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SUPREME COURT

No. 16AP1688

IN THE

Wisconsin Supreme Court

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 Certification by Court of Appeals, Dis. II, January 16, 2019
On Appeal from Dane County Circuit Court, Hon. John W. Markson, Presiding, Case No. 15-cv-2633

REPLY BRIEF OF INTERVENOR THE WISCONSIN LEGISLATURE

ERIC M. MCLEOD, 1021730
KIRSTEN A. ATANASOFF, 1116561
HUSCH BLACKWELL LLP
P.O. Box 1379
33 East Main Street, Ste. 300
Madison, WI 53701-1379
eric.mcleod@huschblackwell.com
kirsten.atanasoff@huschblackwell.com

LISA M. LAWLESS, 1021749
HUSCH BLACKWELL LLP
511 N. Broadway, Ste. 1100
Milwaukee, WI 53202
lisa.lawless@huschblackwell.com

Attorneys for the Wisconsin Legislature

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INTRODUCTION

This case is about Act 21 and its plain mandate that agencies may no longer enforce requirements not "explicitly required" or "explicitly permitted" by statute or rule. Act 21's application here is straightforward: because no statute or rule explicitly required or explicitly permitted DNR to impose off-site groundwater-monitoring or animal-unit maximum conditions in the permits at issue, DNR lacked authority to do so. On appeal, Petitioners[1] do all they can to avoid this inescapable conclusion by asserting why DNR *should* be able to impose the permit conditions. But Petitioners do not, and cannot, avoid the fact that the statutes and rules they cite, at most, *implicitly* require or permit the conditions at issue. Accordingly, their arguments must fail.

ARGUMENT

I. Contrary to Act 21, the permit conditions are "standards" or "requirements" not "explicitly required" or "explicitly permitted" by statute or rule.

Act 21 is implicated whenever an agency "implement[s]" or "enforce[s]" a "standard" or "requirement," like the DNR's

[1] For ease of reference, DNR and Clean Wisconsin are collectively referred to as "Petitioners." Although DNR started out as Appellant in this case, it is now aligned with Petitioners.

imposition of the permit conditions here. Wis. Stat. § 227.10(2m). Such a standard or requirement must be "explicitly required" or "explicitly permitted" by statute or rule. *Id.* Petitioners butcher this clear text, as they must to reach the outcome they advocate. When interpreted correctly, Act 21 easily disposes of this case. Since no party has identified a statute or rule that explicitly requires or explicitly permits the permit conditions at issue, the Court should reverse.

A. Petitioners misinterpret Act 21, attempting to atextually justify DNR's actions.

Act 21 "significantly alter[ed]" Wisconsin's administrative-law jurisprudence. *Wisconsin Legislature v. Palm*, 2020 WI 41, ¶ 51, 391 Wis. 2d 497, 942 N.W.2d 900. In two related provisions, Act 21 sets forth substantive guideposts defining agency authority and creates a framework for evaluating the legality of agency action. First, as codified in section 227.11(2), Act 21 limits the classes of statutes agencies can rely on for rulemaking authority. To support a rule, an agency must rely on statutory text that "explicitly confer[s]" rulemaking authority—not on statements of purpose, intent, findings, or policy, and not on provisions describing general

powers and duties. Wis. Stat. § 227.11(2)(a)1.–2. Second, as codified in section 227.10(2m), an agency can "implement or enforce" a "standard, requirement, or threshold" only if that standard, requirement, or threshold is "explicitly required" or "explicitly permitted" by statute or rule. So, to decide whether an agency's implementation or enforcement of a standard, requirement, or threshold was lawful, this Court must consider Act 21. Unless the standard, requirement, or threshold is explicitly required or explicitly permitted by statute or rule, the agency's action is unlawful.[2]

Petitioners depart from Act 21's textual framework. DNR, for its part, does not even attempt to engage the substance of Act 21's application to the question in this case. It conducts its entire analysis of whether "DNR had authority to prescribe the offsite monitoring requirement and animal unit limit" without reference to Act 21, relying instead upon its own statutory interpretation of Chapter 283 informed by *Maple Leaf* and other pre-Act 21 cases. DNR-Br.22–29 (citing, *e.g.*, *Maple Leaf Farms, Inc. v. DNR*, 2001

[2] And, if the Court finds that a standard, requirement, or threshold is, in fact, explicitly required or explicitly permitted by a *rule* (thus satisfying section 227.10(2m)), it must *also* ensure that that rule was promulgated based on legitimate rulemaking authority (thus satisfying section 227.11(2)).

WI App 170, 247 Wis. 2d 96, 633 N.W.2d 720; *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73). DNR finally addresses Act 21 only *after* concluding that DNR "had authority" to impose both conditions. DNR-Br.30. Specifically, DNR concludes, without further explanation, that "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)." All this analysis does is carry over the answer to this question under the pre-Act 21 regime but adding in the word "explicitly" to account for Act 21. In short, DNR's analysis is exactly backward.

Act 21 does not work the way DNR posits. The Act is not an after-the-fact consideration that comes into play after concluding an agency has authority; it rather establishes a framework for evaluating an agency's authority in the first instance. DNR distorts Act 21's meaning, arguing that it does not alter the meaning or effect of Wis. Stat. § 283.31. DNR-Br.31. That is the wrong question. This case isn't about whether Act 21 alters the meaning of other law: it's about whether agency action purportedly taken under other law is, indeed, lawful.

Clean Wisconsin's arguments also misunderstand the meaning of Act 21's "explicitly required or explicitly permitted" language. Wis. Stat. § 227.10(2m). It asserts that Act 21 requires an agency's authority to impose conditions be only "express," and not "specific." CW-Br.45. To make this distinction, they accuse the Legislature of conflating two parts of Act 21—arguing that section 227.11(2)(a)1.–2.'s limitations on the classes of statutes that "explicitly confer[]" rulemaking authority bear no relation to section 227.10(2m)'s "explicitly required or explicitly permitted" standard. Even if general statutes like those listed in section 227.11(2)(a) are insufficient to confer rulemaking authority, their argument goes, those general statutes nonetheless grant DNR power to impose an off-site groundwater-monitoring requirement or animal-unit maximum on a case-by-case basis. CW-Br.42.

This argument leapfrogs over section 227.10(2m) by invoking section 227.11, which is precisely what section 227.11 is designed to prevent. *See Palm*, 2020 WI 42, ¶ 52. While section 227.11(2) does apply to rulemaking authority, Petitioners mischaracterize its pointed *rejection* of general statutes as capable of "explicitly conferr[ing]" rulemaking authority as *approving* those statutes'

ability to "explicitly require or explicitly permit" a requirement not promulgated by a rule. But this is contrary to the plain statutory language.

First—putting aside the word "explicitly"—for a statute to "require" or "permit" an enforceable standard on its own is a higher bar than to "confer" the authority under which that standard may be promulgated as a rule. Thus, if a statute does not sufficiently confer authority to make a rule, it follows that the statute does not require or permit the agency to enforce that standard directly. Section 227.11's acknowledgement that general, broad statutes necessarily fail to "explicitly confer[]" rulemaking authority on an agency confirms the already-intuitive notion that general, broad statutes also fail to "explicitly require or explicitly permit" standards, requirements, and thresholds directly. This is precisely the point: by relying on a statute sufficiently explicit to "confer" rulemaking authority (but perhaps nonetheless insufficiently explicit to "require" or "permit" on its own), an agency can use the rulemaking process to adopt rules that are sufficiently explicit to require or permit implementation or enforcement of standards, requirements, and thresholds.

Second, Petitioners' reading of these statutes is contrary to how administrative law works. Act 21 promotes predictability by putting regulated parties, agencies, and courts on notice of what standards, requirements, and thresholds an agency may enforce under a statute or rule. Applying Act 21 to conclude that a given statute authorizes an agency to enforce a standard on an ad-hoc basis *while simultaneously prohibiting* the agency from promulgating that standard through a rule first is an absurd result that must be rejected.

Although Petitioners complain that requiring all standards and requirements to be truly explicit would usher in an impossibly inflexible regulatory program, the 11,000 pages of the Wisconsin Administrative Code prove otherwise. Jodi E. Jensen, *Regulatory Reform: Moving Policymaking from State Agencies to the Legislature*, Wis. Lawyer, Oct. 2018, at 9. For CAFOs specifically, DNR rules explicitly require, for example: that all CAFOs have at least 180 days' worth of storage capacity set aside for liquid manure, Wis. Admin. Code § NR 243.15(7); installation of ground-water monitoring wells around the storage facilities, § NR 243.14(9); and specific CAFO-manure land application practices, § NR 243.14.

These rules, among many others throughout the Administrative Code, show that meeting Act 21's explicitness requirement is not impracticable, nor does it require "the entire universe of potential agency decisions" be written "verbatim." CW-Br.51.

DNR dismisses the relevance of *Papa* and *Myers* to the Act 21 question on the ground that neither case held that a policy or permit condition must be "written verbatim" in a statute or rule. DNR-Br.34–35. (citing *Papa v. DHS*, 2020 WI 66, 393 Wis. 2d 1, 964 N.W.2d 17; *Myers v. DNR*, 2019 WI 5, 385 Wis. 2d 176, 922 N.W.2d 47). That *Papa* and *Myers* did not require verbatim incantation is undoubtedly correct—and undoubtedly irrelevant for this case. The Legislature does not assert that "explicit" means "verbatim," nor does it cite *Papa* or *Myers* for that proposition. That said, *Papa* is instructive because it details how courts proceed with analyzing agency authority after Act 21. *See* Op.Br.29. Specifically, it shows that the Court strictly adheres to the language of the relevant statutes and rules to evaluate whether they "state" the requirement the agency seeks to enforce. *Papa*, 2020 WI 66, ¶ 41. Similarly, *Myers* declined to "read [] language into the statute" that otherwise could have implied agency authority. 2019 WI 5, ¶ 24.

Petitioners also dismiss *Palm* because it "dealt with an entirely different topic" and because it is a "broad ruling predominantly focused on rulemaking." DNR-Br.35; CW-Br.44. But there's no denying that the *Palm* Court thoroughly addressed the question of whether the agency action "exceeded the scope of permissible actions under [the relevant statute]" *even if* rulemaking "was not required." 2020 WI 41, ¶ 43. The Legislature's citations to *Palm*, then, are directly on point. First, under Act 21, agency authority may not be implied, and courts must "narrowly construe imprecise delegations of power to administrative agencies." *Id.* ¶ 52. Second, section 227.11(2) "prevents agencies from circumventing" section 227.10(2m) "by simply utilizing broad statutes describing the agency's general duties or legislative purpose as a blank check for regulatory authority." *Id.* (quoting Kirsten Koschnick, *Making "Explicit Authority" Explicit: Deciphering Wis. Act 21's Prescriptions for Agency Rulemaking Authority*, 2019 Wis. L. Rev. 993, 997).

B. Petitioners identify no statute or rule explicitly requiring or explicitly permitting the off-site groundwater-monitoring requirement.

Petitioners first point to Wis. Stat. § 283.31(3)–(4) as the source of DNR's authority to impose off-site groundwater-monitoring requirements. These subsections authorize DNR to "prescribe conditions for permits issued under this section to assure compliance with," among other things, "[e]ffluent limitations," and "[g]roundwater protection standards established under ch. 160." *Id.* This language, Petitioners argue, authorizes DNR to enforce any requirement, as a condition on a permit, that it deems necessary to comply with effluent limitations and groundwater-protection standards, without first promulgating a rule articulating that requirement. Off-site groundwater-monitoring is such a condition, their argument continues, so this statute provides sufficient authority to impose that requirement as a condition absent any rule or statute mentioning this requirement.

Petitioners' argument robs Act 21 of any meaning. Act 21 prohibits an agency from enforcing a requirement, "unless *that* … requirement … *is* explicitly required or explicitly permitted." Wis. Stat. § 227.10(2m) (emphases added). It does not say that an

agency can enforce a requirement "fairly encompassed" or "reasonably subsumed" within the statute's explicit directives—it says the requirement *itself* must be explicitly required or explicitly permitted. At most, Petitioners offer a "process of reasoning" that "draw[s] [] a conclusion" regarding DNR's authority to impose an off-site groundwater-monitoring requirement. 7 *Oxford English Dictionary* 572, 923 (2d ed. 1989) (defining "infer"). Yet if authority to impose an off-site groundwater-monitoring requirement can merely be *inferred* from the statute, then by definition such authority is *implicit* and not *explicit*. Even if off-site groundwater monitoring helps DNR assure that Kinnard Farms complies with some other requirements that *are* explicitly required or explicitly permitted—such as the prohibition against fecal contamination of a well—the monitoring is a separate requirement that also must survive section 227.10(2m)'s demanding scrutiny. It does not.

DNR's reliance on *Wis. Ass'n of State Prosecutors v. Wis. Emp't Relations Comm'n* is simply unhelpful. 2018 WI 17, 380 Wis. 2d 1, 907 N.W.2d 425. DNR claims that this case "is instructive" because it illustrates that mandate-containing statutes like section 283.31(4) also authorize predicate acts necessary to fulfill

that mandate. DNR-Br.33. Regardless of the predicate-acts point, it is a mistake to read *State Prosecutors* as revealing anything about whether particular agency action is explicitly required or explicitly permitted by section 283.31(4). Section 227.10(2m) was not at issue in that case. The agency was not enforcing any standard, requirement, or threshold; the subject of the challenge was the rules themselves. *Id.* ¶ 37. As DNR points out elsewhere in its brief, DNR-Br.35, the analysis governing whether an agency may promulgate a rule on a given subject differs from the analysis of whether an agency may enforce a requirement, *see* Wis. Stat. § 227.11. Whether a statute authorizes an agency to promulgate a rule—the question in *State Prosecutors*—is an easier threshold to meet than whether that statute authorizes the agency to enforce a requirement directly—the question here. *See above at pages 5–7.*

An off-site groundwater-monitoring requirement is not explicitly required or explicitly permitted by section 283.31(4). Nor has DNR promulgated a rule explicitly requiring or explicitly permitting that requirement (assuming it even lawfully could, which isn't at issue in this case). This is dispositive here.

Petitioners point to several rules, each of which they claim explicitly authorize an off-site groundwater-monitoring requirement. First, they cite § NR 243.14(2)(b)3., which provides that "[m]anure or process wastewater may not cause the fecal contamination of water in a well." Even assuming this were an "effluent limitation" within the meaning of the statute, this does not explicitly require or explicitly permit an off-site groundwater-monitoring requirement. *See above at pages 10–11.* Second, Petitioners point to Chapter NR 140, which governs groundwater quality. But this Chapter immediately derails Petitioners' claims on its own terms, by providing that "[t]his chapter provides guidelines and procedures for the exercise of regulatory authority *which is established elsewhere* in the statutes and administrative rules, and *does not create independent regulatory authority*." Wis. Admin. Code § NR 140.02(1) (emphases added). Even if this chapter could provide such authority, it does not purport to explicitly require or explicitly permit off-site groundwater-monitoring requirements in WPDES permits. Finally, Petitioners cite § NR 205.066(1), 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." Even if, as they assert, the well-contamination prohibition is an effluent limitation, *but see* Op.-Br.40–42, this section does not explicitly require or explicitly permit the creation of off-site groundwater-monitoring wells, Wis. Admin. Code § NR 205.066(1).[3]

C. Petitioners identify no statute or rule explicitly requiring or explicitly permitting the animal-unit maximum.

Using the same reasoning they did to justify the off-site groundwater-monitoring requirement, Petitioners assert that Wis. Stat. § 283.31(3)–(4) provides DNR authority to impose an animal-unit maximum. This argument fails just the same. Even if the statute *impliedly* authorizes an animal-unit maximum because such a requirement helps assure compliance with an effluent limitation, that is not enough to satisfy section 227.10(2m). Further, the "effluent limitation" to which Petitioners cite, the 180-day storage requirement, does not even implicitly authorize animal-unit maximums. It requires CAFOs to maintain a minimum of 180 days of

[3] Petitioners cite federal law to support their position that nutrient-management plans are effluent limitations to groundwater, CW-Br.32–33, 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).

storage for liquid manure, which is calculated on the maximum animals present. NR § 243.15(3)(j)-(k).

Petitioners point to another provision, Wis. Stat. § 283.31(5), which requires "[e]ach permit" to "specify maximum levels of discharges." At best, this would provide explicit authority if animal units are a "discharge," which of course they are not. Petitioners characterize this point as "contorted" and assert that the animal-unit limit "is about the manure and other waste that they produce—not the animals themselves." Pet. Br. 40. This reveals their fundamental misunderstanding of Act 21. Subsection 5 explicitly requires only that DNR must set "maximum levels of discharges." Wis. Stat. § 283.31(5). If something is not a discharge, then setting its maximum is not explicitly required here. Whether the requirement is really "about" animals or not is irrelevant.

Even without Act 21, this would be the case. Petitioners repeatedly assert that off-site monitoring wells and animal-unit maximums are inherently needed to assure compliance with certain regulatory requirements governing CAFOs. DNR-Br.33; CW-Br.26. This amounts to an "interpretation of a statute which [an agency] specifically adopts to govern its enforcement or

administration of that statute," and therefore must be promulgated as a rule. Wis. Stat. § 227.10(1). If the Court adopts Petitioners' argument—despite Act 21's bar on this kind of implicit authority—then there is no reason to think DNR won't simply continue to impose these requirements on CAFO permits. Problematically, this resembles a "standard" "of general application" "issued by an agency" to "make specific legislation" the agency administers, which invokes the rulemaking requirement in Wis. Stat. § 227.10(1). *Wis. Elec. Power Co. v. DNR*, 93 Wis. 2d 222, 232, 287 N.W.2d 113 (1980). Agency attempts to evade rulemaking procedures by disguising rules as permit conditions are familiar to this Court and should be shut down as the statutes require. *See id.* (holding chlorine limitations in WPDES permits constituted an unpromulgated rule).

CONCLUSION

The Court should reverse the judgment of the circuit court.

Dated this 24th day of March, 2021.

HUSCH BLACKWELL LLP
Attorneys for Intervenor
The Wisconsin Legislature

By:

s/Kirsten A. Atanasoff

Eric M. McLeod
State Bar No. 1021730
Kirsten A. Atanasoff
State Bar No. 1116561
HUSCH BLACKWELL LLP
P.O. Box 1379
33 East Main Street, Suite 300
Madison, WI 53701-1379
608.255.4440
608.258.7138 (fax)
eric.mcleod@huschblackwell.com
kirsten.atanasoff@huschblackwell.com

Lisa M. Lawless
State Bar No. 1021749
HUSCH BLACKWELL LLP
511 North Broadway, Suite 1100
Milwaukee, WI 53202
414.273.2100
414.223.5000 (fax)
lisa.lawless@huschblackwell.com

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,966 words.

Dated this 24th day of March, 2021.

By: *s/Kirsten A. Atanasoff*
Kirsten A. Atanasoff

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 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 this 24th day of March, 2021.

By: *s/Kirsten A. Atanasoff*
Kirsten A. Atanasoff

CERTIFICATE OF SERVICE

I certify that on March 24, 2021, I caused three copies of this brief to be mailed by first-class postage prepaid mail to counsel for the other parties.

Dated this 24th day of March, 2021.

By: *s/Kirsten A. Atanasoff*
Kirsten A. Atanasoff