RECEIVED
03-24-2021
CLERK OF WISCONSIN
SUPREME COURT

SUPREME COURT OF WISCONSIN
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.

On Appeal by Certification by Wisconsin Court of Appeals
District II, Appeal No. 2016AP1688
Dane County Circuit Court Case No. 2015CV002633,
The Honorable John W. Markson, Presiding

REPLY BRIEF OF INTERVENOR-CO-APPELLANT KINNARD FARMS, INC. TO DNR'S AND PETITIONERS' RESPONSE BRIEFS

Submitted by:
MICHAEL BEST & FRIEDRICH LLP
Jordan J. Hemaidan, SBN 1026993
Nancy Cruz, SBN 1113114
P.O. Box 1806
Madison, WI 53701-1806
Phone: 608.257.3501
Fax: 608.283.2275
jjhemaidan@michaelbest.com
ncruz@michaelbest.com

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The question in this case is whether the Department of Natural Resources (DNR) can impose standards as conditions of a license that no statute or rule "explicitly require[s] or explicitly permit[s]." Wis. Stat. § 227.10(2m). 2011 Wis. Act 21 unequivocally answers no. Yet Petitioners insist that Act 21 has no impact here because it "does not revoke [] explicitly delegated authority" Resp. Br. 52, and does not "undercut" the statutory and regulatory authority they cite as granting DNR explicit authority to impose the permit conditions at issue. Resp. Br. 35.

Although Petitioners and DNR (together, "Respondents") identify a handful of statutes and rules that they contend "explicitly" provide for off-site groundwater-monitoring requirements and animal-unit maximums, they fundamentally misunderstand what it means for a law to speak "explicitly." "Explicit" means "[d]istinctly expressing all that is meant; leaving nothing merely implied or suggested." 5 Oxford English Dictionary 572 (2d ed. 1989). An "[i]mplicit" standard, on the other hand, is one "not plainly expressed" but "naturally or necessarily involved in, or capable of being inferred from," relevant language. 7 Oxford

English Dictionary 724 (2d ed. 1989). So a statute or rule that does not "distinctly" require or permit imposition of a given licensing standard does not confer power to impose that standard at all—*even if* the standard is "reasonably interpreting ambiguities" or "logic dictates" such a standard is "a practical way" of applying the provision's language. Opening Br. 34; 44. To illustrate, a grant of power to "include conditions . . . that are necessary to achieve compliance with surface water and groundwater quality standards," Wis. Admin. Code § NR 243.13(1), is not enough—after Act 21—to authorize all that such language "necessarily" implies. Petitioners' contrary arguments do not, and cannot, answer this outcome-determinative point.

ARGUMENT

I. ACT 21 FORBIDS DNR FROM IMPOSING THE PERMIT CONDITIONS THAT THE CIRCUIT COURT ORDERED

A. Wisconsin law explicitly requires or permits DNR to impose a number of specific conditions on permits issued under the Wisconsin Pollution Discharge Elimination System (WPDES). For example, one rule states that all concentrated animal feeding operations (CAFOs) must have at least 180 days' worth of liquid manure storage capacity.

Wis. Admin. Code § NR 243.14(9); *see also* Wis. Stat. § 283.31(3); Wis. Admin. Code § NR 243.17(3)(a). Another allows DNR to require installation of groundwater-monitoring wells around such storage facilities. Wis. Admin. Code § NR 243.15(7). Yet another provision enumerates the limited circumstances in which CAFOs may (because of rainfall) discharge manure from storage facilities into navigable waters. Wis. Admin. Code § NR 243.13(2); *see also* Wis. Stat. § 283.31(3)(a). Still another imposes a number of specific requirements on CAFO-manure land-application practices. *See* Wis. Admin. Code § NR 243.14; *see also* Wis. Stat. § 283.31(3)(d)2.; 40 C.F.R. § 122.23(e).

Yet none of those wide-ranging, explicit conditions even touches upon off-site groundwater monitoring or animal-unit maximums. Nor do any of the statutes or regulations that Petitioners or DNR argue "explicitly require[ ] or explicitly permit[ ]" those conditions.

1. Respondents first point to Wis. Stat. § 283.31(4) as "explicitly authoriz[ing] and requir[ing]" both off-site groundwater monitoring and animal-unit maximums, Resp. Br. 26-27, 36, but the statute does not explicitly provide for either condition.

Subsection 4 requires DNR to "prescribe conditions for permits issued under this section to assure compliance with the requirements of sub. (3)," which includes effluent limitations. Wis. Stat. § 283.31(4).[1] For off-site groundwater monitoring, Petitioners argue that "the prohibition against fecal contamination of a well is an effluent limitation," that the area where Kinnard land-applies manure "is very susceptible to groundwater contamination," and that therefore off-site groundwater monitoring is "necessary to assure compliance with" the well-contamination limitation. Resp. Br. 27-29. But this argument merely draws an *inference*. It offers nothing more than a "process of reasoning" that "'draw[s]' [ ] a conclusion," 7 Oxford English Dictionary, *supra*, at 923 (defining "infer"), that off-site groundwater monitoring is required by the statutory text. Yet if a requirement to impose an off-site groundwater-monitoring condition can only be *inferred* from the statute, then clearly the requirement is not "*explicit*." *See also* Opening Br. 26. This Court acknowledged as much in *Maple Leaf Farms, Inc. v. DNR*, 2001 WI App

[1] Effluent limitations are "restriction[s] . . . on quantities, rates, and … constituents which are discharged from point sources into waters of this state." Wis. Stat. § 283.01(6); *see also* Opening Br. 6.

170, ¶ 13, 247 Wis. 2d 96, 633 N.W.2d 720, that DNR had only *implicit* statutory authority to regulate off-site landspreading.[2]

DNR also argues that section 283.31(4) providing examples of additional conditions that the Department may prescribe for permits, noting that DNR is not directed to promulgate such conditions by rule "[n]or do the enumerated conditions in subsection (4) constitute an exhaustive list." DNR Resp. Br. 24. Whether or not the conditions enumerated in subsection (4) constitute an exhaustive list, additional conditions must, after Act 21, be grounded in the explicit authority granted in subsection (3). The disputed conditions are not.

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

[2] This Court decided *Maple Leaf* in the pre–Act 21 era of implied authority. Opening Br. 23-24. Although Petitioners argue that "since the *Maple Leaf* decision, DNR has repromulgated Chapter NR 243," Resp. Br. 35, these rules nevertheless do not provide the explicit authority required after Act 21.

limitation, and that therefore animal-unit maximums are "necessary to assure compliance with an effluent limitation." Resp. Br. 36-37. Even setting aside whether the conclusion follows from the second premise, it remains that animal-unit maximums are, at best, an inference from Subsection 4's language—and therefore are not explicit.[3]

2. Finally, Petitioners point to Wis. Stat. § 283.31(5), arguing that it explicitly requires animal-unit maximums because "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. . ." Resp. Br. 37. But subsection 5 requires only that DNR "specify maximum levels of discharges," Wis. Stat. § 283.31(5), and an animal unit is not a "discharge." Subsection 5 explicitly provides only that DNR must set maximum levels of discharges. If something is not a discharge, then setting its maximum is not

[3] DNR cannot invoke the general language of Wis. Stat. § 283.31(4) to use the case-by-case adjudication model to impose unwritten requirements on WPDES permits, but DNR could promulgate a rule interpreting what additional categories of "conditions . . . to assure compliance" might prove necessary in future cases. Wis. Stat. § 283.31(4). Then, DNR could satisfy Act 21's mandate that a permit condition be "explicitly required" "by [ ] rule." Wis. Stat. § 227.10(2m); *see* Opening Br. 26-27.

explicitly required by subsection 5. Whether or not animal units "correlate[ ] to" discharges is irrelevant. Resp. Br. 38.

3. None of the regulations the Respondents cite explicitly requires or permits off-site groundwater monitoring. Respondents first invoke section NR 205.066, which requires DNR to determine "on a case-by-case basis" the "frequency" at which a permittee must conduct monitoring "for each effluent limitation in a permit," Wis. Admin. Code § NR 205.066(1). *See* Resp. Br. 32. But even if the well-contamination prohibition is an effluent limitation, *but see* Opening Br. 6–7, 37,[4] section NR 205.066's requirement that DNR determine a "monitoring frequency" for effluent limitations does not "explicitly require[ ]" the creation of offsite groundwater-monitoring wells, Wis. Admin. Code § NR 205.066(1). Whether or not one might infer from the monitoring-frequency requirement a requirement to impose monitoring wells, such a requirement would, by definition, not be explicit.

[4] Petitioners cite federal law to support their position that nutrient-management plans are effluent limitations to groundwater, Resp. Br. 22-23, but federal law does not apply to groundwater, 40 C.F.R. § 122.2, and applies only to land applications of manure "to land areas under [the CAFO's] control," not to off-site land owned and controlled by others, *id.* § 122.23(e).

4. Respondents also point to Wis. Stat. ch. 160 and the rules promulgated in chapter NR 140, Resp. Br. 30, but these rules, located in a section of the regulatory code separate from the WPDES regulations, do not help Petitioners. To begin with, neither chapter 160 nor NR 140 is a self-executing regulatory scheme. Section 160.001(3) clearly states that it "does not create independent regulatory authority." Wis. Stat. § 160.001(3). Similarly, section NR 140.02 states that it "does not create independent regulatory authority," but instead simply "supplements . . . [and] provides guidelines and procedures for the exercise of regulatory authority . . . established elsewhere." Wis. Admin. Code § NR 140.02(1). Thus, the authority to impose conditions on permits must come from "elsewhere" in the statutes or regulatory code—it cannot come from section NR 140.02. It is clear from the plain language that neither chapter 160 nor NR 140 provide explicit criteria that can form the basis of a decision to impose the permit conditions at issue in this case.

Regardless, even if section NR 140.02 provided independent authority, its broad language that DNR "may take any actions . . . necessary to protect public health and

welfare" does not explicitly permit off-site groundwater-monitoring requirements in a CAFO WPDES permit. Wis. Admin. Code § 140.02(4). Any such requirements could only be inferred from section NR 140.02's language.

5. DNR's regulations at section NR 243.13 do not explicitly require or permit off-site groundwater-monitoring requirements either. Resp. Br. 33-34. Section NR 243.13's rule that DNR include conditions in permits "to achieve compliance with surface water and groundwater quality standards" applies to only "the production area and ancillary service and storage areas," not to off-site landspreading fields. Wis. Admin. Code § NR 243.13(1). And even if this language applied to off-site landspreading fields, it does not explicitly require off-site groundwater monitoring. Off-site groundwater monitoring could, at best, only be *inferred* as a "condition[ ] . . . necessary to achieve compliance" with certain water-quality standards. *See id.*

6. Finally, section NR 243.14 does not explicitly require or permit off-site groundwater-monitoring conditions. Resp. Br. 33-34. Section NR 243.14's language that DNR may "require the permittee to implement practices in addition to" those explicitly provided in the rules "when necessary to

prevent exceedances of groundwater quality standards," Wis. Admin. Code § NR 243.14(10), does not explicitly grant DNR authority to impose off-site groundwater-monitoring requirements after Act 21. Such additional requirements could only be derived by inference from the regulatory language, an exercise Act 21 does not allow.

B. Petitioners' and DNR's arguments that Act 21's effects are limited are unconvincing. Resp. Br. 44. Petitioners do not at all grapple with the statute's text, but instead offer only the conclusory statement that "[n]othing in Act 21 rescinds a legislative grant of general authority or requires agencies to promulgate rules in order to exercise broad grants of authority," Resp. Br. 47, a statement that wholly ignores the plain text of the law that the Legislature enacted.

Petitioners attempt to detract from the effects of Act 21 on DNR's permitting authority and justify the unlawful conditions by focusing on their merits and ALJ Boldt's reasoning for imposing the conditions at issue. *See*, *e.g.*, "The ALJ concluded that an animal unit cap was necessary . . . based, in part, on Kinnard Farms' previous history of noncompliance. . ." Resp. Br. 37. Resp. Br. 38. However, these justifications are irrelevant to the legal question at hand.

Ultimately, as a creature of statute, DNR's scope of permitting authority is determined by the Legislature's explicit grants or withdrawals of authority through either statutes or properly promulgated administrative rules—not whether extraneous facts justify such conditions.

Furthermore, Petitioner's argue that here, unlike in *Papa*, the disputed conditions are "linked to numerous statutory and regulatory provisions." Resp. Br. 46-47. However, the court in *Papa* established that the Legislature granted DHS explicit authority to recoup Medicaid payments only if DHS could not verify certain information enumerated in the statute and compared the policy at issue to that explicit grant of recoupment authority. *Papa v. Wis. Dep't of Health Servs.*, 2020 WI 66, ¶ 40-41, 393 Wis. 2d 1, 946 N.W.2d 17. The court in *Papa* was "linking" a set of facts to authority that the court determined was explicitly granted to DHS in the relevant statues and promulgated rules. Here, the question is not whether there is a "link" between the permit conditions and the authority cited. Rather, the question is about the scope of the agency's authority, and whether that explicit authority exists at all.

Act 21 requires, contrary to the prior regime, that each permit condition be "explicitly required or explicitly permitted by statute or by [ ] rule." Wis. Stat. § 227.10(2m). By Act 21's plain terms, if an agency wishes to exercise a broad grant of authority by placing conditions on permits, the agency must first promulgate a rule "explicitly requir[ing] or explicitly permitt[ing]" each condition it wishes to impose under that authority. If the agency fails to do so, then the condition will not be "explicitly required or explicitly permitted by statute or by [ ] rule," and thus the agency may not "implement or enforce" that condition. Wis. Stat. § 227.10(2m); *see also* Opening Br. 26-27. Petitioners argue that the legislature did not intend to place the same limitations on permitting authority as it did on rulemaking authority through Act 21. Resp. Br. 41. However, Petitioners fail to read section 227.10(2m) in conjunction with section 227.10(1), which provides that "[e]ach agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Wis. Stat. § 227.10(1). Because Petitioners' arguments ignore the statutory text, those arguments necessarily fail.

To support their proposition that Act 21 is effectively a dead letter, Resp. Br. 49-50, Petitioners cite the Wisconsin Supreme Court's decision in *Lake Beulah Management District v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, Resp. Br. 50. But the Court's characterization of how DNR exercises its authority says nothing about the meaning of Act 21. Indeed, in a footnote addressing Act 21, the Court in *Lake Beulah* simply "agree[d] with the parties," without engaging in any legal reasoning or statutory interpretation, that Act 21 "d[id] not affect [the] analysis in" the particular case before it. 335 Wis. 2d 47, ¶ 39 n.31. That the Court, in an unreasoned footnote, agreed with the parties that Act 21 was not an issue in a separate case involving a different statutory and regulatory regime provides this Court with no guidance as to how Act 21 affects the present dispute. Hence, *Lake Beulah* does not control here.

Finally, Petitioners' proposition that Kinnard Farms' and the Legislature's interpretation of Act 21 would "draw into question innumerable statutory and regulatory provisions" for their generality and "frustrate the legislature's policy decisions" is an interesting observation, but not one which supports the outcome Respondents seek. Resp. Br. 51.

By its very participation in this case, the Legislature has made it clear that its policy imperative is to restrain DNR from imposing the disputed conditions in Kinnard Farms' permit in this case, because doing so would be at direct odds with the intent of Act 21. Petitioners might well be right that implementing and enforcing Act 21 in this case or others may disrupt the age old DNR practice of regulating on the basis of inferred or implied authority, but that is a natural consequence of Act 21. As such, Act 21 is nothing short of a paradigm shift in how the state governs private life and business. Paradigm shifts are uncomfortable. And it is true that in a world where courts honor and enforce Act 21, agencies will have to make dramatic adjustments in how they regulate. But governmental agencies exist for the benefit of the people, and Act 21 is the expression of the Legislature's intent that the people should be served by agencies whose reach is limited by explicit authority—not implied authority.

II. PETITIONERS' ARGUMENTS ON AGENCY PROCEDURE LACK MERIT

In arguing that DNR violated its internal procedures in this case, Petitioners make several missteps. First, Petitioners argue that this one-off procedural dispute will recur "given

the numerous quasi-judicial decisions that DNR makes each year" and because "WPDES permits expire every five years." Resp. Br. 54. Petitioners argue that DNR adopted the ALJ decision as its decision when it denied NR 2.20 review and did not petition for judicial review. Petitioners ignore that DNR could not have appealed the ALJ's order because it was not final. At bottom, they fault DNR for failing to file a procedurally improper motion. Resp. Br. 57-58. Second, Petitioners' argument that DNR cannot "institute itself as the decision-maker" after an ALJ has decided a contested case, Resp. Br. 63, would render section NR 2.20 unlawful, *see* Wis. Admin. Code § NR 2.20 (permitting the DNR Secretary to review all contested-case hearings). Finally, Petitioners bypass this Court's clear holding that an agency must have the authority to revisit decisions that the agency concludes rest upon errors of law. *Schoen v. Bd. of Fire & Police Comm'rs*, 2015 WI App 95, ¶¶ 20–22, 366 Wis. 2d 279, 873 N.W.2d 232; Opening Br. 49-50. No rule binds an agency to its errors nor renders it powerless to correct them. *See* Opening Br. 50; *Schoen*, 366 Wis. 2d 279, ¶ 21.

CONCLUSION

This Court should reverse the circuit court's decision.

Respectfully submitted this 24th day of March, 2021.

MICHAEL BEST & FRIEDRICH LLP

By: _____

Jordan J. Hemaidan, SBN 1026993
Nancy Cruz, SBN 1113114
MICHAEL BEST & FRIEDRICH LLP
P.O. Box 1806
Madison, WI 53701-1806
Phone: 608.257.3501
Fax: 608.283.2275
jjhemaidan@michaelbest.com
ncruz@michaelbest.com

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

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 2,944 words.

Dated: March 24, 2021

Nancy Cruz

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

I hereby certify that:

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: March 24, 2021

Nancy Cruz

SUPREME COURT OF WISCONSIN
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.

On Appeal by Certification by Wisconsin Court of Appeals
District II, Appeal No. 2016AP1688
Dane County Circuit Court Case No. 2015CV002633,
The Honorable John W. Markson, Presiding

AFFIDAVIT OF MAILING

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, Susan Bunge, being first duly sworn, state that on March 24, 2021, I caused three (3) true and correct copies of the Reply Brief of Intervenor-Co-Appellant Kinnard Farms, Inc. to DNR's and Petitioners' Response Briefs to be served upon the following via First Class mail, postage prepaid:

Kathryn Nekola
Evan Feinauer
Clean Wisconsin
634 West Main Street, Suite 300
Madison, WI 53703

Jennifer L. Vandermeuse
Gabe Johnson-Karp
Assistant Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Robert D. Lee
Angela Gelatt
Midwest Environmental Advocates, Inc.
612 West Main Street, Suite 302
Madison, WI 53703

Robert I. Fassbender
Great Lakes Legal Foundation
10 E. Doty Street, Suite 504
Madison, WI 53703

Eric M. McLeod
Lane E.B. Ruhland
Kirsten Atanasoff
Husch Blackwell
33 E. Main Street, Suite 300
Madison, WI 53703

Lisa M. Lawless
Husch Blackwell, LLP
511 N. Broadway, Suite 1100
Milwaukee, WI 53202

Ryan J. Owens
3553 Richie Road
Verona, WI 53593

Susan Bunge

Subscribed and sworn to before me
this ___ day of March, 2021.

Notary Public, State of Wisconsin
My Commission:_____