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SUPREME COURT OF WISCONSIN
No. 2016AP1688

Clean Wisconsin, Inc., Lynda Cochart, Amy Cochart,
Roger DeJardin, Sandra Winnemueller and Chad Cochart,
Petitioners-Respondents,
v.
Wisconsin Department of Natural Resources,
Respondent-Appellant,

Kinnard Farms, Inc.,
Intervenor-Co-Appellant,

Wisconsin Legislature,
Intervenor.

On Appeal by Certification from
Court of Appeals District II, Appeal No. 2016AP1688
Dane County Circuit Court, Case No. 2015cv002633
Honorable John W. Markson, Presiding

RESPONSE BRIEF OF PETITIONERS-RESPONDENTS CLEAN WISCONSIN, INC. AND COCHART, ET AL.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

ISSUES PRESENTED

1. Does the Department of Natural Resources (DNR) have authority to impose off-site groundwater monitoring and an animal unit limit in a Wisconsin Pollution Discharge Elimination System (WPDES) permit for a large, concentrated animal feeding operation?

The circuit court and the administrative law judge answered yes.

2. Did DNR have authority to "reconsider" its decision to deny NR 2.20 review of an administrative law judge's decision nearly a year after denying such review?

The circuit court answered no.

INTRODUCTION

This case began in 2012 when Kewaunee County residents asked DNR to include reasonable conditions in a water pollution discharge permit for a large dairy farm, Kinnard Farms, Inc. After a lengthy hearing, Administrative Law Judge (ALJ) Jeffrey Boldt held that a necessary regulatory response to the drinking water contamination crisis in Kewaunee County was to require some modest monitoring of Kinnard Farms' impact on groundwater quality and place an animal unit limit on the farm.

DNR chose not to appeal and denied Kinnard Farms' request for DNR Secretary review of the ALJ's decision pursuant to NR 2.20. Kinnard Farms petitioned for judicial review, and, in that case, DNR defended its authority to impose the groundwater monitoring and animal unit limit ordered by ALJ Boldt.

Nearly a year later, DNR abruptly reversed course and abandoned its considered legal position. The DNR Secretary "reconsidered" her decision to deny NR 2.20

review, ignored the long-expired deadlines, and purportedly reversed the ALJ's decision requiring off-site groundwater monitoring and an animal unit limit. DNR has now returned to its original position that it has authority to impose those conditions.

The legislature[1] explicitly granted DNR not just the authority but the duty to impose limits and monitoring necessary to develop enforceable permits that comply with the federal Clean Water Act. Kinnard Farms and the Legislature offer an erroneous interpretation of 2011 Wisconsin Act 21 in an attempt to divert the Court from its true task—to evaluate the relevant statutes and regulations that provide DNR explicit authority to adopt permit conditions that ALJ Boldt found were "essential" to address a known source of groundwater pollution. Adopting this erroneous interpretation of Act 21 would create widespread

[1] We use "legislature" to refer to the branch of government. "Legislature" refers to the Intervenor in this case.

uncertainty about agency authority and render meaningless clear legislative directives.

Further, DNR does not have unlimited discretion to reverse its decisions when statutory and regulatory time limits have passed and when there is no change in the facts or law to warrant such reversal. Accordingly, DNR's 2015 reversal of ALJ Boldt's decision was improper.

STATEMENT OF THE CASE

Kinnard Farms operates a large, concentrated animal feeding operation ("CAFO"), in the Town of Lincoln, Kewaunee County. Kinnard Farms proposed to build a new facility at "Site 2," approximately a quarter mile to the northeast of the original "Site 1," to accommodate a significant expansion to its farm. Kinnard App.014; Legis. App.120; R.34:3786.[2] In March 2012, it filed an application for a WPDES permit with DNR, indicating its operation

[2] References to R.34 are to the administrative record as paginated in the files transmitted to this Court on CD.

would expand from approximately 5,800 animal units[3] to approximately 8,700 animal units by February 2013. Legis. App.120-22; R.34:3786-88. Several Kewaunee County residents who live near Kinnard Farms' operation challenged DNR's decision to reissue a WPDES permit to Kinnard Farms in 2012.

Kinnard Farms is currently authorized to operate at 12,860 animal units. P.-R. App.01-02. In 2018, DNR explained that at the farm's then-approximately 10,000 animal units, "105,355,750 gallons of manure and process wastewater will be generated annually." *Id.*[4] The Kinnard Farms facility and landspreading fields are in an area that is very susceptible to groundwater contamination. The

[3] Animal unit means "a unit of measure used to determine the total number of single animal types or combination of animal types . . . that are at an animal feeding operation." Wis. Admin. Code § NR 243.03(5). For example, 715 milking and dry cows is equal to 1,000 animal units. *Id.* § NR 243.05, Table 2A.

[4] For reference, a pool containing one million gallons would be 10 feet deep, 50 feet wide, and nearly as long as a football field. The manure and wastewater produced annually would fill approximately 100 such pools. *See, e.g.*, USGS, *A Million Gallons of Water—How much is it?* https://www.usgs.gov/special-topic/water-science-school/science/a-million-gallons-water-how-much-it?qt-science_center_objects=0#qt-science_center_objects (last visited Mar. 3, 2021).

groundwater beneath that area is in a fractured carbonate bedrock aquifer—a type of karst geology characterized by shallow soils over fractured bedrock that allows contaminants at the surface to travel rapidly into and through groundwater. Most of the Petitioners have experienced contamination of their drinking water wells. Kinnard App.020-21; R.34:670-71.

This case began with a petition for contested case hearing of DNR's decision to reissue a WPDES permit to Kinnard Farms in 2012. Petitioners objected to the permit because it did not adequately protect surface water and their drinking water. Specifically, Petitioners argued that the permit was unreasonable because it did not require groundwater monitoring and did not include a limit on the number of animal units at the facility. Kinnard App.013-14; R.34:663-64.

Contested case hearing

DNR granted the petition for contested case hearing and forwarded the case to the Division of Hearings and

Appeals to be decided by ALJ Boldt. R.34:33, 39. ALJ Boldt presided over a five-day evidentiary hearing that included testimony by experts as well as members of the public who testified "credibly and forcefully about the hardship and financial ruin that this local groundwater contamination crisis has had on their businesses, homes and daily life." Kinnard App.024; R.34:674.

ALJ Boldt began by describing background facts about the facility, including that "[a]ll manure generated at the [Site 2] production area is transported to the manure storage facility and eventually land-applied in accordance with the Kinnard Farms [Nutrient Management Plan (NMP)]." Kinnard App.016; R.34:666. ALJ Boldt then found that "the level of groundwater contamination including E. Coli bacteria in the area at or near the project site is … very unusual, as is the proliferation of CAFOs in Kewaunee County." Kinnard App.020; R.34:670. Witnesses testified that "as many as 30 percent of wells" in the Town of Lincoln "had tested positive for E. coli

bacteria." *Id.* No Kinnard Farms or DNR witness disputed these numbers. *Id.* One member of the public "testified memorably to eating anti-diarrheal medicine 'like it was candy' after being sickened by e-coli contaminated well water that was under 100 feet from a Kinnard landspreading field." Kinnard App.020-21; R.34:670-71. DNR determined that the bacterial contamination came from cow manure, although it declined to use expensive DNA tests to determine the precise source of contamination. Kinnard App.024; R.34:674.[5] Witnesses also testified to high levels of nitrates in their wells. Kinnard App.021; R:34:671.

Dr. Maureen Muldoon, a geology professor with extensive experience investigating fractured carbonate bedrock aquifers like the one present at Site 2, testified that in "karst areas such as those beneath Site 2," pollution can travel over half a mile through groundwater into down gradient wells in 24 hours. Kinnard App.022; R.34:672. She

[5] The ALJ acknowledged that this well had since been replaced at taxpayer expense and, at the time of the hearing, the well was no longer contaminated. Kinnard App.020-21; R.34:670-71.

also "testified persuasively that the area around Kinnard Farms is very vulnerable to groundwater contamination." *Id.*

Following the hearing, ALJ Boldt concluded that "[t]he proliferation of contaminated wells represents a massive regulatory failure to protect groundwater in the Town of Lincoln." Kinnard App.024; R.34:674. It was therefore "required" that DNR exercise its regulatory authority to ensure that Kinnard Farms meet its obligation not to contaminate well water with fecal bacteria from manure or process wastewater or landspread within 100 feet of direct conduits to groundwater. Kinnard App.027; R.34:677. ALJ Boldt also concluded that "it is essential that the Department utilize its clear regulatory authority as set forth below to ensure that Kinnard Farms meet its legal obligation under Wis. Admin. Code NR 243.14(2)(b)(3)." Kinnard App.021, 027; R.34:671, 677. ALJ Boldt therefore directed DNR "to utilize its clear regulatory authority to require groundwater monitoring to enhance its ability to

prevent further groundwater contamination." Kinnard App.024; R.34:674.

ALJ Boldt found that "in 2009 and 2010 Kinnard failed to have permanent markers installed to allow a ready indication of when it had reached the 180-day limit of manure and wastewater storage." Kinnard App.023; R.34:673. ALJ Boldt further ordered DNR to include an animal unit limit in the permit because "[e]stablishing a cap on the maximum number of animal units will provide clarity and transparency for all sides as to the limits that are necessary to protect groundwater and surface waters." Kinnard App.026; R.34:676.

Kinnard's appeal and petition for NR 2.20 review

Following ALJ Boldt's decision, Kinnard Farms petitioned for DNR Secretary review of the contested case hearing decision pursuant to Wisconsin Administrative Code Section NR 2.20. R.34:681-711. DNR denied the petition for review within the time required. Kinnard

App.031-33; R.34:718-20. DNR did not petition for judicial review of ALJ Boldt's decision.

Kinnard Farms petitioned for judicial review of the contested case decision, which was heard in the Kewaunee County Circuit Court. R.34:6419-47. In that case, DNR defended ALJ Boldt's decision and argued that DNR has authority to impose off-site groundwater monitoring and an animal unit limit in Kinnard Farms' WPDES permit. R.34:6685-93. DNR also asserted that the department had adopted ALJ Boldt's decision as its own when it did not petition for judicial review or grant NR 2.20 review. R.34:6577. The circuit court determined that the petition for judicial review was premature and could not be heard until DNR imposed the conditions ordered by ALJ Boldt. Kinnard App.034-39; R.34:6918-23, 6966-68.

DNR's implementation and review of ALJ decision

DNR then began to implement the conditions in ALJ Boldt's decision. On March 19, 2015, DNR sent a notice to Kinnard Farms requesting a groundwater monitoring plan

for landspreading areas or an explanation to justify the absence of off-site groundwater monitoring. R.40:12-13. On June 3, 2015, a DNR attorney sent a letter to Kinnard Farms' attorney requesting information necessary to amend the WPDES permit consistent with ALJ Boldt's decision. R.40:17. The letter stated, "[a]s required in the DNR Order dated October 29, 2014, DNR will amend the Permit to establish a maximum number of animal units at the facility and will amend the Permit to require a groundwater monitoring plan." R.40:17.

On August 17, 2015, DNR requested a legal opinion regarding the impact of Act 21 on DNR's authority to implement these conditions. Legis. App.47-48; R.34:729-30. The next day, an Assistant Attorney General provided an opinion that DNR does not have authority to impose an animal unit limit and off-site groundwater monitoring in the Kinnard WPDES permit. Legis. App.49-51; R.34:731-33.[6]

[6] The Dane County Circuit Court later commented on DNR's inability to explain this change in position, "For reasons that remain obscure,

On September 11, 2015, the DNR Secretary "reconsidered" her November 25, 2014, decision to deny Kinnard Farms' NR 2.20 petition based on this opinion. Kinnard App.044-47; R.34:725-28. Without prior notice to Petitioners or the opportunity for briefing or argument, the DNR Secretary issued a decision granting Kinnard Farms' NR 2.20 petition and reversing the part of ALJ Boldt's decision that ordered DNR to include off-site groundwater monitoring and an animal unit limit in the Kinnard permit. *Id.*

Dane County Circuit Court review and decision

Petitioners and Clean Wisconsin sought judicial review of DNR's decision to reconsider and reverse part of ALJ Boldt's decision. Legis. App.35; R.1, 17:1-2. The parties' appeals were consolidated in Dane County Circuit Court before the Honorable John W. Markson. R.33. The circuit court reversed the DNR's September 2015 decision

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DNR requested the Attorney General reexamine the application of a law that the Department of Justice had already argued to a court in the course of this litigation was entirely consistent with the Permit Conditions." R.42:4.

and remanded the case to DNR with directions to implement the ALJ decision requiring off-site groundwater monitoring and an animal unit limit in the Kinnard WPDES permit. Kinnard App.073; R.42:26.

The circuit court offered two separate and independent justifications for its reversal of DNR's decision. First, the circuit court held that the DNR Secretary lacked authority to reconsider the decision to deny NR 2.20 review nearly a year after declining such review (hereinafter, "the procedural issue"). Kinnard App.054-64; R.42:7-17. Second, the circuit court determined that DNR erred as a matter of law in its decision because DNR has authority to impose an animal unit limit and off-site groundwater monitoring in the Kinnard WPDES permit (hereinafter, "the substantive issue"). Kinnard App.064-72; R.42:17-25.

Regarding the procedural issue, the circuit court concluded that DNR adopted the ALJ decision as its own when it denied NR 2.20 review and did not appeal the ALJ

decision. Kinnard App.056; R.42:9. The court noted that this is consistent with DNR's own argument in response to Kinnard Farms' earlier appeal in this case. Kinnard App.058; R.42:11. The circuit court did not rely on judicial estoppel or judicial admission but found DNR's inconsistent position undermined its legal argument.

The circuit court further concluded that DNR lacked authority to reconsider its decision to deny NR 2.20 review. The court noted that neither DOJ nor DNR cited new facts or law to support its new interpretation of DNR's authority. Kinnard App.060; R.42:13. The court noted that Chapter 227 and NR 2 provide clear and explicit procedures for appeal or reconsideration, which DNR did not follow in this case. Kinnard App.061; R.42:14. It held that DNR cannot bypass these time limits and does not have a general authority to reconsider decisions at any time. Kinnard App.062; R.42:15. Finally, it held that DNR lacked a good reason to reconsider such as newly discovered evidence or a manifest error of law. Kinnard App.063; R.42:16.

Regarding the substantive issue, the circuit court interpreted DNR's authority under Chapter 283 and NR 243 within the limitations imposed by Act 21 and concluded that DNR has authority to impose the challenged conditions.[7] The court concluded that DNR has the authority—and duty in this case—to impose an animal unit limit because (1) it is a limit necessary to "assure compliance" with groundwater protection standards and effluent limitations, and (2) it is a permit condition on the "maximum levels of discharges." Kinnard App.068-70; R.42:21-23; *see* Wis. Stat. § 283.31(3), (4). The court further concluded that DNR has authority to require off-site groundwater monitoring because it is a permit condition necessary to assure compliance with effluent limitations, such as the prohibitions in NR 243. Kinnard App.070-71; R.42:23-24; *see* Wis. Stat. § 283.31(3), (4). The court explained:

> Furthermore, it is difficult to contemplate a permit condition that would more directly mean "assuring

[7] Despite the circuit court's clear holding that the agency had explicit authority, Kinnard Farms inaccurately states that the circuit court held that the agency has only implied authority to include the contested conditions. Kinnard Br. 3.

> compliance" with a statute or rule than monitoring for compliance. In fact, if monitoring was not sufficiently explicit in "assuring compliance" following the enactment of Act 21, then Act 21 would render the words meaningless.

Kinnard App.071; R.42:24. DNR and Kinnard appealed the circuit court's decision. R.52; R.53.

DNR reissuance of Kinnard WPDES permit in 2018

In 2018, while this appeal was pending, DNR reissued a WPDES permit to Kinnard Farms but did not include either an animal unit limit or require off-site groundwater monitoring in this permit. Kinnard App.107-139. Five Kewaunee County residents petitioned DNR for a contested case hearing on the 2018 Kinnard WPDES permit. The petition asserted that DNR did not follow the law when it reissued the Kinnard WPDES permit because the Dane County Circuit Court ordered DNR to include those conditions in the Kinnard WPDES permit, and DNR has neither requested nor received a stay of that order. Kinnard App.094-106. The contested case was settled by an

agreement wherein the parties agreed to implement the ruling of this Court in a modification of the 2018 permit.

STANDARD OF REVIEW

In judicial review of an agency decision, appellate courts review the decision of the agency, not the circuit court. *See Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶84, 382 Wis. 2d 496, 914 N.W.2d 21. This Court reviews the agency decision de novo with no deference to the agency's interpretation of law. *See id.* The "substantial evidence" standard applies to any finding of fact. Wis. Stat. § 227.57(6). The ALJ's factual findings are not at issue in this appeal.

"Statutory interpretation begins with the language of the statute." *Wis. Indus. Energy Group, Inc. v. Pub. Serv. Comm'n*, 2012 WI 89, ¶15, 342 Wis. 2d 576, 819 N.W.2d 240. Statutory language is given its common, ordinary, and accepted meaning, but technical or specially defined words or phrases are given their technical or special definitional meaning. *State ex rel. Kalal v. Circuit Court for Dane Cty.*,

2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. "When an administrative agency promulgates regulations pursuant to a power delegated by the legislature, we construe those regulations together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason." *Wis. Ass'n of State Prosecutors v. Wisconsin Employment Relations Comm'n*, 2018 WI 17, ¶44, 380 Wis. 2d 1, 907 N.W.2d 425 (quoting *Wis. Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶45, 311 Wis. 2d 579, 754 N.W.2d 95).

ARGUMENT

I. DNR has explicit authority to impose off-site groundwater monitoring and an animal unit limit in the Kinnard permit.[8]

The WPDES program grants DNR explicit authority to impose the two conditions at issue in the Kinnard permit.

[8] The parties agree that the issue regarding the scope of DNR's explicit authority to impose the two permit conditions is not moot. Kinnard Br. 21-23; Legis. Br. 22 n.11. Whether DNR may impose the two permit conditions in Kinnard's WPDES permit is still in dispute, such that the issue is not moot. Assuming, *arguendo*, the Court finds that it is moot, the issue satisfies the mootness exceptions because "a definitive

Our argument will proceed in four parts. In Section A, we describe the regulatory framework for WPDES permits. We then evaluate that framework in Sections B and C to show that permit conditions like off-site groundwater monitoring and animal unit limits are explicitly authorized. Finally, Section D responds to Kinnard Farms and the Legislature's Act 21 arguments that attempt to avoid the conclusion that DNR has authority for the permit conditions by (1) conflating distinct provisions in Chapter 227 to suggest that the Court must consider the scope of agency rulemaking authority in this permitting authority case; (2) misinterpreting Wis. Stat. § 227.10(2m) as preventing DNR from acting pursuant to explicit authority to implement general standards; and (3) wrongly concluding that statutory provisions that grant DNR discretion to include permit

decision is essential to guide the trial courts" and agencies. *See In re Matter of Commitment of J.W.K.*, 2019 WI 54, ¶¶12, 29, 386 Wis. 2d 672, 927 N.W.2d 509.

terms not copied verbatim from a statute or regulation are now impermissible.

A. WPDES Program Framework

Wisconsin law prohibits the discharge of any pollutant to waters of the state[9] unless DNR authorizes the discharge in a permit. Wis. Stat. § 283.31(1). The minimum requirements for this permitting program—the WPDES program—are in Chapter 283 of the Wisconsin Statutes. DNR may issue WPDES permits only if DNR includes appropriate effluent limits and any "additional conditions" necessary to "assure compliance" with effluent limits[10] and groundwater protection standards.[11] Wis. Stat. § 283.31(3), (4); Wis. Admin. Code § NR 243.13(1). WPDES permits must also include a limit on the maximum level of

[9] "Waters of the state" includes both surface water and groundwater. Wis. Stat. § 283.01(20).

[10] "Effluent limitations" include "any restriction established by the department . . . 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); Wis. Admin. Code § NR 205.03(15).

[11] DNR promulgated groundwater protection standards in NR 140 of the Wisconsin Administrative Code, as authorized by Chapter 160 of the Wisconsin Statutes.

discharges authorized under that permit. Wis. Stat. § 283.31(5).

CAFOs are subject to these requirements because they are "point sources." Wis. Stat. § 283.01(12)(a). A CAFO's agricultural waste, including manure and water that comes into contact with animal feed or manure (process wastewater), is defined as a "pollutant" and subject to regulation. Wis. Stat. § 283.01(13). The WPDES program regulates all CAFO pollution discharges, including discharges from the production area—on-site—and the fields where manure is land applied—off-site. *See* Wis. Admin. Code §§ NR 243.03(12)(a) (defining CAFOs, in relevant part, to include farms with 1,000 or more animal units that "land appl[y] manure"), 243.14(1), (2) (requiring CAFOs to develop Nutrient Management Plans (NMPs) and comply with requirements for land application of manure); *see also* 40 C.F.R. §§ 412.31(b) (regulating discharges under the federal Clean Water Act from land application areas under federal effluent limitation guidelines),

122.42(e)(5) (requiring an NMP as part of a federal CAFO permit).

CAFOs and other industries must comply with minimum effluent limitations and prohibitions specific to that industry. Depending on the nature of an industry's discharges, effluent limits may be expressed as numeric limits—such as a specific concentration of a pollutant—or as non-numeric limits, such as best management practices. *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 496-97, 502 (2d Cir. 2005) (describing examples of best management practices at CAFOs such as "requirements designed to minimize the possibility of overflows" from manure storage facilities, and the requirement to "develop and implement a nutrient management plan").

Chapter NR 243 contains the WPDES program regulations for CAFOs, which include the following effluent limitations relevant to this appeal. First, any permitted CAFO discharge must comply with surface water and groundwater standards. Wis. Admin. Code § NR

243.13(5)(a). Second, the so-called "no discharge" effluent limitation prohibits any on-site discharge from a CAFO except during certain storm events, if the CAFO has at least 180 days of properly designed manure storage plus a margin of safety. Wis. Admin. Code §§ NR 243.13(1), 243.15(3)(j)-(k). Third, CAFOs must have enough manure storage to contain at least 180 days of the manure and process wastewater generated at the CAFO. Wis. Admin. Code § NR 243.15(3)(j)-(k). Fourth, a CAFO may not contaminate a well with fecal matter or bacteria. Wis. Admin. Code § NR 243.14(2)(b)3. These are all examples of effluent limitations because they restrict the quantity, rate, or concentration of pollutants that are or may be discharged from a CAFO to groundwater and surface waters. *See* Wis. Stat. § 283.01(6) (defining "effluent limitation").[12]

The number of animals that will be housed at a CAFO is a critical component of DNR's review and

[12] The list of effluent limitations demonstrates that the Legislature's assertion that there is only one effluent limitation applicable to CAFOs—the production area no-discharge requirement—is inaccurate. Legis. Br. 45.

approval of CAFO permits. For example, it is how DNR determines whether a CAFO has at least 180 days of manure storage. Wis. Admin. Code § NR 243.15(3)(j)-(k) (requiring CAFOs to have "a minimum of 180 days of storage," which is "calculated based on the maximum animals present at an operation"). In addition, a CAFO's NMP, which governs land application of manure and process wastewater is "based on the volume of manure that will be generated by the operation from … the number of animal units that are expected to be at the operation …." *Id.* §§ NR 243.12(2)(a)6, .14(1)(a).

B. DNR has explicit authority to require off-site groundwater monitoring in the Kinnard permit.

Several statutes and rules independently provide DNR with explicit authority to require off-site groundwater monitoring in this case. First, such monitoring is authorized when necessary to "assure compliance" with effluent limitations applicable to CAFOs. Second, DNR has broad authority to take "any actions necessary" to protect public

health and groundwater quality. Third, DNR's rules authorize and require DNR to implement appropriate monitoring in WPDES permits.

The first basis for DNR's authority and duty is that groundwater monitoring is necessary to "assure compliance" with effluent limitations and groundwater protection standards. Wis. Stat. § 283.31(3), (4); *see also* Wis. Admin. Code § NR 243.13(1). Subsection (3) provides that WPDES permits must require compliance with "effluent limitations" and "[g]roundwater protection standards." Wis. Stat. § 283.31(3). Subsection (4) explicitly authorizes and requires DNR to "prescribe conditions for permits . . . to assure compliance with" subsection (3) requirements.[13] Wis. Stat. § 283.31(4).

Thus, this statute provides explicit authority for DNR to impose monitoring—as an "additional

[13] Kinnard Farms and the Legislature assert that off-site groundwater monitoring is neither an effluent limit nor a groundwater protection standard. Kinnard Br. 34-35, 37-38; Legis. Br. 37-38, 39. We agree. Rather, it is a permit condition necessary to assure compliance with these requirements.

condition[]"—if it is necessary to assure compliance with effluent limits or groundwater protection standards. *Id.*

In this case, ALJ Boldt found that off-site groundwater monitoring was necessary to ensure that CAFO discharges comply with groundwater protection standards and do not pollute wells. Kinnard App.021, 27; R.34:671, 677. Specifically, the ALJ concluded that DNR must require such groundwater monitoring to assure compliance with effluent limitations such as the prohibition against causing fecal contamination of a well in NR 243.14(2)(b)(3), and the requirement that CAFO discharges comply with groundwater protection standards in NR 243.13(5). [14] Kinnard App.027; R.34:677. The ALJ based these conclusions on site-specific evidence of contaminated wells: "[G]iven the proliferation of contaminated wells at or near the project site, it is essential that the Department

[14] The ALJ found, "While the Department has not previously required groundwater monitoring, it has clear regulatory authority to do so in the context of a CAFO WPDES permit. *See* Wis. Stat. § 283.31(3), (4); *see also* Wis. Admin. Code § NR 243.13(1), (5), 243.15(3)(c)2., (7)." Kinnard App.024-25; R.34:674-75.

utilize its clear regulatory authority as set forth below to ensure that Kinnard Farms meet its legal obligation under Wis. Admin. Code NR 243.14(2)(b)(3).” Kinnard App.021, 27; R.34:671, 677. As the circuit court addressing this issue explained,

> Furthermore, it is difficult to contemplate a permit condition that would more directly mean “assuring compliance” with a statute or rule than monitoring for compliance. In fact, if monitoring was not sufficiently explicit in “assuring compliance” following the enactment of Act 21, then Act 21 would render the words meaningless.

Kinnard App.071; R.42:24. *See Belding v. Demoulin*, 2014 WI 8, ¶17, 352 Wis. 2d 359, 843 N.W.2d 373 (“Statutory interpretations that render provisions meaningless should be avoided.”).

As explained above, *supra* p.24, the prohibition against fecal contamination of a well is an effluent limitation because it restricts to zero the amount of manure or fecal matter that a CAFO may discharge to groundwater. Off-site groundwater monitoring is an “additional condition[]” necessary to assure compliance with that limitation. This legal conclusion follows from the ALJ’s findings of

unaddressed fecal contamination. The area where Kinnard Farms land applies manure is very susceptible to groundwater contamination, many area wells are already contaminated with E. coli bacteria indicative of fecal contamination, and there are many other CAFOs in Kewaunee County. Dr. Muldoon "testified persuasively that the area around Kinnard Farms is very vulnerable to groundwater contamination." Kinnard App.022; R.34:672. The ALJ also found that "the level of groundwater contamination including E Coli bacteria in the area at or near the project site is also very unusual, as is the proliferation of CAFOs in Kewaunee County." Kinnard App.020; R.34:670.

Indeed, Kinnard Farms and the Legislature agree that groundwater monitoring may be necessary for enforcement of effluent limitations or groundwater quality standards. Legis. Br. 37-38 ("monitoring requirements would help watch the quality of the water"), Kinnard Br. 35 ("an off-site groundwater-monitoring requirement might aid in

DNR's enforcement of an 'effluent limitation'"); *id.* 35-36 (such monitoring "might help protect groundwater").

The second statutory and regulatory basis for DNR's authority to impose this condition is in the groundwater protection statutes and rules. In Chapter 160, the legislature delegated to DNR broad authority to establish, monitor, and enforce health-based, numeric groundwater quality standards, which DNR promulgates in Chapter NR 140. NR 140 applies to "all facilities, practices and activities which may affect groundwater quality," including those regulated under ch. 283. Wis. Admin. Code § NR 140.03; *see also* Wis. Stat. § 160.25(2). Pursuant to those rules, DNR "may take *any actions* within the context of regulatory programs established in statutes or rules outside of this chapter, if those actions are necessary to protect public health and welfare." Wis. Admin. Code § NR 140.02(4) (emphasis added). These statutes and rules provide an explicit grant of authority to DNR to issue conditions or monitoring where necessary to protect groundwater and public health. In

particular, in response to an exceedance of the enforcement standards for groundwater for total coliform bacteria at a point of standards application,[15] DNR may require any response listed in Wis. Admin. Code § NR 140.26, Table 6, as well any response listed in Table 5, except response number one: "No action." Wis. Admin. Code § NR 140.26(2)(a). One of these actions is to require the installation and sampling of groundwater monitoring wells. *See id.* § NR 140.24, Table 5, Response 2. Pursuant to Chapter 160, DNR has established groundwater protection standards for nitrate and total coliform bacteria. Both the preventive action limit and the enforcement standard for total coliform bacteria (which includes E. coli) is 0/100 mg/L. Wis. Admin. Code § NR 140.10, Table 1, "Bacteria, Total Coliform."

In this case, the ALJ found that "the level of groundwater contamination including E. Coli bacteria in the

[15] A point of standards application includes "[a]ny point of present groundwater use." Wis. Admin. Code § NR 140.22(2)(b)1.

area at or near the project site is … very unusual, as is the proliferation of CAFOs in Kewaunee County." Kinnard App.020; R.34:670. Witnesses testified that "as many of 30 percent of wells" in the Town of Lincoln "had tested positive for E.coli bacteria." *Id.* One member of the public testified that his E. coli contaminated well was under 100 feet from a Kinnard Farms landspreading field. Kinnard App.020-21; R.34:670-71. [16] Given this, DNR has the authority to, at a minimum, direct Kinnard Farms to conduct groundwater monitoring.

The third source of regulatory authority is in WPDES program regulations, Chapters NR 205 and NR 243. *See* Wis. Admin. Code § NR 205.02. Subsection NR 205.066(1) requires DNR to "determine on a case-by-case basis the monitoring frequency to be required for each effluent limitation in a [WPDES] permit." Kinnard Farms and the Legislature's assertion that no effluent limitations apply to

[16] *See supra* n.5.

off-site land application areas is unsupported. Kinnard Br. 38; Legis. Br. 41. NMPs and the restrictions included in those plans constitute "effluent limitations" because they are restrictions on the amount of pollution that may be discharged from land application areas of a CAFO to surface water and groundwater. *See* Wis. Stat. § 283.01(6); *see also supra* p.24. Further, federal courts interpreting the parallel definition of "effluent limitation" in the federal Clean Water Act concluded that the NMP and its terms constitute effluent limitations. *Waterkeeper*, 399 F.3d at 501; *see also id.* at 510 (the Act "not only permits, but demands" that discharges from land application sites be construed as discharges "from" a CAFO).

Finally, Chapter 243—which provides WPDES regulations specific to the CAFO industry—explicitly incorporates DNR's authority and obligation "to include conditions . . . that are necessary to achieve compliance with surface water and groundwater quality standards." Wis. Admin. Code § NR 243.13(1). It further provides DNR with

the authority to "require the permittee to implement practices in addition to or that are more stringent than the requirements specified in [section NR 243.14] when necessary to prevent exceedances of groundwater quality standards" considering the "[p]otential impact to groundwater in areas with direct conduits to groundwater [and] shallow soils over bedrock." Wis. Admin. Code § NR 243.14(10)(g). *See also* Wis. Admin. Code § NR 243.15(1)(d)5 (authorizes DNR to require additional requirements or practices necessary to prevent exceedances of groundwater or surface water quality standards).

Kinnard Farms and the Legislature also assert that *Maple Leaf Farms v. State Dep't of Natural Res.*, 2001 WI App 170, 247 Wis. 2d 96, 633 N.W.2d 720, holds that Chapter 283 does not explicitly authorize the regulation of land application areas at CAFOs. Kinnard Br. 33; Legis. Br. 35. By reasonably interpreting ambiguities in the statute, the *Maple Leaf* Court did, in fact, conclude that Chapter 283 gave DNR authority to regulate land application areas. More

importantly, as discussed above in section I.A, regulation of land application of manure is explicitly authorized under Chapter NR 243 and the applicable federal regulations. Moreover, since the *Maple Leaf* decision, DNR has repromulgated Chapter NR 243, which regulates and provides effluent limitations for discharges from CAFO land application areas. *See, e.g.*, Wis. Admin. Code §§ NR 243.03(12)(a) (defining CAFOs, in relevant part, to include farms with 1,000 or more animal units that "land appl[y] manure"), 243.14 (providing requirements for land application areas).

Kinnard Farms and the Legislature make several arguments based on Act 21 and recent caselaw attempting to undercut this clear statutory and regulatory authority, all of which are either misleading or incorrect. *See infra* section I.D.

C. DNR has explicit authority to impose an animal unit limit in the Kinnard Farms permit.

DNR has authority to include an animal unit limit in a CAFO WPDES permit if such a condition is necessary to assure compliance with an effluent limitation, or to ensure that the permit sets a maximum level of discharge. *See* Wis. Stat. § 283.31(3)-(5).

In this case, ALJ Boldt determined that an animal unit limit was necessary to assure compliance with the 180-day storage effluent limitation in NR 243.15(3)(k). [17] Kinnard App.026; R.34:676. The 180-day storage requirement is related to the "no discharge" limitation, which authorizes discharges from manure storage facilities during certain rain events. Wis. Admin. Code § NR 243.13. The 180-day storage requirement is an effluent limitation because it restricts the amount of manure and other

[17] DNR acknowledged during oral arguments before the Dane County Circuit Court that the 180-day storage requirement was one of the effluent limitations applicable to CAFOs. R.57:18 ("But there are a number of effluent limitations, and different things that are covered in a permit, and a 180 day storage requirement is one."); *see also* R.34:3848 (pre-filed testimony of Thomas Bauman).

agricultural waste that a CAFO may discharge during these rain events. *See* Wis. Admin. Code § NR 243.13(2), 243.15(3)(k); *see also supra* p.24.

The ALJ concluded that an animal unit cap was necessary to assure compliance with the 180-day storage effluent limitation based, in part, on Kinnard Farms' previous history of noncompliance with permit conditions related to this storage requirement. Kinnard App.023; R.34:673. The ALJ concluded that an animal unit limit provides a practical means of assuring compliance with the 180-day storage limit. Kinnard App.026; R.34:676.

DNR also has authority to include an animal unit limit in a WPDES permit because it provides the maximum level of discharges authorized under the permit. The legislature explicitly required that all WPDES permits "issued by the department . . . specify maximum levels of discharges." Wis. Stat. § 283.31(5). Logic dictates that limiting the number of animals at a CAFO is a practical way to quantify and limit the amount of manure and agricultural

waste produced and discharged from that CAFO on-site and off-site. The ALJ found that the number of animals correlates to the amount of manure and process wastewater produced at a CAFO. Kinnard App.023; R.34:673 (finding that "both generation and the discharge of manure is directly related to the number of animal units on site"). The ALJ also concluded that a limit on the number of animals is an effective, transparent, and enforceable method to regulate the amount of waste that a CAFO will generate and discharge. Kinnard App.026; R.34:676. The ALJ's reasoning is in the regulatory history of NR 243, where DNR noted the connection between the storage requirement and avoiding problematic landspreading that leads to surface and groundwater contamination:

> In order to be able to avoid surface applications of liquid manure on frozen or snow-covered ground in accordance with nutrient management requirements and to satisfy the federal requirement for adequate storage, all permittees must have 180 days of storage for liquid manure.

DNR, Analysis Prepared by DNR regarding Order of the State of Wisconsin Natural Resources Board, Repealing and Recreating Rules, WT-21-05.[18]

DNR also has the authority to impose an animal unit cap because it has the authority to approve or reject an NMP. Wis. Admin. Code § NR 243.14(1)-(2). The animal units, and the manure and process wastewater pollutants produced by those animals, are one variable in the calculations that form the basis of an NMP and allow DNR to ensure that permittees can store and land apply waste in compliance with their NMP. *Id.*; *see also id.* § NR 243.14(9). DNR has the explicit authority to reject an amendment to an NMP and the authority to "require additional management practices … in the [NMP] to ensure compliance with the requirements of this chapter and the permittee's WPDES permit." *Id.* § NR 243.14(1)(b). Thus, DNR has explicit authority to require an animal cap when necessary to protect

[18] *Available at* https://docs.legis.wisconsin.gov/code/misc/chr/lrb_filed/cr_05_075_final_rule_filed_with_lrb.

groundwater. *See, e.g.*, *id.* § 243.14(1)(b); *see also id.* §§ 243.14(10) (explaining that the DNR may require "practices . . . when necessary to prevent exceedances of groundwater quality standards"); 243.15(1)(d).

Kinnard Farms and the Legislature argue that an animal unit limit is not a maximum level of discharge based on a contorted argument regarding whether animals are pollutants. Kinnard Br. 40-41; Legis. Br. 46. As explained in the ALJ and circuit court decisions, a limit on animal units is about the manure and other waste that they produce—not the animals themselves. Kinnard App.023, 068-69; R.34:673, 42:21-22.

For the reasons explained below, Act 21 did not modify or remove the explicit statutory and regulatory authority for these permit conditions.

D. Act 21 does not affect the conclusion that DNR possesses explicit authority to impose the challenged conditions.

1. Act 21's rulemaking provisions do not affect DNR's authority to impose the challenged conditions.

The only portion of Act 21 relevant to this case is Wis. Stat. § 227.10(2m), which prohibits an agency from enforcing or implementing a requirement or permit condition unless it is "explicitly required or explicitly permitted" by statute or rule. Act 21, in a separate provision, limits agency rulemaking authority by, in relevant part, providing that "statement[s] . . . of legislative intent, purpose, findings, or policy," and "provision[s] describing the agency's general powers or duties" do not confer rulemaking authority beyond that explicitly provided. Wis. Stat. § 227.11(2)(a)1-2. Those limits are not present in Act 21's sections on permitting authority. By deciding to place this limitation on agency authority in one area—rulemaking—but not in another—permitting and standards enforcement—but placing them within the same act, the

legislature plainly intended this distinction to have effect. Where a word or words are used in one subsection of a statute but not in a related subsection, the court "must conclude that the legislature specifically intended a different meaning." *RURAL v. PSC*, 2000 WI 129, ¶39, 239 Wis. 2d 660, 619 N.W.2d 888 (quoted source omitted). Accordingly, any argument that Act 21's rulemaking provisions inform the meaning of "explicit" in the permitting provisions is a nonstarter.

Here, DNR's rulemaking authority is not at issue, and thus Act 21's rulemaking provisions are irrelevant. Nevertheless, Kinnard Farms and the Legislature attempt to conflate Act 21's permitting provisions with those solely applicable to agency rulemaking to support their erroneous interpretation of Wis. Stat. § 227.10(2m). Kinnard Br. 29-30; Legis. Br. 30-31. For the reasons just described, this attempt to conflate distinct lines of authority must be rejected.

Moreover, as this Court recently confirmed, there is a very important difference between rulemaking, in which the legislature plays a statutorily defined role (and which is a shared power), and fact-specific agency decision-making like issuing the permits here (executive action). *Service Employees International Union v. Vos*, 2020 WI 67, ¶¶88, 99, 105-106, 393 Wis. 2d 38, 946 N.W.2d 35. Thus, the distinct language and subject matter of Wis. Stat. § 227.10(2m) and § 227.11 must be given effect.

For this reason, *Wisconsin Legislature v. Palm* is not instructive here because it broadly characterizes Act 21, primarily discussing what statutes can provide a basis for proper rulemaking, rather than analyzing what constitutes "explicit authority" in the context of a specific regulatory scheme, as is called for here. 2020 WI 42, ¶¶42, 52, 391 Wis. 2d 497, 942 N.W.2d 900.[19] In fact, the Court did not

[19] In *Palm*, this Court principally decided that the challenged COVID-related order was an improperly promulgated rule. *Id.* ¶42. After the Court invalidated the order for failure to following rulemaking procedures, the Court then discussed whether the order exceeded Palm's statutory authority. *Id.* ¶43. The Court's discussion on "explicit authority" is thus dicta.

need to define the "precise scope" of agency authority under the statutes at issue in *Palm* because "clearly" the challenged, unpromulgated rule "went too far." *Id.* ¶55. In reaching that conclusion, the Court noted that it cannot "expansively read statutes with imprecise terminology," 2020 WI 42, ¶55, and that "any reasonable doubt pertaining to an agency's [] powers" must be resolved "against the agency." *Id.* ¶51 (quoted source omitted). This broad ruling predominantly focused on rulemaking does not resolve the questions presented by this case.

2. Statutes that require DNR to condition permits so that they meet broad or general standards confer explicit authority.

Kinnard Farms and the Legislature argue that general or broad statutes no longer confer "explicit" authority on the agency. Kinnard Br. 26; Legis. Br. 28-29.[20] They do not

[20] Notably, Kinnard hedges this argument two pages later by acknowledging that Wis. Stat. § 227.11(2)(a) (which is not at issue in this case), does not prohibit agencies from acting under "general" statutes but, rather addresses whether an agency can promulgate a rule using as its sole statutory basis a statutory or non-statutory "statement or declaration of legislative intent, purpose, findings, or policy" or "describing the agency's general powers or duties." Kinnard Br. 29-30.

provide a basis for this definitional leap. Their quoted definitions are consistent with other dictionary definitions, which focus on clarity of expression, not breadth of scope. For example, the American Heritage Dictionary (2nd Coll. Ed.) at 478 defines "explicit" as:

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

"Explicit" relates to clarity, synonymous with "express"; and its antonym is "implied." "General" relates to scope; and its antonyms are "limited" or "detailed." The terms address different concepts, which is why their assertion that "explicit" somehow means both "express" and "specific" is simply wrong. Kinnard Br. 26; Legis. Br. 28-29. On the contrary, there is nothing in § 227.10(2m), the definition of "explicit", or Wisconsin case law that supports the conclusion that general but explicit authority cannot be used as the basis for permit conditions.

The Court's recent ruling in *Papa v. Wis. Dep't of Health Servs.*, 2020 WI 66, 393 Wis. 2d 1 946 N.W.2d 17,

is not to the contrary. In *Papa*, this Court addressed the agency's "statutes and promulgated . . . rules" to determine "the scope of [the agency's] authority." *Papa*, 2020 WI 66, ¶¶19, 32. The petitioners challenged what the Court termed a "Perfection Policy" where DHS allegedly sought recoupment of payments for covered services "simply because a post-payment audit found that the nurse's records were not perfect." 2020 WI 66, ¶8. Based on its statutory and regulatory review, the Court found that this "Perfection Policy" that denied recoupment based on "mere record imperfections" exceeded DHS's recoupment authority. *Id.* ¶38. The Court found that DHS could recoup payments within three statutory categories of claims (and rules promulgated thereunder) and found that the "Perfection Policy" fell within none of those categories. *Id.* ¶¶31, 37, 40-41. Specifically, the Court held that there was no evidence that the "Perfection Policy" is "linked to" any of those three statutory categories or any regulatory authority, and thus, there was no legal basis for the "Perfection

Policy." *Id.* ¶41. Here, the disputed conditions are linked to numerous statutory and regulatory provisions. Moreover, there is no exclusive set of agency options that these conditions lie outside of. There is thus nothing in *Papa* that supports a reading of "explicit" that precludes use of statutes and regulations requiring DNR to implement general standards.

Kinnard Farms separately asserts that, after Act 21, DNR must promulgate rules to implement all broad grants of statutory authority (such as that in section 283.31(3), (4)) to specify how it will be applied in individual cases. *See* Kinnard Br. 26-27, 37. However, nothing in Act 21 rescinds a legislative grant of general authority or requires agencies to promulgate rules to exercise statutory grants of authority. Rather, Wis. Stat. § 227.10(2m) requires the agency to locate explicit authority in a statute *or* rule, not engage in any new or additional rulemaking. As the Wisconsin Supreme Court recently noted, when interpreting legislation, "[n]othing is to be added to what the text states

or reasonably implies." *Wis. Ass'n of State Prosecutors*, 2018 WI 17, ¶45 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 193-94 (2012)). Act 21 does not implicitly require rulemaking to give the explicit authority in Wis. Stat. ch. 283 effect. Accordingly, Kinnard Farms' argument lacks merit.

Lastly, Kinnard Farms and the Legislature's argument that the requirements in Wis. Stat. § 283.31(3)-(4) are now void would create significant problems for the WPDES program as a whole, which must comply with the federal Clean Water Act. Any reading of Wis. Stat. § 227.10(2m) that would render the entire WPDES program unlawful for failure to comply with federal law must be rejected. Wis. Stat. §§ 283.11(2), 283.31(3)(d)(1)-(2); *Kalal*, 2004 WI 58, ¶46.

3. Where explicitly authorized, DNR can impose permit conditions not copied verbatim from regulations or statutes.

Kinnard Farms and the Legislature's argument amounts to the conclusion that, no matter how explicitly delegated, DNR may not exercise discretion to select permit conditions that meet explicit, general permitting standards and instead all permit conditions must be listed verbatim in statutes or rules. *See, e.g.*, Kinnard Br. 26-27. The reality is that the regulatory framework for this and other complex environmental laws explicitly leaves certain matters to agency discretion. Kinnard Farms and the Legislature's interpretation would lead to an inflexible and cumbersome regulatory program that fails to comply with statutory mandates, protect the environment, or serve the needs of permittees. *Watton v. Hegerty*, 2008 WI 74, ¶14, 311 Wis. 2d 52, 751 N.W.2d 369 (providing that courts should interpret statutes to avoid absurd or unreasonable results).

In *Lake Beulah*, the Court rejected the argument that an agency exercising discretion to apply general standards

to fact-specific conditions would result in a permitting program without clear standards, finding that this argument:

> ignores the reality of how the DNR exercises its authority and complies with its duty within the statutory standards. As with many other environmental statutes, within the general statutory framework, the DNR utilizes its expertise and exercises its discretion to make what, by necessity, are fact-specific determinations. General standards are common in environmental statutes . . . . The fact that these are broad standards does not make them non-existent ones.

Lake Beulah Mgmt. Dist. v. Dep't of Natural Res., 2011 WI 54, ¶43, 335 Wis. 2d 47, 799 N.W.2d 73.[21] Indeed, the provisions in Wis. Stat. § 283.31 Kinnard Farms and the Legislature erroneously assert were essentially repealed by Act 21 are an unremarkable conferral of limited discretion on DNR to properly implement the technical and complex WPDES permitting program and ensure that certain minimum standards are met.

[21] Broad, explicit standards are common in other contexts. For example, the "public interest" standard is the basis for the Public Service Commission to allow an entity to exercise eminent domain for certain pipeline projects or to allow a municipality to establish a bulkhead line along navigable waters. *See, e.g.*, Wis. Stat. §§ 32.02(13); 30.11(2).

For this reason, Kinnard Farms and the Legislature's argument that their interpretation of Act 21 would promote predictability is upside down. Kinnard Br. 27. Rather, it would draw into question innumerable statutory and regulatory provisions, which would now apparently be of dubious continuing validity because they are too general and fail to list the entire universe of potential agency decisions verbatim. Neither agencies, the public, nor regulated entities will know whether the provisions they are affected by are sufficiently "specific" to satisfy this convoluted definition of "explicit."

This strained interpretation would also frustrate the legislature's policy decisions. Every place in statute where the legislature granted DNR—or any agency—authority to enforce conditions, or otherwise act "where necessary," or to impose "additional requirements" beyond those provided as a regulatory minimum, represents a legislative decision to allow an agency to exercise discretion in its permitting decisions. *See, e.g.*, Wis. Stat. §§ 283.31(4), 281.35(5)(d)1;

Wis. Admin. Code § NR 243.13(1). In other statutes, the legislature chose to impose specific requirements. *See, e.g.*, Wis. Stat. § 30.126(5). The legislature's choice to do the former, no less than the latter, is deserving of this Court's respect and attention in declining to (re)make policy decisions on the legislature's behalf. Here, the legislature has enacted statutes that grant DNR the authority to impose the contested conditions if it finds them necessary to comply with statutory standards. Act 21 does not revoke this explicitly delegated authority simply because Kinnard Farms and the Legislature do not like how DNR has exercised that authority in this case.

II. DNR does not have authority to reconsider its decisions outside of the statutory and regulatory deadlines.[22]

A. This issue is not moot.

"An issue is moot when its resolution will have no practical effect on the underlying controversy . . . In other

[22] The Legislature does not take a position on this issue. Legis. Br. 1. As we noted in our response to the DNR's motion to amend modify

words, a moot question is one which circumstances have rendered purely academic." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425. DNR's authority to reconsider its decisions is not a purely academic question. It invokes important questions of finality, due process, and fairness that will likely affect permittees and concerned citizens in the future.

B. Even if this Court determines that this issue is moot, it falls under the exceptions to the mootness doctrine and should be decided by this Court.

Moot points are considered by the court when "the issue has great public importance, a statute's constitutionality is involved, or a decision is needed to guide the trial courts." *Olson*, 233 Wis. 2d 685, ¶3 (quoting *Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 487, 368 N.W.2d 668 (Ct. App. 1985)). "Furthermore, we take up moot questions where the issue is 'likely of repetition and

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the briefing schedule in this case, we may seek to file a short reply if necessary to address new arguments made in DNR's response brief to this Court. P.-R. App.03-04.

yet evades review' because the situation involved is one that typically is resolved before completion of the appellate process." *Olson*, 233 Wis. 2d 685, ¶3 (quoting *State ex rel. La Crosse Tribune v. Circuit Court*, 115 Wis. 2d 220, 229, 340 N.W.2d 460 (1983)).

Kinnard Farms' decision to adopt and defend DNR's prior position on this issue—that DNR has broad inherent authority to reconsider any of its decisions—has the potential to affect many people and to arise again in the future. This issue is likely to recur given the numerous quasi-judicial decisions that DNR makes each year. DNR has thousands of individual permits that authorize permittees, such as CAFOs, to discharge effluents into water, emit pollutants into air, and fill wetlands. DNR is also involved in numerous contested case hearings each year regarding its decisions.

DNR's authority to reconsider NR 2.20 decisions is likely to recur and evade review because WPDES permits expire every five years. Wis. Stat. § 283.53(1); 33 U.S.C. §

1342(b)(1)(B). Approximately 1,000 WPDES permits for industrial and municipal facilities are currently in effect. As is evident from this case, the administrative and judicial review process often takes much longer than five years. Accepting Kinnard Farms' arguments would mean allowing DNR to evade review of its unlawful actions and make a mockery of the opportunity for public participation and review.

The scope of DNR's authority to reconsider its decisions is a matter of great public importance because it involves a public policy issue that could affect many permittees and interested persons. This Court concluded that public policy issues qualify as matters of great public importance. *In re Sheila W.*, 2013 WI 63, ¶7, 348 Wis. 2d 674, 835 N.W.2d 148 (concluding that important social policy issues such as "when or if a minor can withdraw consent to life-saving medical treatment" qualify as an issue of great public importance). This case involves such public policy issues, as the circuit court noted in its decision:

> The laws that provide structure and predictability to our administrative process do not allow an agency to change its mind on a whim or for political purposes. The people of Wisconsin reasonably expect consistency, uniformity, and predictability from their administrative agencies and from the Department of Justice. Having decided not to seek judicial review and denying Kinnard's request for Secretary review, DNR had no authority to reverse the ALJ decision. Its attempt to do so is without any basis in law, and it is void.

Kinnard App.064; R.42:17.

For the above reasons, this Court should address the procedural issue presented in this case because it is either not moot or falls under the exceptions to the mootness doctrine.

C. DNR does not have authority to ignore statutory and regulatory time limits or to reconsider a decision nearly a year later.

Wisconsin's administrative statutes and rules provide a circumscribed process for contested case hearings and decisions to ensure a full and fair hearing, and the finality of the outcome. DNR—like all agencies—is a creature of statute and only has those powers expressly conferred or necessarily implied from the statutory provisions under

which it operates. *Wis. Ass'n of State Prosecutors*, 2018 WI 17, ¶37.

To ensure finality and fairness, the legislature limited DNR's authority to modify or revoke an ALJ decision once a contested case proceeds through a hearing. Additionally, time limits apply to DNR's options following a contested case decision. As explained below, nothing in case law, statutes, or rules gives DNR authority to change its mind and legal position nearly a year after making a decision.

1. DNR adopted the ALJ decision as its decision when it denied NR 2.20 review and did not petition for judicial review.

This issue turns on a straightforward application of administrative law. According to Wis. Stat. § 227.46(3), DNR may, by rule, "[d]irect that the hearing examiner's decision be the final decision of the agency"; may "direct that the record be certified to it without an intervening proposed decision"; or may follow the second option with discretion to limit oral and written arguments in certain proceedings. Wis. Stat. § 227.46(3)(a)-(c). Consistent with

this statute, DNR promulgated NR 2.155, which further defines and limits its options:

> (1) ADMINISTRATIVE LAW JUDGE DECISION. The administrative law judge shall prepare findings of fact, conclusions of law and decision subsequent to each contested case heard. *Unless the department petitions for judicial review as provided in s. 227.46 (8), Stats., the decision shall be the final decision of the department, but may be reviewed in the manner described in s. NR 2.20.* Every decision shall include findings regarding compliance with the requirements of s. 1.11, Stats., to the extent compliance with s. 1.11, Stats., was at issue in the contested case.
> (2) SECRETARY DECISION.
> (a) Notwithstanding sub. (1), the secretary, prior to hearing, may direct that the record be certified to the secretary or secretary's designee for decision in accordance with the provisions of s. 227.46 (3) (b), Stats., without an intervening decision by the administrative law judge.
> (b) Notwithstanding sub. (1), the secretary, prior to hearing, may direct that the decision be made in accordance with the provisions of s. 227.46 (2) or (4), Stats.

Wis. Admin. Code § NR 2.155(1)-(2) (emphasis added).

To summarize, DNR's rules provide three options: (1) petition for judicial review within 30 days of the ALJ decision, (2) grant a petition for NR 2.20 review within 14 days of receipt of the petition, or (3) adopt and follow the ALJ decision. Wis. Admin. Code §§ NR 2.155(1), 2.20; *see also* Wis. Stat. §§ 227.46(8), .52-.53. The first two options

are subject to time limits—30 days from the ALJ decision for a petition for judicial review, and 14 days for NR 2.20 review. Wis. Stat. §§ 227.46(8), 227.53(1)(a)2; Wis. Admin. Code § NR 2.20. If DNR does not take either action within the required time, it adopts the ALJ decision as its decision. Wis. Admin. Code § NR 2.155(1).

DNR's lawfully promulgated rules are binding on it until it modifies or rescinds those rules through the rulemaking process in Chapter 227. *Wis. Citizens Concerned for Cranes & Doves v. Dep't of Nat. Res.*, 2004 WI 40, ¶5 n.5, 270 Wis. 2d 318, 677 N.W.2d 612 (quoting *Staples v. DHSS*, 115 Wis. 2d 363, 367, 340 N.W.2d 194 (1983) ("Administrative rules enacted pursuant to statutory rulemaking authority have the force and effect of law in Wisconsin.")). DNR may not, on a whim, choose not to follow its rules simply because it has the power to change those rules.

The circuit court rejected the argument that DNR did not adopt the ALJ decision as its own, noting "it did, as a

matter of operation of the administrative rules; and it did, as a matter of fact." Kinnard App.056; R.42:9. This fact was definitively asserted by DNR through its counsel at the Department of Justice in an earlier appeal in this case, "The [ALJ's] Decision became the DNR's decision pursuant to Wis. Stats. § 227.46(3) and Wis. Admin. Code § NR 2.155(1)." R.34:6577. The circuit court did not apply judicial estoppel in this case but did note that DNR's inconsistent legal positions undermined its legal arguments. Kinnard App.058-59; R.42:11-12.

2. Finality is not dispositive of whether DNR had authority to reconsider its decision to deny NR 2.20 review.

The ALJ's decision became final as to DNR because DNR's decision not to appeal and to deny NR 2.20 review determined *DNR's* legal rights and obligations and required *DNR* to comply with certain directives regarding Kinnard Farms' permit. *See Sierra Club v. Dep't of Nat. Res.*, 2007 WI App 181, ¶¶13-15, 304 Wis. 2d 614, 736 N.W.2d 918. For this reason, the circuit court dismissed DNR's argument

regarding finality. Kinnard App.058; R.42:11. The circuit court explained why the ALJ decision became final as to DNR even though it was not final for purposes of judicial review for the other parties in the case:

> The ALJ's decision required DNR to modify the permit. The DNR Secretary declined to change the order and DNR went about complying with the order and requiring Kinnard to submit necessary information. From DNR's perspective, the ALJ's decision established just what DNR had to do. And, DNR set out to do it. From the two other parties' perspectives, they did not know what they would need to do until DNR established the criteria and amended the permit. Those things were well underway when DNR abruptly changed course.

Kinnard App.057-58; R.42:10-11. In this appeal, Kinnard Farms has adopted the same argument rejected by the circuit court. Kinnard Br. 43-49. Kinnard Farms' adoption of this finality argument is an attempt to obscure the fact that DNR's rules explicitly prohibit DNR from reconsidering its decision not to appeal and to deny NR 2.20 review.

3. DNR lacked authority to reconsider its decision to deny NR 2.20 review because such authority conflicts with DNR's rules.

As explained above, NR 2.20(3) mandates that the secretary has 14 days to "decide whether or not to grant the requested review." Wis. Admin. Code § NR 2.20(3). The

DNR Secretary timely denied Kinnard Farms' petition for review. R.34:718-19. NR 2.20 does not allow DNR to reconsider its decision to deny its review of the ALJ decision. The arguments in DNR's September 2015 decision and the August 2015 Assistant Attorney General letter cannot overcome this conflict.

In the September 11, 2015 decision, the DNR Secretary asserted that DNR had authority to reconsider its decision due to "new information, legal analysis, and subsequent court proceedings." R.34:727. "Subsequent court proceedings" refers to the Kewaunee County Circuit Court's dismissal of Kinnard Farms' petition for judicial review—in which DNR asserted that it had authority to impose these conditions. R.34:6918-23. The "legal analysis" refers to the August 18, 2015, letter from an Assistant Attorney General in response to DNR's request. R.34:731-33. The DNR Secretary's decision also asserted that under Wis. Stat. § 227.46(3), "the Department may

determine whether DHA may issue the final agency action in a particular case." R.34:727.

This rationale is a conclusion in search of an analysis. In its 2015 decision, DNR is unable to explain why it ignored the advice of one Assistant Attorney General, whose brief outlined DNR's authority to impose these conditions, and requested the opinion of another Assistant Attorney General, whose legal advice DNR decided to follow. DNR also fails to provide new factual or legal developments that would warrant DNR's reconsideration of its earlier decision. R.42:13.

Further, subsection 227.46(3) does not authorize DNR to institute itself as the decision-maker after an ALJ holds a hearing and rules against DNR. DNR's authority under section 227.46(3)—which DNR implemented and further refined in Wis. Admin. Code § NR 2.155—gives DNR two options: DNR may "[d]irect that the [ALJ] decision be the final decision of the agency," or direct that DNR itself act as the decision-maker "without an

intervening proposed decision" by the ALJ. If DNR wants to act as the decision-maker in a particular case, it must make that decision "prior to hearing." Wis. Admin. Code § NR 2.155(2). In this case, DNR lost its chance to step in as the decision-maker once ALJ Boldt held a hearing and issued findings of fact and conclusions of law.

Any inherent authority to reconsider decisions is limited by DNR's enabling statutes and rules. As explained above, DNR's ability to act as the decision-maker or to review or reverse an ALJ decision are constrained by time limits, which DNR may not avoid by relying on an extra-statutory general authority to reconsider. *See Currier v. Dep't of Rev.*, 2006 WI App 12, ¶23, 288 Wis. 2d 693, 709 N.W.2d 520 (requiring strict compliance with Chapter 227 in agency decisions).

In the few cases on an agency's reconsideration power, courts have concluded that an agency has implied authority to reconsider only when it is conducted within a reasonable time, and only if it does not conflict with

applicable statutory provisions. *See, e.g.*, *Schoen v. Bd. of Fire and Police Comm'rs of Milwaukee*, 2015 WI App 95, ¶22, 366 Wis. 2d 279, 873 N.W.2d 232 (providing that an administrative body had implied authority to reconsider a decision when such reconsideration took place eight days after initial determination); *Bookman v. United States*, 197 Ct. Cl. 108, 112-13, 453 F.2d 1263 (1972) (providing "absent contrary legislative intent or other affirmative evidence, this court will sustain the reconsidered decision of an agency, as long as the administrative action is conducted within a short and reasonable time period").

Kinnard Farms now suggests that DNR can reconsider and modify its decisions regardless of "how much time has passed since the initial decision" in particular when correcting a misapplication of law. Kinnard Br. 50. This frames DNR's role as the ultimate arbiter of its legal authority and duty. But the reality is that the legislature created an independent, separate process for administrative review of agency decisions (and interpretations of law) and

made those decisions subject to judicial review. It is our court system and this Court that ultimately determines the legality of DNR's actions.

CONCLUSION

For the foregoing reasons, this Court should affirm the decisions of the circuit court.

Dated this 10th day of March, 2021.

Respectfully submitted,

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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. The length of this brief is 10,698 words.

Dated: March 10, 2021.

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Andrea Gelatt

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

I hereby certify that:

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

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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: March 10, 2021.

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Andrea Gelatt