does not leak into groundwater. Wis. Admin. Code § NR 243.15(7). Yet another provision enumerates the limited circumstances in which CAFOs may (because of rainfall) discharge manure from storage facilities into

navigable waters. Wis. Admin. Code § NR 243.13(2); *see also* Wis. Stat. § 283.31(3)(a). Still another imposes a number of specific requirements on CAFO-manure land-application practices. *See* Wis. Admin. Code § NR 243.14; *see also* Wis. Stat. § 283.31(3)(d)2.; 40 C.F.R. § 122.23(e).

Yet none of those wide-ranging, textually enumerated conditions even touches upon off-site groundwater monitoring or animal-unit maximums. Nor do any of the statutes or regulations that Petitioners cite. And while Petitioners offer six statutes or rules that they think "explicitly require[ ] or explicitly permit[ ]" imposition of those standards in permits issued under the WPDES program, Petitioners, in truth, misread each of those provisions.[1]

1. Petitioners first point to Wis. Stat. § 283.31(4) as "explicitly requir[ing]" both off-site groundwater monitoring and animal-unit maximums, Resp. Br. 19–21, 24–25, but the statute does not explicitly provide for either condition. Subsection 4 requires DNR to "prescribe conditions for permits issued under this section to assure compliance with the requirements of sub. (3)," which includes effluent limitations. Wis. Stat. § 283.31(4).[2] Specifically, with regard

[1] Petitioners agree with DNR that, notwithstanding any possible mootness objections, this Court should decide the question of whether the circuit court lawfully required the contested permit conditions. Resp. Br. 15–16.

[2] Effluent limitations are "restriction[s] . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into waters of this state." Wis. Stat. § 283.01(6); *see also* Opening Br. 5–6.

to off-site groundwater monitoring, Petitioners argue that "the prohibition against fecal contamination of a well is an effluent limitation," that the area where Kinnard land-applies manure "is very susceptible to groundwater contamination," and that therefore off-site groundwater monitoring is "necessary to assure compliance with" the well-contamination limitation. Resp. Br. 20–21. But this argument merely draws an *inference*. It offers nothing more than a "process of reasoning" that "'draw[s]' [ ] a conclusion," 7 Oxford English Dictionary, *supra*, at 923 (defining "infer"), that off-site groundwater monitoring is required by the statutory text. Yet if a requirement to impose an off-site groundwater-monitoring condition can only be *inferred* from the statute, then clearly the requirement is not "*explicit*." *See also* Opening Br. 28–29, 32. Consistent with this observation, this Court acknowledged in *Maple Leaf Farms, Inc. v. DNR*, 2001 WI App 170, ¶ 13, 247 Wis. 2d 96, 633 N.W.2d 720, that DNR (before Act 21) had only *implicit* statutory authority to regulate off-site landspreading.[3]

Petitioners' arguments about animal-unit maximums likewise fail to show that Subsection 4 "explicitly require[s]" that condition. Petitioners contend that "[t]he 180-day storage requirement is an effluent limitation," "an animal unit limit provides a practical means of assuring compliance

[3] This Court decided *Maple Leaf* in the pre–Act 21 era of implied authority. Opening Br. 21–23.

with" that limitation, and that therefore animal-unit maximums are "necessary to assure compliance with an effluent limitation." Resp. Br. 24–25. Even setting aside whether the conclusion follows from the second premise, it remains that animal-unit maximums are, at best, a permissible inference from Subsection 4's language—and therefore are not explicit.[4]

2. The only other statutory provision to which Petitioners point is Wis. Stat. § 283.31(5), arguing that it explicitly requires animal-unit maximums. Resp. Br. 25. But Subsection 5 requires only that DNR "specify maximum levels of discharges," Wis. Stat. § 283.31(5), and an animal unit is not a "discharge." *See* Opening Br. 32–33. Petitioners' characterization of this point as "contorted" reveals their fundamental misunderstanding of Act 21. Resp. Br. 25–26. Subsection 5 explicitly provides only that DNR must set maximum levels of discharges. If something is not a discharge, then setting its maximum is not explicitly required by Subsection 5. Whether or not animal units "correlate[ ] to" discharges is irrelevant. Resp. Br. 25.

[4] Although DNR cannot invoke the general language of Wis. Stat. § 283.31(4) to use the case-by-case adjudication model to impose unwritten requirements on WPDES permits, DNR likely could adopt a rule interpreting what additional categories of "conditions . . . to assure compliance" might prove necessary in future cases. Wis. Stat. § 283.31(4). In so doing, DNR would satisfy Act 21's mandate that a permit condition be "explicitly required" "by [ ] rule." Wis. Stat. § 227.10(2m); *see* Opening Br. 24–25.

3. Like Petitioners' statutory provisions, none of the regulations that they cite explicitly requires or permits off-site groundwater monitoring. Petitioners first invoke Section NR 205.066, which requires DNR to determine "on a case-by-case basis" the "frequency" at which a permittee must conduct monitoring "for each effluent limitation in a permit," Wis. Admin. Code § NR 205.066(1). *See* Resp. Br. 22. But even if the well-contamination prohibition is an effluent limitation, *but see* Opening Br. 6–7, 29,[5] Section NR 205.066's requirement that DNR determine a "monitoring frequency" for effluent limitations does not "explicitly require[ ]" the creation of offsite groundwater-monitoring wells, Wis. Admin. Code § NR 205.066(1). Whether or not one might infer from the monitoring-frequency requirement a requirement to impose monitoring wells, such a requirement would, by definition, not be explicit.

4. Petitioners also point to Section NR 140.02, Resp. Br. 21–22, but this rule, located in a section of the regulatory code separate from the WPDES regulations, does not help Petitioners. To begin with, Section NR 140.02 clearly states that it "does not create independent regulatory authority," but instead simply "provides guidelines and procedures for the

[5] Petitioners cite federal law to support their position that nutrient-management plans are effluent limitations to groundwater, Resp. Br. 22, but federal law does not apply to groundwater, 40 C.F.R. § 122.2, and applies only to land applications of manure "to land areas under [the CAFO's] control," not to off-site land owned and controlled by others, *id.* § 122.23 (e).

exercise of regulatory authority . . . established elsewhere." Wis. Admin. Code § NR 140.02(1). Thus, the authority to impose conditions on permits must come from "elsewhere" in the statutes or regulatory code—it cannot come from Section NR 140.02. Regardless, even if Section NR 140.02 provided independent authority, its broad language that DNR "may take any actions . . . necessary to protect public health and welfare" does not explicitly permit off-site groundwater-monitoring requirements in WPDES permits. Any such requirements could only be inferred from Section NR 140.02's language.

5. DNR's regulations at Section NR 243.13 do not explicitly require or permit off-site groundwater-monitoring requirements either. Resp. Br. 22–23. Section NR 243.13's rule that DNR include conditions in permits "to achieve compliance with surface water and groundwater quality standards" applies to only "the production area and ancillary service and storage areas," not to off-site landspreading fields. Wis. Admin. Code § NR 243.13(1). And even if this language applied to off-site landspreading fields, it does not explicitly require off-site groundwater monitoring. Off-site groundwater monitoring could, at best, only be inferred as a "condition[ ] . . . necessary to achieve compliance" with certain water-quality standards. *See id.*

6. Finally, Section NR 243.14 does not explicitly require or permit off-site groundwater-monitoring conditions. Resp. Br. 22–23. Section NR 243.14's language that DNR may

"require the permittee to implement practices in addition to" those explicitly provided in the rules "when necessary to prevent exceedances of groundwater quality standards," Wis. Admin. Code § NR 243.14(10), does not explicitly grant DNR authority to impose off-site groundwater-monitoring requirements after Act 21 because such additional requirements would need to be inferred from the regulatory language.

B. Petitioners' arguments that Act 21's effects are "limited" are unconvincing. Resp. Br. 26–29. Petitioners do not at all grapple with the statute's text, but instead offer only the conclusory statement that "[n]othing in Act 21 rescinds a legislative grant of general authority or requires agencies to promulgate rules in order to exercise broad grants of authority," Resp. Br. 28, a statement that wholly ignores the plain text of the law that the Legislature enacted. Act 21 requires, contrary to the prior regime, that each permit condition be "explicitly required or explicitly permitted by statute or by [ ] rule." Wis. Stat. § 227.10(2m). By Act 21's plain terms, if an agency wishes to exercise a broad grant of authority by placing conditions on permits, the agency must first promulgate a rule "explicitly requir[ing] or explicitly permitt[ing]" each condition it wishes to impose under that authority. If the agency fails to do so, then the condition will not be "explicitly required or explicitly permitted by statute or by [ ] rule," and thus the agency may not "implement or enforce" that condition. Wis. Stat. § 227.10(2m); *see also*

Opening Br. 24–25. Because Petitioners' arguments ignore the statutory text, those arguments necessarily fail.

To support their proposition that Act 21 is effectively a dead letter, Resp. Br. 27–28, Petitioners cite a footnote in the Wisconsin Supreme Court's decision in *Lake Beulah Management District v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, Resp. Br. 29. But that footnote, prompted by a post-argument *amicus* letter, says nothing about the meaning of Act 21. The Court in *Lake Beulah* simply "agree[d] with the parties," without engaging in any legal reasoning or statutory interpretation, that Act 21 "d[id] not affect [the] analysis in" the particular case before it. 2011 WI 54, ¶ 39 n.31. That the Court, in an unreasoned footnote, agreed with the parties that Act 21 was not an issue in a separate case involving a different statutory and regulatory regime provides this Court with no guidance as to how Act 21 affects the present dispute. Hence, *Lake Beulah* does not control here.

II. Petitioners' Arguments On Agency Procedure And Costs And Fees Lack Merit

Renewing their argument that DNR violated its internal procedures in this case, Petitioners make several missteps. First, they do not identify any reason to suppose that this one-off procedural dispute will recur, or that addressing this issue is therefore important or will provide any necessary guidance to lower courts. Resp. Br. 31–33;

compare Opening Br. 35–36.[6] On the merits, Petitioners ignore that DNR could not have appealed the ALJ's order because it was not final. At bottom, they fault DNR for failing to file a procedurally improper motion. Resp. Br. 34–38; *compare* Opening Br. 37–43. Petitioners' next argument, that DNR cannot "institute itself as the decision-maker" after an ALJ has decided a contested case, Resp. Br. 40–42, would render Section NR 2.20 unlawful, *see* Wis. Admin. Code § NR 2.20 (permitting the DNR Secretary to review all contested-case hearings). Finally, Petitioners bypass this Court's clear holding that an agency must have the authority to revisit decisions that the agency concludes rest upon errors of law. *Schoen v. Bd. of Fire & Police Comm'rs of Milwaukee*, 2015 WI App 95, ¶¶ 20–22, 366 Wis. 2d 279, 873 N.W.2d 232; Opening Br. 41. No rule binds an agency to its errors (it is, at the very least, free to concede its errors in court, for example), nor renders it powerless to correct them. *See* Opening Br. 36; *Schoen*, 2015 WI App 95, ¶ 21.

Petitioners' arguments on costs and fees are also unavailing. Petitioners make no legally relevant argument as to why the circuit court had competency to issue an order on costs and fees, and their single legal citation does not support their assertion that the circuit court's oral ruling was a final order. Resp. Br. 45–47. This Court should remand for a

[6] Petitioners also fail to explain why they think they would be entitled to costs and fees even if they lose in this Court on the main issue: whether DNR can impose the contested permit conditions at all. Resp. Br. 31.

proper determination of costs and fees, Resp. Br. 47, *only if* it rejects DNR's arguments on the merits of this appeal and holds Petitioners to be the "prevailing part[ies]," Wis. Stat. § 814.245(3). If this Court does remand to the circuit court, it should do so with instructions that the circuit court apply the proper legal standard, which is whether DNR's legal position had any "arguable merit," *Behnke v. DHSS*, 146 Wis. 2d 178, 183–84, 430 N.W.2d 600 (Ct. App. 1988), *not* whether the position prevailed or was novel, *Sheely v. DHSS*, 150 Wis. 2d 320, 337–38, 442 N.W.2d 1 (1989); Opening Br. 45–47. While Petitioners make much of the circuit court's reasoning on this issue, Resp. Br. 42–45, a straightforward reading of the court's oral ruling clearly shows that the court failed to consider whether DNR's position had any "arguable merit," Opening Br. 46–47. Finally, Petitioners' reliance on Wis. Stat. § 815.05(8) as providing for interest on a costs-and-fees award, Resp. Br. 47–48, is misplaced because this case does not involve the execution of a judgment, Opening Br. 47–48.

CONCLUSION

This Court should reverse the circuit court's decision.

Dated: July 10, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,599 words.

Dated: July 10, 2018.

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RYAN J. WALSH
Chief Deputy Solicitor General

CERTIFICATE OF COMPLIANCE
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I hereby certify that:

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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: July 10, 2018.

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