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STATE OF WISCONSIN

IN SUPREME COURT

Case 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.

APPEAL FROM A DECISION AND ORDER ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE JOHN W. MARKSON, PRESIDING

BRIEF OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

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INTRODUCTION

This case involves permit conditions for Kinnard Farms Inc.'s concentrated animal feeding operation (CAFO) under Wisconsin' water pollutant discharge elimination system (WPDES) program. The Department of Natural Resources (DNR) prescribes conditions for permits issued to such operations in order "to assure compliance" with certain standards, including effluent limitations and groundwater protection standards, which are integral to protecting public health. Wis. Stat. § 283.31(3), (4).

A group of Kinnard's neighbors challenged Kinnard's WPDES permit as needing certain additional conditions because of the proliferation of groundwater contamination found at or near the farm. After a contested case hearing, the presiding administrative law judge (ALJ) found that Kinnard failed to comply with manure storage requirements, and that fecal contamination was proliferating in nearby drinking wells. To assure compliance with the WPDES standards, the ALJ added an animal unit limit and groundwater monitoring condition to the permit.

By operation of its administrative rules, DNR adopted the ALJ's decision. Nearly a year later, the former DNR Secretary reversed course, stating that 2011 Wis. Act 21 prohibited the animal unit limit and offsite monitoring conditions because they were not "explicitly" provided by statute or rule. The DNR Secretary issued a new decision, which professed to be the final decision of the agency, and ordered that the two conditions not be added to the permit.

The circuit court correctly reversed. Given the ALJ's findings, offsite groundwater monitoring and an animal unit limit "assured compliance" with effluent limitations and groundwater protection standards, and were therefore a proper exercise of authority under Wis. Stat. § 283.31. Act 21

did nothing to change the meaning or effect of that statute. And even taking Act 21 into account, permit conditions that assure compliance with Wis. Stat. § 283.31(3) are "explicitly permitted." Wis. Stat. § 227.10(2m). Further, while the issue is now moot, the circuit court correctly concluded that the DNR Secretary erred in reversing DNR's decision, given the plain language of its rules of procedure.

STATEMENT OF THE ISSUES

1. Whether DNR has authority to prescribe an offsite groundwater monitoring condition and animal unit limit for a WPDES permit when it finds that such conditions assure compliance with Wis. Stat. § 283.31(3).

The circuit court answered yes.

The court of appeals certified this appeal to this Court without deciding the issue.

This Court should answer yes.

2. Whether the former DNR Secretary could "reconsider" her denial of review under Wis. Admin Code NR § 2.20 and rewrite the agency's final decision when the former DNR Secretary did not grant review under Wis. Admin. Code NR § 2.20 within the code's 14-day time limit.

The circuit court answered no.

The court of appeals certified this appeal to this Court without deciding the issue.

This Court should not address this issue because it meets none of the mootness doctrine's exceptions, but if this Court takes up the question, it should answer no.

ORAL ARGUMENT AND PUBLICATION

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

STATEMENT OF THE CASE

I. Legal background.

A. Federal Clean Water Act and WPDES program.

1. Clean Water Act's NPDES program.

In 1970, Congress enacted the Clean Water Act ("the Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *Andersen v. DNR*, 2011 WI 19, ¶ 33, 332 Wis. 2d 41, 796 N.W.2d 1. To achieve this goal, Congress empowered the Environmental Protection Agency (EPA) to administer the National Pollution Discharge Elimination System (NPDES). *See* 33 U.S.C. §§ 1311(a), 1342. The Act prohibits the discharge of a pollutant by any person from any point source to navigable waters except when authorized by a permit issued under the NPDES program. *See* 33 U.S.C. §§ 1311(a), 1342; *see also Waterkeeper All., Inc. v. U.S. E.P.A.*, 399 F.3d 486, 491 (2d Cir. 2005). A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged," including a ditch, well, or "concentrated animal feeding operation." 33 U.S.C. § 1362(14).

The Act mandates that every permit contain "(1) effluent limitations that reflect the best practicable control technology available to achieve pollution reduction, 33 U.S.C. § 1311(b)(1)(A), and (2) any more stringent pollutant discharge limitations necessary to meet the

water quality standards of the applicable body of water, § 1311(b)(1)(C)." *Andersen*, 332 Wis. 2d 41, ¶ 33 (footnotes omitted). The Act defines "effluent limitation" as "any restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." 33 U.S.C. § 1362(11); *see also Andersen*, 332 Wis. 2d 41, ¶ 10 n.3. Effluent limitations, as they relate to Wisconsin law, will be discussed in further detail below.

The Act authorizes EPA to allow states to administer their own permitting programs in lieu of the NPDES scheme, so long as those state programs meet certain federal requirements. 33 U.S.C. § 1342(b); *Andersen*, 332 Wis. 2d 41, ¶¶ 34–36. States are free to implement requirements that are more stringent than the federal program. 40 C.F.R. § 123.1(i); *see also* 40 C.F.R. § 123.25.

Permits issued by authorized states are subject to review by EPA. 33 U.S.C. § 1342(d). If EPA objects to a state permit and the state does not change the permit to address EPA's concerns, EPA may issue its own permit for the facility. 33 U.S.C. § 1342(d)(4). A state's proposed permit program "shall not be approved if the EPA determines that adequate authority does not exist for the state to issue permits which apply, and insure compliance with, the requirements of the Act and of 40 C.F.R. pt. 123." *Andersen*, 332 Wis. 2d 41, ¶ 36; *see also* 33 U.S.C. § 1342(b)(1)(A), (b)(2)(A), (c)(1). EPA can withdraw its approval of a state permit program and take over the program if it finds that the state is not administering the program in accordance with the Act's requirements. 33 U.S.C. § 1342(c)(3); 40 C.F.R. § 123.63(a).

2. WPDES program.

In 1974, EPA approved Wisconsin's WPDES permit program. *Andersen*, 332 Wis. 2d 41, ¶ 37. DNR administers the WPDES program, Wis. Stat. § 283.001(2), which is subject to federal oversight, 33 U.S.C. § 1342(c), (d); *Andersen*, 332 Wis. 2d 41, ¶¶ 39–40. Unlike the NPDES program, the WPDES program covers discharges to groundwater and requires compliance with groundwater protection standards. *See* Wis. Stat. § 283.01(20) (defining "[w]aters of the state" to include groundwater); Wis. Stat. § 283.31(3)(f).

An owner or operator of a point source may not discharge pollutants into waters of the state unless it does so under a lawful WPDES permit issued by DNR. Wis. Stat. §§ 283.31(1), 283.37. Like federal law, Wisconsin law defines "[p]oint source" to include CAFOs. Wis. Stat. § 283.01(12)(a).

B. WPDES permits for large livestock facilities.

1. WPDES permit application process.

WPDES permits are required for large CAFOs, that is, animal feeding operations with one thousand animal units or more.[1] Wis. Admin. Code NR §§ 243.03(31), 243.11. The CAFO may not discharge pollutants from manure or process wastewater into waters of the state until DNR has issued an

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[1] An animal unit is "a unit of measure used to determine the total number of single animal types or combination of animal types, as specified in s. NR 243.11, that are at an animal feeding operation." Wis. Admin. Code NR § 243.03(5). Chapter NR 243 provides methods for calculating the number of animal units. *See* Wis. Admin. Code NR § 243.05. As part of an application for a CAFO WPDES permit, the permittee is required to specify "the expected number of animal units at the operation for the first year of the permit and during the permit term." Wis. Admin. Code NR § 243.12(2)(a)6.

individual WPDES permit or has issued a general permit allowing for such discharges.[2] Wis. Stat. § 283.31(1); Wis. Admin. Code NR § 243.11(3)(a).

Once DNR receives a WPDES permit application, DNR must notify the public and receive comments for at least 30 days and must hold a public hearing if requested. Wis. Stat. §§ 283.39, 283.49.

WPDES permits last up to five years and may be reissued for additional five-year terms. Wis. Stat. § 283.53(1). Large CAFOs that hold WPDES permits must reapply for reissuance. Wis. Stat. § 283.53(3)(a). A reissuance application includes information on changes that have occurred during the current permit term, anticipated changes during the upcoming permit term, and any other information DNR requests in order to comply with its environmental analysis and review requirements in Wis. Admin. Code NR ch. 150. Wis. Admin. Code NR § 243.12(1)(d), (2)(b); Wis. Stat. § 283.53(3).

2. Relevant WPDES permit requirements.

WPDES permits generally regulate two basic areas of a CAFO: the production area,[3] and the area where manure is land applied to fields. A final permit application consists of many components related to these two areas, including a

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[2] DNR may issue a WPDES general permit to cover a category or group of CAFOs when DNR has determined that the operations will not be covered by individual permits. Wis. Admin. Code NR § 243.121(1); Wis. Stat. § 283.35. General permits are not at issue in this case.

[3] The "production area" is defined in relevant part as the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas but not CAFO outdoor vegetated areas. Wis. Admin. Code NR § 243.03(54).

description of existing and proposed manure storage facilities, process wastewater storage or treatment facilities, groundwater monitoring systems, permanent spray irrigation systems or other landspreading or treatment systems, a complete nutrient management plan, and any other information DNR requests to comply with its environmental analysis and review requirements in Wis. Admin. Code NR ch. 150. Wis. Admin. Code NR § 243.12(2); Wis. Stat. § 283.37.

DNR may issue a permit to a large CAFO for the discharge of certain pollutants

> upon condition that such discharges will meet all the following [requirements], whenever applicable . . . :
>
> (a) Effluent limitations.
>
> (b) Standards of performance for new sources.
>
> (c) Effluent standards, effluents prohibitions and pretreatment standards.
>
> (d) Any more stringent limitations, including those:
>
> 1. Necessary to meet federal or state water quality standards, or schedules of compliance established by the department; or
>
> 2. Necessary to comply with any applicable federal law or regulation; or
>
> 3. Necessary to avoid exceeding total maximum daily loads established pursuant to a continuing planning process developed under s. 283.83.
>
> (e) Any more stringent legally applicable requirements necessary to comply with an approved areawide waste treatment management plan.

> (f) Groundwater protection standards established under ch. 160.

Wis. Stat. § 283.31(3). DNR "shall prescribe conditions for permits issued under this section to assure compliance with the requirements of sub. (3)." Wis. Stat. § 283.31(4).

a. Effluent limitations.

"Effluent limitation" is defined as "any restriction established by the department, including schedules of compliance, 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). Effluent limitations are set out in Wis. Stat. § 283.13.

Effluent limitations include technology-based effluent limitations (TBELs) and water quality-based effluent limitations (WQBELs), among others. *See generally* https://www.epa.gov/npdes/permit-limits-tbels-and-wqbels; (*see also* R. 34:700, App. 19; 34:3835–36, 3842, 3848–49).[4] Relevant to this case, TBELs require permittees to implement the best technologies that are used to reduce the amount of pollutants discharged from a facility. *See* Wis. Stat. § 283.13(2)(a) (discharges must comply with "[t]he application of the best practicable control technology currently available").

Effluent limitations and other federally required permit terms have been promulgated for categorical industries in many areas of the Wisconsin administrative code, including

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[4] "R. 34" refers to the agency record in this matter, which was provided to the Court on a CD. "App." refers to Kinnard's Appendix, filed with this Court on Feb. 4, 2021. "Intervenor App." refers to the Appendix of the Legislative Intervenors (defined below), filed with this Court on Feb. 4, 2021.

for CAFOs in Wis. Admin. Code NR ch. 243. CAFO TBELs "are based on proper manure and process wastewater storage/containment (*e.g.*, 180 days for liquid manure) and land application (adequate acreage for nutrients produced by the livestock) practices." (R. 34:3848; 34:677, App. 027).[5]

Examples of TBELs for CAFOs in NR ch. 243 include the production area discharge requirement at Wis. Admin. Code NR § 243.13(2), which does not allow a discharge of manure to a navigable water except under certain site-specific conditions, and the requirement for a CAFO to have 180 days of properly designed storage. Wis. Admin. Code NR §§ 243.13(2), 243.15(3)(i)–(k); (*see also* R. 34:665, App. 015.) The reason for the 180-day requirement is to allow for sufficient storage at a CAFO to contain manure produced by the herd through the winter months when spreading of manure is restricted to emergencies only. Wis. Admin. Code NR § 243.14(7)(a). Thus, the permittee must "operate and maintain [manure] storage facilities or system such that the 180–day design requirement is met for all animals onsite." Wis. Admin. Code NR § 243.17(3)(a).

Design volume for providing 180 days of storage for liquid manure "shall be calculated based on the maximum animals present at an operation for the period of time liquid manure and other wastes mixed with the liquid manure are to be stored during any 180-day period and other design considerations." Wis. Admin. Code NR § 243.15(3)(k). "Liquid manure and process wastewater storage and containment facilities shall be constructed with permanent markers to clearly indicate the margin of safety level and maximum operating levels." Wis. Admin. Code NR § 243.15(3)(e). "Liquid manure storage and containment facilities shall also

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[5] Federal rules require "adequate storage." 40 C.F.R. § 122.42(e)(1)(i).

have a marker near the bottom of the facility indicating the level at which the facility provides 180 days of storage." *Id.*

Another relevant TBEL is found in the CAFO nutrient management plan, which provides the amounts, timing, locations, and methods for land application of manure and process wastewater. *See generally* Wis. Admin. Code NR § 243.14; (R. 34:677, App. 27); *see also Waterkeeper All.*, 399 F.3d at 501–02 (holding that, under the Act, the terms of nutrient management plans are effluent limitations under the parallel definition).

A nutrient management plan is a required component of a WPDES permit application. Wis. Admin. Code NR § 243.14(1)(a); *see also* 40 C.F.R. §§ 122.42(e)(1), 412.4. CAFO owners or operators are responsible for the storage, management, and land application of all manure and process wastewater generated by the operation. Wis. Admin. Code NR §§ 243.142(1), 243.14(2). A nutrient management plan is designed to prevent manure or other wastewater runoff from fields to surface waters. The nutrient management plan is also designed to minimize the runoff of nutrients from the land to surface water or leaching of nutrients to groundwater by ensuring applied nutrients meet crop needs.[6] The nutrient management plan requires a CAFO to manage manure and process wastewater following specific procedures restrictions and prohibitions, *e.g.*, Wis. Admin. Code NR § 243.14(2)–(10), including manure storage design of 180 days, Wis. Admin. Code NR § 243.14(9). As part of the nutrient management plan, DNR "may require the permittee to implement practices . . . when necessary to prevent exceedances of groundwater quality standards," including restrictions on nitrogen and

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[6] *See* Wis. Dep't of Nat. Res., *Nutrient Management Planning*, https://dnr.wisconsin.gov/topic/CAFO/NutrientManagementPlan.html.

phosphorus loadings or other nutrients and pollutants, restrictions on winter landspreading, and other management or site restrictions. Wis. Admin. Code NR § 243.14(10). Further, when land applying manure, "manure or process wastewater may not cause the fecal contamination of water in a well." Wis. Admin. Code NR § 243.14(2)(b)3. This effluent limitation is established to protect public health, and corresponds with the bacteria total coliform ground water protection standard, discussed below.

CAFO permits also include WQBELs. To ensure compliance with surface water quality standards and groundwater standards, Wis. Admin. Code NR § 243.13(1) provides that "the department shall include conditions in a WPDES permit for the production area and ancillary service and storage areas . . . that are necessary to achieve compliance with surface water and groundwater quality standards contained in chs. NR 102 to 105, 140 and 207."

b. Groundwater protection standards.

Wisconsin Stat. § 283.31(3)(f) and (4) authorize WPDES permit conditions to assure compliance with groundwater standards under Wis. Stat. ch. 160. Wisconsin Stat. ch. 160 authorizes "the use of numerical standards in all groundwater regulatory programs" which, "upon adoption, will become criteria for the protection of public health and welfare." Wis. Stat. § 160.001. Thus, chapter 160 establishes "an administrative process which will produce numerical standards, comprised of enforcement standards and preventive action limits, for substances in groundwater." Wis. Stat. § 160.001(1). Further, "administrative procedures also provide for minimizing the concentration of substances in groundwater." *Id.*

The state groundwater standards and evaluation and response procedures for standard exceedances are found in Wis. Admin. Code NR ch. 140. That chapter applies to all facilities, activities, and practices that may affect groundwater quality and that are regulated under Wis. Stat. ch. 283. Wis. Admin. Code NR § 140.03. Relevant public health groundwater quality standards include total bacteria coliform (a family of bacteria which includes e-coli)[7] and nitrates. Relevant here, table 1 in subchapter II of Wis. Admin. Code NR ch. 140 establishes a public health standard for "Bacteria, Total Coliform" set at zero. Wisconsin Admin. Code NR ch. 140 provides for responses when a substance of health or welfare concern is attained or exceeded (*e.g.*, bacteria total coliform), and such responses include "the installation and sampling of groundwater monitoring wells." *See* Wis. Admin. Code NR § 140.24(4), Table 5; *see also* Wis. Admin. Code NR § 140.26(2), Table 6.

Aside from Wisconsin Admin. Code NR ch. 140, Wis. Admin. Code NR ch. 243 requires discharges from a CAFO to comply with groundwater quality standards. For example, Wis. Admin. Code NR § 243.13(5)(a) provides that "[i]f a discharge of manure or process wastewater pollutants to waters of the state occurs, including a discharge allowed [by the permit], the discharge shall comply with groundwater and surface water quality standards." In addition, Wis. Admin. Code NR § 243.14(2)(b)6. provides that "[l]and application practices shall maximize the use of available nutrients for crop production, prevent delivery of manure and process wastewater to waters of the state, and minimize the loss of nutrients and other contaminants to waters of the

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[7] *See* Wis. Dep't of Nat. Res., Bureau of Drinking Water and Groundwater, *Bacteriological Contamination of Drinking Water Wells*, https://dnr.wi.gov/files/pdf/pubs/DG/DG0003.pdf.

state to prevent exceedances of groundwater and surface water quality standards." *See also* Wis. Admin. Code NR § 243.14(10).

Under Wisconsin law, DNR "shall prescribe conditions for permits" "to assure compliance with" effluent limitations and groundwater protection standards. Wis. Stat. § 283.31(4), (3)(a), (f).

C. Process for challenging WPDES permitting decisions.

Any permittee, applicant, affected state, or five or more affected persons may petition DNR for review of DNR's permitting decision and "the reasonableness of or necessity for any term or condition" of any permit. Wis. Stat. § 283.63(1). If DNR grants the petition, DNR must hold a public hearing on the issues raised. Wis. Stat. § 283.63(1)(b), (d).

If an ALJ is assigned to make the decision, the ALJ "shall prepare findings of fact, conclusions of law and decision subsequent to each contested case heard." Wis. Admin. Code NR § 2.155(1); *see also* Wis. Admin. Code NR § 2.155(2). "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." Wis. Admin. Code NR § 2.155(1).

Wisconsin Admin. Code NR § 2.20(1) provides that any party to a contested case who is adversely affected by a final decision after a contested case hearing may, "within 20 days after issuance of the decision, file a written petition for review by the [DNR] secretary or the secretary's designee." "Within 14 days of the receipt of the petition, the secretary shall decide whether or not to grant the requested review." Wis. Admin. Code NR § 2.20(3). If the secretary grants review, the

secretary may "order the filing of briefs, presentation of oral argument, or a rehearing of all or part of the evidence presented at the original public hearing, or any combination thereof." *Id.*

If the secretary does not grant NR § 2.20 review and if DNR does not petition for judicial review, the ALJ's contested case hearing decision is the final decision of the agency. Wis. Admin. Code NR §§2.155(1), 2.20(3).

Any person adversely affected by DNR's decision may then petition for judicial review of that decision under Wis. Stat. §§ 227.52, 283.63(2). A petition for secretary review under NR § 2.20 "is not a prerequisite for appeal or review under ss. 227.52 to 227.53, Stats." Wis. Admin. Code NR § 2.20(4).

II. Factual and procedural background.

A. DNR issues Kinnard a WPDES permit, local residents challenge it, and a contested case hearing is held.

Kinnard runs a large CAFO in Kewaunee County. (R. 34:0226.) In 2012, Kinnard sought to expand its operation by adding a second site ("Site 2") and over 3,000 animal units. (R. 34:0226.) That required approval from DNR and a new WPDES permit, which it applied for and received on August 16, 2012. (R. 34:0045.) Kinnard's WPDES permit was effective September 1, 2012, and was set to expire August 31, 2017. (R. 34:0045–74, *see also* Intervenor App. 120–51.)

After DNR issued the permit, five local residents (the individual petitioners here) sought administrative review under Wis. Stat. § 283.63. (R. 34:0001–32.) The petitioners lived near Kinnard's proposed dairy expansion at Site 2, had private drinking wells, and expressed concern about groundwater contamination from Kinnard's expanded dairy,

given, among other things, the karst geology underlying the area. (R. 34:03–04.) Karst geology is characterized by shallow soils and fractured bedrock, which increase the risk of groundwater contamination from surface activities. (R. 34:672, App. 22.)

The petitioners' claims included that the permit improperly failed to require monitoring to evaluate impacts to groundwater, (R. 34:12–17), and to set a maximum number of animal units, (R. 34:17–21).

DNR granted the petition for a contested case hearing and referred the matter to the Division of Hearings and Appeals, where an ALJ presided over the hearing. (R. 34:39–110.)

On October 29, 2014, the ALJ issued findings of fact, conclusions of law and an order. (R. 660 80, App. 12–30.) The ALJ ordered that DNR modify the permit to include a plan for groundwater monitoring with no fewer than six wells, and "if practicable," at least two of which monitored groundwater quality impacts from off-site spreading. (R. 34:679, App. 29.) The ALJ further ordered that the permit be modified to reflect a maximum number of animal units at the facility in addition to current storage requirements. (R. 34:679, App. 29.)

Regarding monitoring, the ALJ noted that "the level of groundwater contamination including E Coli bacteria in the area at or near the project site" is "very unusual," (R. 34:670, App. 20), as members of the public testified "that up to 50 percent of private wells in the Town of Lincoln are contaminated and that as many as 30 percent of wells had tested positive for E.coli bacteria." (R. 34:670, App. 20.) "No witness for the dairy or the DNR disputed these numbers." (R. 34:670, App. 20.) "Numerous witnesses testified credibly and forcefully about the hardship and financial ruin that well

water contamination has had on their businesses, homes and daily life." (R. 34:670, App. 20.) Many witnesses whose homes were located five miles or fewer from the Kinnard Farm or a Kinnard landspreading field testified as to the contamination of their wells, and their belief that Kinnard Farms was the only likely source of the contamination. (R. 34:671, App. 21.)

Based on the proximity of Kinnard's operation to the contaminated wells and the likely presence of karst features including fractured bedrock underlying the area, the ALJ concluded that it was essential for DNR to "utilize its clear regulatory authority" to ensure that Kinnard Farms "meet its legal obligation under Wis. Admin. Code NR [§] 243.14(2)(b)(3) not to contaminate well water with fecal bacteria from manure or process wastewater." (R. 34:671, App. 21.) Finding that the area was "'susceptible to groundwater contamination' within the meaning of [Wis. Admin. Code] § NR 243.15(3)[(c)2.a.]," the ALJ ordered the WPDES permit be modified "to include a groundwater monitoring plan which includes no less than six monitoring wells." (R. 34:672, App. 22.) "If practicable, the permit-holder shall include at least two monitoring wells which are located off-site[8] on voluntarily willing neighboring properties with water contamination issues or risks." (R. 34:672, App. 22.)

The ALJ further concluded that DNR should modify the permit to reflect an animal unit maximum. (R. 34:673, App. 23.) The ALJ acknowledged that "[t]he number of animal units is not an effective sole method by which the DNR determines WPDES permit compliance." (R. 34:673, App. 23.) Since "[t]he measure of compliance with a discharge permit is how waste is managed," a practical short-term measure of whether the facility is exceeding the amount of waste it is able

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[8] "Offsite" means areas where manure is land applied, rather than at the production area.

to store and land apply is by looking at the amount of manure in a pit. (R. 34:673, App. 23.) However, an animal unit maximum helps show when problems are likely to occur "because both generation and the discharge of manure is directly related to the number of animal units on site." (R. 34:673, App. 23.) The ALJ 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. (R. 34:673, App. 23.) Under these site-specific circumstances, the ALJ ordered that the permit be modified to state a maximum number of animal units at the facility. (R. 34:673, App. 23.)

B. The former DNR Secretary denies review of the ALJ's decision, but ten months later reconsiders that denial.

Kinnard petitioned the DNR Secretary for review of the ALJ's decision on November 18, 2014. (R. 34:718); Wis. Admin. Code NR § 2.20. On November 25, 2014, the Secretary denied review, explaining that these issues were amenable to judicial review and that therefore the issues "would most appropriately [be] decided by the courts of this state." (R. 34:719, App. 32.) Kinnard then filed a petition for judicial review in the Kewaunee County Circuit Court. (R. 34:6419–47.) The circuit court dismissed the action, ruling that the ALJ's order was not final because DNR had not yet implemented the permit conditions the ALJ ordered and, therefore, it was not yet judicially reviewable under Wis. Stat. ch. 227. (R. 34:6922–23, App. 38–39.)

After the case was dismissed, DNR consulted with the Wisconsin Department of Justice regarding the application of 2011 Wis. Act 21 to the ALJ's decision. (*See* R. 34:731–41.) After receiving a response, the DNR Secretary then issued a decision and order on September 11, 2015, that rejected the

permit conditions previously imposed. (R. 34:725–41, App. 44–47, *see also* Intervenor App. 43–58.) The Secretary stated that DNR "may not amend the WPDES Permit to include conditions unless those conditions are explicitly required or explicitly permitted by statute or by rule," that animal-unit maximums and off-site groundwater monitoring are not "explicitly required or explicitly permitted by statute or by a rule," and therefore, those conditions "will not be added" to the permit. (R. 34:727, App. 46 (citing Wis. Stat. § 227.10(2m)). Styling her response as a "re-consideration" of her earlier denial of Kinnard's Wis. Admin. Code NR § 2.20 petition, the Secretary explained that her order would "constitute the final agency action for all purposes under ch. 227 in this case." (R. 34:727, App. 46.)

C. The circuit court reverses DNR's 2015 decision.

On October 12, 2015, Clean Wisconsin, an interested environmental group, filed a petition for judicial review in Dane County Circuit Court. (R. 1, Intervenor App. 35–78.) Likewise, the individual petitioners filed a petition for judicial review in Kewaunee County Circuit Court. (Petition, Oct. 12, 2015 (*Cochart v. DNR*, Case No. 15-CV-0091)). The Dane County Circuit Court consolidated these cases into Dane County. (R. 33.) After briefing and oral argument, the circuit court reversed DNR and ruled for petitioners. (R. 42, App. 48–73.)

It first determined that the ALJ's decision became DNR's decision when the Secretary denied Kinnard's Wis. Admin. Code NR § 2.20 petition for review. (R. 42:7–12, App. 54–59.) The court explained that DNR had by rule directed that the ALJ's decision was the final decision of the agency, unless DNR petitioned for judicial review. (R. 42:14–15, App. 61–62.) The court held that the ALJ's

decision became the final decision of DNR because DNR had not petitioned for judicial review. (R. 42:8–9, App. 55–56.) The court determined that the DNR Secretary's attempt to reverse her denial of Kinnard's Wis. Admin. Code NR § 2.20 petition was untimely and beyond her authority. (R. 42:12–17, App. 59–64.)

On the merits, the court determined that DNR has authority to impose the ALJ's permit conditions under Act 21. (R. 42:17–25, App. 64–72.) The court explained that it must read Act 21 in conjunction with other statutes, including those within Wis. Stat. ch. 283. (R. 42:18–19, App. 65–66.) The court held that DNR was authorized to impose an animal unit maximum by its authority under Wis. Stat. § 283.31(3), (4), and (5) and related regulations. (R. 42:19–23, App. 66–70.) The court next held that DNR had authority to impose off-site groundwater monitoring. (R. 42:23–25, App. 70–72.) The court cited Wis. Stat. § 283.31(4), which "requires DNR to establish permit conditions that assure compliance with [ ] effluent limitations." (R. 42:23, App. 70.)

On August 24, DNR filed a notice of appeal, (R. 52), and on August 26, Kinnard filed its own notice of appeal, (R. 53).[9]

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[9] The circuit court later awarded Clean Wisconsin and the individual petitioners their costs and fees under Wis. Stat. § 814.245. DNR also appealed that judgment, (App. 85), which became Case No. 2016AP2502. DNR, Clean Wisconsin, and the Individual Petitioners settled the fee issue, and on May 2, 2019, DNR voluntarily dismissed Case No. 2016AP2502. (App. 146.) The issues related to fees are not before this Court.

D. This Court accepts the Wisconsin court of appeals' certification and grants intervention.

The court of appeals certified the appeal to this Court, and this Court accepted certification on April 9, 2019. (App. 1–2, 4–10.)

On May 2, 2019, DNR filed a motion to modify the briefing schedule, noting that it had determined that certain positions asserted in its briefing to the lower courts were not consistent with controlling law. (*See* DNR Mot. to Modify Br. Schedule, May 2, 2019 (Case No. 2016AP1688)). The Court granted that request. (Order, May 30, 2019 (Case No. 2016AP1688)).

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

E. Reissued WPDES Permit.

While the appeals were pending, Kinnard's 2012 WPDES permit expired, (*see* R. 34:45), and Kinnard applied for and received a new WPDES permit, effective February 1, 2018. (App. 108.) The reissued permit (like the old permit) does not contain offsite groundwater monitoring requirements or an animal-unit maximum. (App. 107–39.) A group of citizens petitioned for a contested case hearing on the new permit, arguing that DNR must impose offsite groundwater monitoring and an animal unit limit. (App. 94–106.) Rather than pursue that contested case further, the parties agreed to await the outcome of this appeal on the animal unit and offsite monitoring issues.

STANDARDS OF REVIEW

In an appeal from a circuit court order reviewing an agency decision, appellate courts review the decision of the agency, not the circuit court. *Hilton ex rel. Pages Homeowners' Ass'n v. DNR*, 2006 WI 84, ¶ 15, 293 Wis. 2d 1, 717 N.W.2d 166. This Court applies de novo review to questions of statutory interpretation and questions regarding the scope of an agency's authority. *Andersen*, 332 Wis. 2d 41, ¶¶ 25–26. "The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law." Wis. Stat. § 227.57(5).

"If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." Wis. Stat. § 227.57(6). "The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record." *Id.* "The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law . . . ." Wis. Stat. § 227.57(8).

SUMMARY OF THE ARGUMENT

Wisconsin Stat. § 283.31(4) requires DNR to include conditions in a WPDES permit when these conditions assure compliance with Wis. Stat. § 283.31(3). DNR thus had statutory authority to include an offsite monitoring requirement and animal unit limit in Kinnard's permit, to assure compliance with effluent limitations and groundwater

protection standards under Wis. Stat. § 283.31(3). Put differently, the conditions that assure compliance with these standards are explicitly permitted by those sections, as contemplated by Wis. Stat. § 227.10(2m).

Here, the ALJ ordered Kinnard to install offsite groundwater monitoring devices, if practicable, to assure compliance with relevant effluent limitations and groundwater protection standards, which include the prohibition on fecal contamination of drinking wells. The ALJ concluded that an animal unit limit was needed to assure compliance because of Kinnard's failure to comply with the 180-day storage capacity effluent limitation. On this record, the conditions were authorized, and this Court should affirm the circuit court.

The question of whether the former DNR Secretary had authority to reconsider her denial of Wis. Admin. Code NR § 2.20 review is moot and meets no exception to the mootness doctrine. To the extent this Court takes up that issue, DNR agrees with the circuit court that the former Secretary erred in reconsidering her denial of Wis. Admin. Code NR § 2.20 review.

ARGUMENT

I. On this record, DNR had authority to prescribe the offsite monitoring requirement and animal unit limit for the 2012 permit.

DNR has authority to prescribe an offsite monitoring condition and animal unit limit for a WPDES permit. While Kinnard's 2012 permit has expired, this Court's ruling will

guide DNR and other parties with respect to Kinnard's active permit and future reissued permits.[10]

A. DNR has authority to prescribe conditions for WPDES permits to assure compliance with the requirements of Wis. Stat. § 283.31(3), including effluent limitations and groundwater protection standards.

This case requires interpretation of Wis. Stat. § 283.31. Statutory interpretation begins with the text, and if the meaning is plain, the court goes no further. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Words receive their "common, ordinary, and accepted" meanings unless they have "technical or special" definitions. *Id.* Statutory language is interpreted in context, as part of a whole, in relation to surrounding or closely-related statutes, and reasonably, to avoid absurd or unreasonable results. *Id.* ¶ 46.

Here, the statutory language is clear and unambiguous. Wisconsin Stat. § 283.31 allows DNR to issue a permit

> for the discharge of any pollutant . . . upon condition that such discharges will meet all the following, whenever applicable, . . .
>
> (a) Effluent limitations.
>
> . . . .
>
> (d) Any more stringent limitations, including those:
>
> . . . .
>
> 2. Necessary to comply with any applicable federal law or regulation; or

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[10] DNR agrees with Kinnard and Legislative Intervenors that this case would meet the mootness doctrine's exceptions.

. . . .

> (f) Groundwater protection standards established under ch. 160.

Wis. Stat. § 283.31(3)(a), (d), (f). Further, "[t]he department shall prescribe conditions for permits issued under this section to assure compliance with the requirements of sub. (3)." Wis. Stat. § 283.31(4). "Such additional conditions shall include at least the following . . . ." *Id.*

Notably, Wis. Stat. § 283.31(4) requires DNR to "prescribe conditions" to assure compliance with Wis. Stat § 283.31(3). It does not require DNR to promulgate *rules* to assure compliance with Wis. Stat § 283.31(3). *Maple Leaf Farms, Inc. v. DNR*, 2001 WI App 170, ¶ 30, 247 Wis. 2d 96, 633 N.W.2d 720 (stating that "while Wis. Stat. § 283.31(4) directs the DNR to prescribe conditions for permits to assure compliance with water quality standards, the statute does not require the DNR to promulgate such conditions by rule"). Nor do the enumerated conditions in subsection (4) constitute an exhaustive list. Wis. Stat. § 283.31(4) (stating that DNR shall prescribe conditions for permits, which "shall include at least the following").

This plain language is reinforced by considering the nature of permit conditions. Conditions for WPDES permits are prescribed case-by-case, based on the specific facts surrounding a permittee, in a way that "closely balance[s] the specific needs of the permit holder with public environmental concerns." *Maple Leaf Farms*, 247 Wis. 2d 96, ¶ 31. This Court has affirmed that general concept of DNR's permitting authority: "[a]s with many [ ] environmental statutes," DNR "utilizes its expertise and exercises its discretion to make what, by necessity, are fact-specific determinations." *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, ¶ 43, 335 Wis. 2d 47, 799 N.W.2d 73. Thus, permit conditions are not standards of

general application themselves. *See* Wis. Stat. §§ 227.01(13), 227.10(1). Rather, the permit conditions are specifically tailored to the particular applicant to assure compliance with state standards and requirements, as well as applicable federal standards and regulations.[11] Wis. Stat. § 283.31(3), (4).

Allowing a flexible approach to WPDES permit conditions is not only the law, it also makes practical sense. If the Legislature had required permit writers to include in permits "only restatements of the precise language contained in the administrative code," this "would make the issuance of permits an untimely, cumbersome and inflexible exercise that would not benefit permit holders at all." *Maple Leaf Farms*, 247 Wis. 2d 96, ¶ 31. It makes more sense that the "legislature would allow the DNR flexibility in drafting conditions in permits," which "allows the DNR to work individually with permit holders to fashion permits that more closely balance the specific needs of the permit holder with public environmental concerns." *Id.* In fact, as the *Maple Leaf* court explained, permittees can be the *beneficiary* of flexible conditions. *Id.* ¶ 32.

While Wis. Stat. § 283.31 gives DNR discretion to prescribe conditions, such discretion does not give DNR unfettered authority. Whether a condition assures compliance is a fact-specific inquiry determined on a case-by-case basis, and is reviewable. If DNR prescribes a condition for a permit

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[11] *See, e.g.*, Wis. Stat. §§ 283.11(1) ("The department shall promulgate by rule effluent limitations, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards . . . ."), 283.19 (requiring DNR to promulgate by rule standards of performance), 283.21(1)(a) (requiring DNR to promulgate by rule a list of toxic pollutants or combinations of pollutants subject to this chapter), 283.21(1)(b) (permitting DNR to promulgate by rule an effluent standard).

that a party does not believe assures compliance with Wis. Stat. § 283.31(3), the party could challenge that condition in a contested case hearing and judicial review. Wis. Stat. § 283.63(1) (allowing review by the department of "the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit"); *see also* Wis. Stat. §§ 227.52, 283.63(2).

Given the statute's plain language and context, DNR is required to prescribe conditions for permits to assure compliance with Wis. Stat. § 283.31(3), which includes effluent limitations and groundwater protection standards.

B. In some cases, and on this record, an offsite monitoring condition and animal unit limit assure compliance with Wis. Stat. § 283.31(3).

1. The offsite groundwater monitoring condition here assures compliance with effluent limitations and groundwater protection standards.

Under Wis. Stat. § 283.31 and corresponding regulations, offsite groundwater monitoring may be an appropriate permit condition to assure compliance with effluent limitations and groundwater protection standards required by Wis. Stat. § 283.31(3).

Here, the ALJ found that offsite monitoring, if practicable, would assure compliance with effluent limitations, including Wis. Admin. Code NR § 243.14(2)(b)3., which prohibits fecal contamination of a well by landspreading manure or process wastewater. (R. 34:677, App. 27). Given the proximity of contaminated wells and the likely presence of karst features including fractured bedrock underlying the area, the ALJ concluded that it was essential for DNR to "utilize its clear regulatory authority" to ensure

that Kinnard "meet its legal obligation under Wis. Admin. Code NR [§] 243.14(2)(b)(3) not to contaminate well water with fecal bacteria from manure or process wastewater." (R. 34:671, App. 21.) Also finding that the area was "'susceptible to groundwater contamination' within the meaning of [Wis. Admin. Code] § NR 243.15(3)[(c)2.a.],"[12] the ALJ ordered the WPDES permit be modified to include a groundwater monitoring plan which includes no less than six monitoring wells, two of which should be located offsite, if practicable. (R. 679, App. 29.)

On this record, offsite monitoring would also assure compliance with groundwater protection standards found in Wis. Admin. Code NR ch. 140.[13] The ALJ found that "the level of groundwater contamination including E Coli bacteria in the area at or near [Kinnard's] project site" is "very unusual," (R. 34:670, App. 20), and nearby neighbors testified about being sickened by e-coli contaminated well water within short distances from Kinnard's Site 2 and landspreading fields. (R. 34:670–71, App. 20–21). Further, members of the public testified "that up to 50 percent of private wells in the Town of Lincoln are contaminated and that as many as 30 percent of wells had tested positive for E.coli

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[12] Wisconsin Admin. Code NR § 243.15(3)(c)2.a. is a production area regulation, and supports the "onsite" groundwater monitoring order in the ALJ's decision. (R. 34:677, App. 27.) DNR's authority to require onsite groundwater monitoring is not at issue in this case. Nor is this case about whether DNR has authority to require groundwater monitoring in the vicinity of "permanent spray irrigation systems." Wis. Admin. Code NR § 243.15(7).

[13] Wisconsin Admin. Code NR ch. 140 provides for groundwater monitoring as one of the responses DNR can take when groundwater standards are exceeded. (*See* Statement of the Case sec. I.B.2.b.)

bacteria." (R. 34:670, App. 20.) "No witness for the dairy or the DNR disputed these numbers." (R. 34:670, App. 20.)

The ALJ found, based on site-specific facts in the record, that Kinnard was located in an area where the geology and environmental conditions made offsite groundwater monitoring an appropriate permit condition to assure compliance with effluent limitations and groundwater protection standards. Because groundwater contamination was a serious concern both on-site and offsite where manure was being spread, the ALJ ordered that Kinnard install six monitoring wells, including two offsite on landspreading areas "[i]f practicable" on "voluntarily willing neighboring properties with water contamination issues or risks." (R. 34:672, App. 22.)

As applied to these facts, the prescribed conditions assure compliance with Wis. Stat. § 283.31(3), exactly as Wis. Stat. § 283.31(4) directs.

2. The animal unit limit here assures compliance with relevant technology based effluent limitations.

As with the offsite monitoring, an animal unit limit may be an appropriate CAFO permit condition to assure compliance with effluent limitations. The effluent limitations most pertinent here are production area discharge requirement in Wis. Admin. Code NR § 243.13, which does not allow a discharge of manure to a navigable water except under certain site-specific conditions, and the requirement for a CAFO to have 180 days of properly designed storage, in Wis. Admin. Code NR §§ 243.13(2) and 243.15(3)(i)–(k). Also relevant are the nutrient management plan requirements in Wis. Admin. Code NR § 243.14. (*See* Statement of the Case sec. I.B.2.a.)

A CAFO's number of animal units is relevant to how much manure will be produced, and therefore, properly stored. *See, e.g.*, Wis. Admin. Code NR § 243.15(3)(k) (design volume for providing 180 days of storage for liquid manure "shall be calculated based on the maximum animals present at an operation" during certain times); *see also* Wis. Admin. Code NR § 243.12(3)(c)4. (permittees shall demonstrate compliance with the 180-day design storage capacity requirement when a facility is proposing certain increases in animal units). Failure to properly manage manure storage creates a risk of storage overflow and potential groundwater and surface water contamination. In certain circumstances, an animal unit condition may assure compliance with storage requirement effluent limitations.[14]

Typically, the 180-day storage requirement is monitored through required markers. "Liquid manure and process wastewater storage and containment facilities shall be constructed with permanent markers to clearly indicate the margin of safety level and maximum operating levels." *See* Wis. Admin. Code NR § 243.15(3)(e). Liquid manure storage and containment facilities "shall also have a marker near the bottom of the facility indicating the level at which the facility provides 180 days of storage." *Id.*; *see also* Wis. Admin. Code NR § 243.17(3)(b).

In this case, the ALJ determined that it was appropriate to require Kinnard's permit to have an animal unit limit because (1) placing a limit on the number of animal limits was directly related to generation and discharge of

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[14] Depending on the facts, DNR may use various approaches to assure compliance with the storage requirement effluent limitation other than the approach found appropriate in this case, including its inspection authority to observe the level of manure in storage facilities, Wis. Stat. § 283.55(2).

manure, and (2) 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. (R. 34:673, App. 23.) Thus, in this particular case, and for that particular 2012 permit, an animal unit limit would assure compliance with the 180-day storage TBEL, when other methods had not.

The animal unit number assured compliance with effluent limitations under Wis. Stat. § 283.31(3). DNR had authority to include it in Kinnard's 2012 permit. Wis. Stat. § 283.31(4).

C. Legislative Intervenors and Kinnard misread Wis. Stat. § 227.10(2m).

Legislative Intervenors and Kinnard contend that this case is primarily about Act 21. They read Act 21 to mean that DNR can no longer prescribe WPDES permit conditions under Wis. Stat. ch. 283 unless the condition is written verbatim, word for word, in a statute, or administrative rule. They argue that, because offsite monitoring and animal unit conditions are not written word for word in a statute or regulation, they are prohibited under Wis. Stat. § 227.10(2m).

This position erroneously interprets Act 21 as eclipsing express grants of agency authority found in other statutes. Further, the application of Wis. Stat. § 283.31 here is entirely consistent with Wis. Stat. § 227.10(2m), because conditions that assure compliance with Wis. Stat. § 283.31(3) are explicitly permitted by Wis. Stat. § 283.31(4).

1. Act 21 did not alter the meaning or effect of Wis. Stat. § 283.31.

Legislative Intervenors and Kinnard wrongly assume that an amendment to the Wisconsin Administrative Procedure Act effected sweeping changes to various

regulatory programs, including management of the WPDES permitting program. The Legislature, however, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The relevant provision of Act 21, Wis. Stat. § 227.10(2m), provides that "[n]o agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a [properly promulgated] rule." Nothing in this language purports to alter the text or meaning of other statutes.

Nor could it. "[A] subsequent legislature cannot by a later act declare the construction which was intended by a former enactment so as to make such construction binding upon a court faced with making a construction of the earlier act." *State ex rel. Larson v. Giessel*, 266 Wis. 547, 555, 64 N.W.2d 421 (1954), *disapproved of on other grounds by Fulton Found. v. Dep't of Taxation*, 13 Wis. 2d 1, 108 N.W.2d 312 (1961); *accord Moorman Mfg. Co. v. Indus. Comm'n*, 241 Wis. 200, 208, 5 N.W.2d 743 (1942). It is one thing for a legislature to define terms used in statutes; it is "something else," however, "for them to prescribe that fair meaning will not govern. That cannot be done." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 233 (2012) (discussing interpretive-direction canon). Indeed, legislation purporting to dictate the judiciary's interpretation would pose significant separation-of-powers concerns. *See id.*; *see also Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (recognizing that Congress "cross[es] the line from legislative power to judicial power" when directing how judiciary must interpret law in particular

cases) (per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment).

What Wis. Stat. § 227.10(2m) actually says is entirely consistent with the application of Wis. Stat. § 283.31(3) and (4) here. It provides that no agency "may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency" unless it is "explicitly required or explicitly permitted by statute or by a rule." Wis. Stat. § 227.10(2m).

That poses no bar here because the statutes explicitly permit what was done: Wis. Stat. § 283.31(4) requires DNR to prescribe conditions to assure compliance with Wis. Stat. § 283.31(3). Thus, conditions that assure compliance are "explicitly permitted" by statute.

Legislative Intervenors and Kinnard read "explicitly permitted" to mean every possible condition must be written down, verbatim, word-for-word, in a statute, or regulation. But Wis. Stat. § 227.10(2m) does not say that conditions must be stated word-for-word in a statute or regulation; rather, it just says that conditions must be "explicitly permitted" by statute or rule. Here, conditions that assure the relevant compliance are explicitly permitted.

This Court's reasoning in *Wisconsin Association of State Prosecutors* is instructive. *See Wis. Ass'n of State Prosecutors ("WASP") v. Wis. Emp't Relations Comm'n*, 2018 WI 17, 380 Wis. 2d 1, 907 N.W.2d 425. This Court held that the Wisconsin Employment Relations Commission (WERC) did not exceed its statutory authority when it promulgated rules requiring labor organizations to submit a "petition for election." *Id.* ¶ 47. This was because the agency's power "to require a petition for election as a demonstration of interest is necessarily authorized by the statutory mandate that the

ballot 'shall' include only the names of labor organizations 'having an interest' in representation." *Id.*

In upholding the WERC rules, this Court reasoned that "[a] mandate is a command, and '[c]ommand includes permission. To mean to command any act to be done, and not to mean to permit it to be done, is impossible.'" *Id.* ¶ 42 (citing Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 193–94) (quoting Jeremy Bentham, *The Works of Jeremy Bentham* 231, 262 (John Bowring ed., 1843)). WERC's enabling statute "expressly authorized . . . any predicate acts which are necessary to carrying out its mandated duties," despite those predicate acts not themselves being spelled out word-for-word in the enabling legislation. *See id.* ¶¶ 38, 42; *cf. Whitman*, 531 U.S. at 465 (reaffirming EPA's discretion to determine pollutant limits "requisite to protect the public health"). Therefore, "the statutory mandates are also statutory authorizations, and '[a]uthorization of an act also authorizes a necessary predicate act.'" *Id.* ¶ 42. WERC thus was "expressly authorized under the statute to execute any predicate acts which are necessary to carrying out its mandated duties." *Id.*

While this case is about DNR's authority to "prescribe conditions" rather than promulgate rules, *WASP*'s reasoning is instructive. Wisconsin Stat. § 283.31(4) contains a mandate, namely, that DNR prescribe conditions to assure compliance with Wis. Stat. § 283.31(3). The statute expressly authorizes DNR to prescribe permit conditions that assure compliance with subsection (3); they need not be stated verbatim in a statute or rule. *See WASP*, 380 Wis. 2d 1, ¶ 42. Indeed, Wis. Stat. § 823.31(4) specifically contemplates that its list of conditions DNR could prescribe is not exhaustive. Wis. Stat. § 283.31(4) ("The department shall prescribe conditions for permits issued under this section to assure compliance with the requirements of sub. (3). *Such additional*

conditions shall include at least the following . . .") DNR's power is not implied or inferred from Wis. Stat. § 283.31(3) and (4). It is explicit and mandatory.

Legislative Intervenors and Kinnard rely on *Wisconsin Legislature v. Palm*, *Papa v. Wisconsin Department of Health Services*, and *Myers v. Department of Natural Resources*, but those cases do not support their reading of DNR's authority. At most, they teach the importance of paying careful attention to the language of the statutes that give agencies their authority.

Palm notes that Wis. Stat. § 227.10(2m) contains an "explicit authority requirement" that requires courts to narrowly construe imprecise delegations of power to administrative agencies. *Wis. Leg. v. Palm*, 2020 WI 42, ¶ 52, 391 Wis. 2d 497, 942 N.W.2d 900. But Wis. Stat. § 283.31 is not an imprecise delegation of power. The statute mandates that DNR prescribe conditions to assure compliance with the requirements of Wis. Stat. § 283.31(3). *Palm* dealt with an entirely different topic and does not undermine the explicit and mandatory language in Wis. Stat. § 283.31.

Nor is *Papa v. Wisconsin Department of Health Services* helpful to their position. *Papa* required this Court to determine the scope of DHS's authority to recoup payments made to Medicaid service providers. *Papa v. DHS*, 2020 WI 66, ¶ 2, 393 Wis. 2d 1, 946 N.W.2d 17. This Court concluded that DHS's recoupment policy, which essentially sought recoupment when "the nurse's records were not perfect," *Id.* ¶ 8, exceeded its recoupment authority under the statute. *Id.* ¶¶ 32–42. The records policy did not fall within the topics covered under the statute or relevant regulation; there was no holding that this policy ran afoul of Act 21 because the policy was not written verbatim in the statute or administrative rule. *Id.*

Legislative Intervenors also discuss *Myers v. Wisconsin Department of Natural Resources* but, like *Papa*, *Myers* does not support its position. In *Myers*, DNR amended a pier permit to include an ongoing condition that the permit could be rescinded if certain requirements were not met. *Myers v. DNR*, 2019 WI 5, ¶¶ 19, 23, 385 Wis. 2d 176, 922 N.W.2d 47. This Court concluded that this condition was outside DNR's authority under Wis. Stat. ch. 30 because, among other things, the relevant statute "uses the past tense 'met' when it lists the requirements for granting a permit, thus signifying that the conditions must be fulfilled before the permit is granted." *Id.* ¶ 24. *Myers* did not hold that the permit conditions must be stated verbatim in a rule. Rather, *Myers* held DNR's specific statutory authority did not allow a future condition to be placed in the permit after the permit was issued. *Id.* ¶¶ 22–24. Unlike pier permits, CAFO permits contemplate ongoing review and monitoring.

None of these cases change the Court's task: to look at the specific enabling statutes and regulations to determine the scope of an agency's authority. Here, DNR has explicit authority to prescribe conditions that assure compliance with effluent limitations and groundwater protection standards and other requirements of Wis. Stat. § 283.31(3). Conditions that assure compliance fall under this statutory grant of authority.

Legislative Intervenors and Kinnard also cite Wis. Stat. § 227.11(2)(a) to argue that agencies no longer derive authority from broad statutes describing an agency's general duties or legislative purpose. (*See* Legislative Intervenors Br. 30–31; Kinnard Br. 29–30.) Wisconsin Stat. § 227.11 is irrelevant here. That statute is about agency rulemaking authority, and this case is about prescribing permit conditions.

But even assuming it were relevant, and even if their basic position had merit,[15] the proper inquiry is whether the relevant statutes authorize the agency action. Here, the primary source of DNR's statutory authority is the mandate that DNR prescribe conditions to assure compliance with Wis. Stat. § 283.31(3).

Legislative Intervenors and Kinnard argue that *Maple Leaf* held that Wis. Stat. ch. 283 does not "expressly authorize" DNR to regulate offsite manure applications. (Legislative Intervenors Br. 35; Kinnard Br. 3.) *Maple Leaf* predates Act 21, and therefore did not address how to interpret "explicit" in Wis. Stat. § 227.10(2m) in relation to Wis. Stat. § 283.31. As explained, Act 21 could not, and did not, alter DNR's grant of authority in Wis. Stat. § 283.31.

That said, *Maple Leaf*'s analysis of DNR's WPDES permitting authority is consistent with Act 21. The court of appeals held that the statutes granted DNR authority to prescribe conditions for offsite areas of the farm, based on DNR's delegation of power under Wis. Stat. § 283.001 and "explicit" provisions in Wis. Stat. § 283.31, which did not distinguish between discharges that occur offsite or

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[15] There is no support for their reading of Wis. Stat. § 227.11(2)(a). That paragraph provides that an agency "may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute." Wis. Stat. § 227.11(2)(a). Notably, "[a] statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority *beyond the rule-making authority that is explicitly conferred on the agency by the legislature*." Wis. Stat. § 227.11(2)(a)1. This statute does not alter legislative grants of rulemaking authority in statutes outside of Wis. Stat. ch. 227.

onsite. *Maple Leaf Farms*, 247 Wis. 2d 96, ¶¶ 21–23, 26–27.[16] Further, Wis. Admin. Code NR § 243.14, which regulates landspreading practices via the nutrient management plan, did not distinguish between onsite and offsite activities. *Id.* ¶ 29. Permit conditions for offsite areas were authorized, and Wis. Stat. § 283.31 did not require the conditions to be promulgated in a rule. *Id.* ¶¶ 30–31. As this Court did in *Papa* and *Myers*, the *Maple Leaf* court focused on the enabling statutes and regulations to determine the scope of DNR's authority, rather than whether conditions were written verbatim in a statute or rule.

Wisconsin Stat. § 283.31 is consistent with Act 21. But even if it were not, Wis. Stat. § 283.31 is the more specific statute, and would therefore control this case. *Return of Prop. in State v. Jones*, 226 Wis. 2d 565, 576, 594 N.W.2d 738 (1999).

Lastly, Legislative Intervenors' and Kinnard's position would produce absurd results that benefit no one. It undermines the intended flexible, case-by-case approach to prescribing permit conditions to assure compliance with applicable requirements. As Wis. Stat. § 283.31 reflects, WPDES permitting is not a one-size-fits-all proposition. Wisconsin Stat. § 283.31(4) affords the appropriate level of regulatory flexibility for DNR to provide conditions in a WPDES permit that meet the needs of the facility being permitted, while taking into consideration relevant environmental conditions and public health.

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[16] While Wisconsin law governed its analysis, the court found it helpful to review federal NPDES case law as well. *Maple Leaf Farms*, 247 Wis. 2d 96, ¶ 26. After *Maple Leaf* was decided, the Second Circuit held that terms of a nutrient management plan are effluent limitations under the Act's parallel definition. *Waterkeeper All.*, 399 F.3d at 501–02. Under Wisconsin law, permit conditions that assure compliance with effluent limitations are explicitly permitted.

Further, Legislative Intervenors' and Kinnard's reading of Act 21 could have unintended consequences. DNR cannot issue a WPDES permit that fails to include conditions necessary to meet federal or state water quality standards, or federal law. Wis. Stat. § 283.31(3), (3)(d)1., 2., Wis. Stat. § 283.31(4). EPA has the power to withdraw Wisconsin's authority to administer the WPDES program if it finds that Wisconsin's permits are not meeting the Act's requirements. 33 U.S.C. § 1342(c)(3); 40 C.F.R. § 123.63(a). Removing the statutory power to impose conditions to meet those requirements could threaten that delegation's viability.

2. Wisconsin Stat. ch. 283 and related regulations confer authority on DNR to prescribe offsite monitoring and animal unit limits.

Legislative Intervenors and Kinnard also argue that offsite monitoring and an animal unit limit are neither "effluent limitations" nor "groundwater protection standards." DNR agrees. But the statute requires DNR to prescribe conditions *to assure compliance with* effluent limitations and groundwater protection standards, and offsite monitoring and animal unit limits are conditions that do so.

When discussing the general "case-by-case" monitoring requirement in Wis. Admin. Code NR § 205.066(1), Legislative Intervenors and Kinnard appear to argue that the only effluent limitation applicable to large CAFOs is the production area "no discharge" limitation found in Wis. Admin. Code NR § 243.13(2). (Legislative Intervenors Br. 8, 40–41, 45; Kinnard Br. 7–8, 38, 41.) They are incorrect; as explained above, there are numerous other effluent limitations promulgated in the code, including the technology-based restrictions in the nutrient management plan, which indisputably apply to landspreading. (*See* Statement of the Case sec. I.B.2.a.) Further, the 180-day requirement is an

integral part of the "no discharge" effluent limitation. Wis. Admin. Code NR §§ 243.13(2), 243.15(3)(i)–(k); (*see also* R. 34:665, App. 15.)

Both Legislative Intervenors and Kinnard state that "an off-site groundwater-monitoring requirement might aid in DNR's enforcement of an effluent limitation" and "monitoring requirements would help watch the quality of the groundwater." (Legislative Intervenors Br. 37–38; *see also* Kinnard Br. 35–36.) Exactly. If offsite groundwater monitoring will assure compliance with an effluent limitation or other requirement of Wis. Stat. § 283.31(3), it is a proper exercise of agency authority to prescribe it. The same is true for an animal unit limit. And in this case, the conditions assured compliance with Wis. Stat. § 283.31(3).

II. This Court should not decide the procedural issue regarding DNR's reconsideration of its denial of Wis. Admin. Code NR § 2.20 review; but to the extent this Court takes it up, it should affirm the circuit court.

A. The procedural issue is moot and does not meet an exception to the mootness doctrine.

Kinnard argues that the former DNR Secretary was correct to rewrite DNR's decision. (Kinnard Br. 43–49.) Because this issue is moot and unlikely to recur, this Court should not decide it.

Under Wisconsin law, an "issue" in a case "is moot when its resolution will have no practical effect on the underlying controversy" because developments in the case have "rendered" the issue "purely academic." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425. "Generally, moot issues will not be considered by an appellate court." *Id.* Yet a court may decide a technically moot issue when (1) the question has "great

public importance"; (2) it implicates "a statute's constitutionality"; (3) "a decision is needed to guide the trial courts"; or (4) "the situation is likely to be repeated but seems to evade review because it is resolved before the completion of the appellate process." *State ex rel. Milwaukee Cty. Pers. Review Bd. v. Clarke*, 2006 WI App 186, ¶ 31, 296 Wis. 2d 210, 723 N.W.2d 141 (citation omitted).

Whether DNR complied with its administrative rules in this case is moot. Any resolution will have no practical effect on the underlying controversy. Kinnard's permit has expired. As of February 1, 2018, Kinnard operates under a new WPDES permit, and this distinct procedural issue is not in play. Thus, whether DNR followed its rules in issuing a final decision on the 2012 permit is "purely academic." *Litscher*, 233 Wis. 2d 685, ¶ 3.

B. To the extent the Court takes it up, DNR agrees that the former DNR Secretary's action did not follow agency rules.

To the extent this Court elects to decide this issue, DNR agrees with the circuit court that it adopted the ALJ's decision when it did not petition for judicial review and when it denied Wis. Admin. Code NR § 2.20 review. *See* Wis. Admin. Code NR §§ 2.155(1), 2.20(3); (*see also* Statement of the Case sec. I.C.). If DNR wanted to grant Wis. Admin. Code NR § 2.20 review, it needed to act within the prescribed 14 days. Here, DNR took action ten months later, which was too late.[17] Its decision remained that of the ALJ.

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[17] DNR may notify a permittee of its intent to modify, terminate, or revoke and reissue a permit "whenever, on the basis of any information available to it, the department finds that there is cause for modifying, terminating, or revoking and reissuing a permit, in whole or in part." Wis. Stat. § 283.53(2)(b). That statute was not applied here.

CONCLUSION

DNR respectfully requests that this Court affirm the circuit court. However, because the 2012 permit is expired, a remand is no longer appropriate.

Dated this 10th day of March, 2021.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10983 words.

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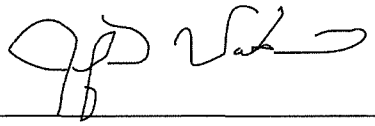

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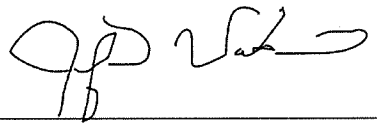

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