FILED
03-25-2021
CLERK OF WISCONSIN
SUPREME COURT

In the Supreme Court of Wisconsin

No. 2016AP1688

CLEAN WISCONSIN, INC., LYNDA COCHART, AMY COCHART, ROGER DEJARDIN, SANDRA WINNEMUELLER AND CHAD COCHART,
Petitioners-Respondents,
v.
WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondent-Appellant,

KINNARD FARMS, INC.,
Intervenor-Co-Appellant,

WISCONSIN LEGISLATURE,
Intervenor

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

JOINT NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS AND COMMERCE, MIDWEST FOOD PRODUCTS ASSOCIATION, WISCONSIN CHEESE MAKERS ASSOCIATION, DAIRY BUSINESS ASSOCIATION, WISCONSIN POTATO AND VEGETABLE GROWERS ASSOCIATION, WISCONSIN FARM BUREAU FEDERATION, WISCONSIN PAPER COUNCIL, WISCONSIN CORN GROWERS ASSOCIATION, WISCONSIN DAIRY ALLIANCE, AND VENTURE DAIRY COOPERATIVE

Submitted by:

Wisconsin Manufacturers & Commerce
Lucas T. Vebber, SBN 1067543
LVebber@wmc.org
Corydon J. Fish, SBN 1095274
cfish@wmc.org
501 East Washington Avenue
Madison, WI 53703
608-258-3400

Great Lakes Legal Foundation
Robert I. Fassbender, SBN 1013985
fassbender@greatlakeslegalfoundation.org
10 East Doty Street, Suite 504
Madison, WI 53703
(608) 310-5315

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INTEREST OF AMICI

Amici are associations whose members are leaders in manufacturing, agriculture, and virtually every other sector of the state's economy. They have an interest in assuring that Wisconsin's administrative agencies operate within their enabling statutes, and strictly abide by the Wisconsin administrative procedures act, including the rulemaking provisions therein.

INTRODUCTION

This case involves questions of statutory authority and rulemaking requirements. 2011 Wisconsin Act 21 ("Act 21") prohibits administrative agencies from implementing or enforcing any standard, requirement or threshold unless such standards, requirements and thresholds were *explicitly* authorized by statute or lawfully adopted rule.

Now Petitioners-Respondents (herein "Clean Wisconsin") and Respondent-Appellant (herein "DNR"), seek to render Act 21 meaningless. If the Court were to validate the arguments they have put forth, it would create a tremendous loophole in statutory rulemaking requirements.

Clean Wisconsin and DNR seek this Court's blessing to impose rules via WPDES permit conditions, without having to promulgate those rules according to the terms of Wis. Stat. Ch. 227.

Fairness and the law call for the notice and opportunity to comment on these important policies that only the statutory rulemaking process can provide.

For the reasons set forth herein, this Court should reverse the Circuit Court.

ARGUMENT

I. The Permit Conditions in This Case Are Rules That Cannot Be Implemented on a Case-By-Case Basis Through Permits.

If, as DNR and Clean Wisconsin now argue, the permit conditions challenged in this case are "necessary" then they are conditions of general applicability, and thus rules which must be promulgated.

Both the animal unit limits and the off-site groundwater monitoring conditions at issue here are rules disguised as permit conditions. This strategy is not new to Wisconsin's regulated community. We have seen other attempts by DNR to impose effluent limitations in a wastewater permit to avoid Chapter 227's administrative rulemaking procedures. If this were to be allowed, then permit by permit, facility by facility, agencies could cobble together regulations of general application through permit conditions.

Courts "have allowed the legislature to delegate its authority to make law to administrative agencies." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 33, 391 Wis. 2d 497, 942 N.W.2d 900. This is accomplished

through Chapter 227 rulemaking. Chapter 227 created a system to "govern the legislature's role in, and oversight of, agency rule-making." *Wisconsin Realtors Ass'n v. Pub. Serv. Comm'n of Wisconsin*, 2015 WI 63, ¶ 97, 363 Wis. 2d 430, 867 N.W.2d 364. The legislature's delegation of its power to make law is constitutional because of the protections afforded by these very procedures. *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d 526, 536, 182 N.W.2d 257, 262 (1971).

Yet in this case, Clean Wisconsin and DNR both seek a ruling that administrative agencies can avoid this rulemaking process altogether. Instead of following the carefully mandated process for the exercise of legislative power, they instead seek to impose their regulatory agenda on a case-by-case basis under the guise of permit conditions. No matter what they want to call these requirements, legally, they are rules—and this Court should treat them as such.

A. Rules Cannot Be Disguised as Permit Conditions to Avoid Statutory Rulemaking Requirements.

Agency action is a "rule" when it is (1) a regulation, standard, statement of policy or general order, (2) of general application, (3) having the effect of law, (4) issued by an agency, (5) to implement, interpret or make specific legislation enforced or administered by said agency as to govern the interpretation or procedure of such agency. *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis.2d 804, 814, 280 N.W.2d 702

(1979). The only element that could possibly separate the permit conditions at issue here from a rule is the element of general applicability.

This Court has long stated that "to be of general application, a rule need not apply to all persons within the state. Even though an action applies only to persons within a small class, the action is of general application if that class is described in general terms and new members can be added to the class." *Id.* at 815-816.

In *Wisconsin Electric Power Co. v. DNR*, 93 Wis. 2d 222, 287 N.W.2d 113 (1980), DNR attempted to impose rules by disguising them as WPDES permit conditions and arguing that they were not of general application. In that case, the Court made it clear that "general applicability" for rulemaking purposes does not require that the permit condition at issue be deemed applicable to *all* permittees, and rather, it is sufficient that the WPDES permit conditions be generally applicable to a discrete set of facilities.

> Uniform application of [DNR] limitations does not mean that the … limitations are always the same in each issued permit. In this case, the DNR uniformly applied the limitations to Wisconsin Electric's six power plants; the specific limitations in the permits differ because the receiving waters of the power plants differ. The chlorine limitations are therefore of general application within the meaning of sec. 227.01(3), Stats.

Id. at 234-235.

To the extent that Clean Wisconsin and DNR argue that they have "explicit authority" because these permit conditions are "necessary" to assure compliance with various statutes and regulations, DNR would *still*

need to promulgate them in order to insert them as conditions into a permit. Permit conditions themselves, as this Court found in *Wisconsin Electric*, can amount to "rules." To the extent that these conditions, like the conditions imposed in *Wisconsin Electric* are generally applicable, they too are rules. Surely a condition that is "necessary" to achieve a statutory or regulatory requirement would be generally applicable to any other similarly situated permittee – and thus "necessary" permit conditions are generally applicable.

1. The Animal Unit Limit Permit Condition

Both the circuit court and the ALJ in this case found that the animal unit limit was *necessary* to assure compliance with various statutes and regulations. This requirement would then unquestionably be considered applicable to all permit holders, and would thus be of "general applicability" such that it is a rule.

The circuit court found that the animal unit limit is itself an effluent limit (which, as discussed infra, must be promulgated as a rule), and further that "DNR may not issue a WPDES permit unless the discharger meets" such an effluent limit. App. 67-68. Moreover, the ALJ made it clear that the animal unit limit is not just about assuring compliance with the 180-day storage requirement:

> It is not a question of either/or-the 180 day storage requirement represents a good short term measure to detect an impending problem, but the maximum animal unit number represents a useful longer-term

> management tool that will ensure that there is not suddenly a mad rush to achieve permit compliance and get under the 180 day capacity threshold.

App. 26.

The ALJ asserts, therefore, that the animal unit limit is a stand-alone requirement that unquestionably would be considered generally applicable to all CAFO facilities.

Both DNR and Clean Wisconsin acknowledge that these requirements are generally applicable. Consistent with the ALJ's decision with respect to the animal unit limits, DNR notes that a "CAFO's number of animal units is relevant to how much manure will be produced, and therefore, properly stored." DNR Br. 29. Although DNR asserts it may use various approaches to assure compliance, the relationship between the number of cows and the volume of manure produced does not change from facility to facility. Given DNR's conclusion that "[t]he animal unit number assured compliance with effluent limitations under Wis. Stat. §283.31(3)," it is reasonable to conclude DNR will apply this limit to other similarly situated CAFO facilities, thus, making it generally applicable.

Similarly, Clean Wisconsin asserts that "[t]he number of animals that will be housed at that CAFO is a critical component of DNR's review and approval of CAFO permits." CW Br. 24-25. Clean Wisconsin also rests its position on the ALJ's determination "that an animal unit limit was necessary to assure compliance with the 180-day storage effluent

limitation." CW Br. 36. Finally, Clean Wisconsin argues the animal unit limit is required in all WPDES permits because the statute requires "that all WPDES permits issued by the department specify maximum levels of discharges." CW Br. 37. Clean Wisconsin's attempt to frame the animal unit limit as a case-specific condition falls flat. There is little question they consider such a limit to be of *general application* to all CAFO permittees.

2. The Off-Site Monitoring Well Permit Condition

With respect to off-site monitoring wells, the ALJ, circuit court, DNR and Clean Wisconsin all parrot the same theme—the off-site monitoring wells condition is the *only* way to assure compliance with certain CAFO statutory and regulatory requirements. The circuit court found that "it is difficult to contemplate a permit condition that would more directly mean 'assuring compliance' with a statute or rule than monitoring for compliance." App. 71. The ALJ found that:

> [Off-site] groundwater monitoring is required to ensure that the permit holder meet the following affirmative legal obligations: that no landspreading may be undertaken within 100 feet of a direct conduit to groundwater, Wis. Admin. Code NR 243.14(2)(b)(8) and that the permit holder not cause fecal contamination of water in a well by either landspreading or management of process wastewater. Wis. Admin. Code NR 243.14(2)(b)(3).

App. 27.

Although the ALJ noted that such off-site monitoring conditions are only required "when necessary," the above finding would clearly pertain to all CAFO facilities. The ALJ and DNR fairly note the unique

geological features and groundwater contamination in the Kinnard Farms' area, asserting that the off-site groundwater monitoring would only apply to the facts on record. But the geological features and groundwater contamination occurring throughout *that* area would make the same off-site groundwater monitoring conditions generally applicable to all CAFO facilities within *that* area, and as discussed *supra*, defining a class in such a way would still make it of "general applicability."

Clean Wisconsin, without exception, argues that "DNR's authority and duty is that groundwater monitoring is necessary to 'assure compliance' with effluent limitations and groundwater protection standards." CW Br. 26. Clean Wisconsin's position is that off-site monitoring requirements should be *generally applicable* within the meaning of Chapter 227's rulemaking requirements.

DNR and Clean Wisconsin rest their entire statutory authority argument on the premise the animal unit limits and off-site groundwater monitoring permit conditions are *necessary* to assure compliance with the applicable statutory and administrative rule requirements. But if they are so broadly *necessary* to assure compliance with Wisconsin's WPDES permit program, they are *necessarily* of general application in the context of Chapter 227, and they were required to be adopted through the statutory rule-making procedures.

B. Additionally, The Animal Unit Limit Is an Effluent Limit That Plainly Requires Rulemaking.

Wis. Stat. §283.11(1) provides that DNR "shall promulgate by rule effluent limitations..." As such, this mandate must be promulgated as a rule. The circuit court held:

> An effluent limitation is "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." § 283.01(6).
>
> An animal unit maximum is just that—a limit on the quantity of effluent from a point source, to assure compliance. . .

App. 68.

This is consistent with the ALJ assertion that the animal unit limit would limit the discharge of manure. In addition, as discussed above, DNR and Clean Wisconsin advocate for an animal unit limit for the purposes of limiting discharge of manure into the waters of the state. *See* CW Br. 24, noting the 180-day storage requirement is an effluent limitation because it "restricts the quantity, rate, or concentration of pollutants that are to be discharged from a CAFO."

Citing *Maple Leaf Farms, Inc. v. DNR*, 2001 WI App 170, ¶30, 247 Wis. 2d 96, 633 N.W.2d 720, DNR asserts that while "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)." DNR Br. 24. We read *Maple Leaf* differently relating to rulemaking. The court in *Maple Leaf*

found *Wisconsin Electric* inapplicable because the "chlorine limitations [in *Wisconsin Electric*] were industrial point source effluent limitations which the legislature had explicitly directed must be promulgated by rule" and not "general reporting requirements" that were at issue. *Id.* 114-115, citing Wis. Stat. §283.11(1). The court in *Maple Leaf* was clear that effluent limitations must be promulgated by a rule. Indeed, that is what state law requires.

II. DNR Lacks Explicit Statutory Authority to Implement the Permit Conditions.

In any event, the permit conditions themselves are unlawful because DNR lacks the *explicit* authority to impose them.

For decades, the reach of administrative agencies' power grew from having only those powers clearly given to them by statute to powers that were "necessarily" or even "fairly" implied. This changed in 2011 when the legislature enacted Act 21. Act 21 created Wis. Stat. § 227.10 (2m) prohibiting administrative agencies from imposing regulatory standards and requirements not *explicitly* allowed by statute or rule.

Further, Act 21 created Wis. Stat. §§ 227.11 (2)(a)1. and 2., providing that statutory preambles—declarations of legislative intent, purpose, findings, or policy, as well as descriptions of an agency's general powers or duties—confer *no authority* on the agency and *cannot* be used as a regulatory wildcard to impose the policies of the agency's choosing.

The explicit authority concept came to the forefront in this Court in 2020, starting with *Wisconsin Legislature v. Palm*, 2020 WI 42, where the Court for the first time acknowledged the "explicit authority requirement." This was soon followed by *Papa v. Wisconsin Department of Health Services*, 2020 WI 66, 393 Wis. 2d 1, 946 N.W.2d 17, where a unanimous Court found that the Wisconsin Department of Health Services lacked explicit authority to enforce its Medicaid recoupment practices.

The Court in *Palm* found the Act 21 provisions giving rise to the explicit authority requirement were interpretive clauses that must be carefully followed by the courts. *Palm*, at ¶52. In addition, the Court recognized that "the Legislature does not alter fundamental details of a regulatory scheme in vague terms or in ancillary provisions." *Id*. at ¶53.

Both DNR and Clean Wisconsin recognize the applicability of Act 21's explicit authority requirement in this case. However, they erroneously claim that Wis. Stat. § 227.10 (2m) is the sole source of this requirement. As noted by the Court in *Palm*, the legislative construct of Act 21's explicit authority requirement includes Wis. Stat. §§ 227.11 (2)(a)1.-3., provisions the Court found "prevent agencies from circumventing this new 'explicit authority' requirement by simply utilizing broad statutes describing the agency's general duties or legislative purpose as a blank check for regulatory authority." *Id*. Read together, the Court found these Act 21 provisions set forth the "explicit

authority requirement [that] is, in effect, a legislatively-imposed canon of construction that requires [the Court] to narrowly construe imprecise delegations of power to administrative agencies." *Id*.

A statutory provision allowing permit conditions necessary to assure compliance *does not* create an exception to Act 21's explicit authority requirement. As the Court in *Palm* notes, the term "necessary to assure compliance" must be narrowly construed by the courts to assure that agencies do not operate outside the boundaries of their enabling statutes.

With respect to the explicit statutory authority for animal unit limits, *amici* agree with ALJ's conclusion that "no applicable rule or statute requires a WPDES permit to specify a number of animal units at a CAFO facility." App. 23. Nevertheless, the ALJ believed that it "does provide a useful longer-term management tool." *Id*. He notes the Petitioners also found the quota "a good idea," and that it will provide "clarity and transparency." App. 26.

Clean Wisconsin rests its explicit authority argument on the ALJ determination that "an animal unit limit was necessary to assure compliance with the 180-day storage effluent limitation in NR 243.15(3)(k). CW Br. 36. But being "useful" or providing "clarity and transparency" is not equivalent to assuring compliance. Nowhere in his findings of fact, conclusions of law and order does the ALJ conclude the

animal unit limit is necessary to assure compliance with any statutory regulatory provisions. In fact, he specifically notes that there is no applicable rule or statute requiring such a condition.

Since Act 21 prohibits an agency from implementing or enforcing any standard, requirement or threshold unless such standards, requirements and thresholds were *explicitly* authorized by statute or lawfully adopted rule, and since it is clear that these permit conditions do not meet that requirement, they are unlawful.

In *Maple Leaf,* the court considered "the DNR's authority to regulate the land application of manure on off-site croplands." *Maple Leaf*, at ¶4. The court found that Wis. Stat. Ch. 283 does not expressly authorize DNR to regulate off-site manure applications. *Maple Leaf*, 247 Wis. 2d 104. An "explicit" authorization (which, again, is what is now required by Wis. Stat. § 227.10 (2m), created by Act 21) is something even more specific than an "express" authorization, and so finding no express authorization should end the inquiry. There are no explicit authorities relating to off-site manure application, and by implication, off-site monitoring wells.

Should animal unit limitations and offsite groundwater monitoring wells be deemed desirable policy objectives, they ought to be enacted by the legislature as were the six enumerated conditions specified by the

legislature to be included in a WPDES permit. *See* Wis. Stat. § 283.31(4)(a)-(f).

The only consideration that matters is the law, and the law does not explicitly allow or explicitly require the imposition of off-site monitoring well conditions or limitations on the number of animals for this type of permit.

CONCLUSION

This case is vital to enforcing the statutory limitations upon administrative agency power in Wisconsin. For the reasons herein, *amici* respectfully request the Court reverse the decision of the Circuit Court.

Respectfully Submitted, DATED this 24th day of March 2021.

_____
Robert I. Fassbender, SBN #1013985
GREAT LAKES LEGAL FOUNDATION
10 East Doty Street, Suite 504
Madison, WI 53703
fassbender@greatlakeslegalfoundation.org
Telephone: (608) 310-5315

Attorney for Intervenors-Co-Appellants
Midwest Food Products Association
Wisconsin Cheese Makers Association
Dairy Business Association
Wisconsin Potato & Vegetable Growers
Wisconsin Farm Bureau Federation
Wisconsin Paper Council
Wisconsin Corn Growers
Wisconsin Dairy Alliance
Venture Dairy Cooperative

_____
Lucas T. Vebber (WI Bar No. 1067543)
LVebber@wmc.org

_____
Corydon J. Fish (WI Bar No. 1095274)
cfish@wmc.org

501 East Washington Avenue Madison, WI 53703
Telephone: 608-258-3400
Attorneys for Intervenors-Co-Appellants
Wisconsin Manufacturers & Commerce

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) §§ 809.19(8)(b) and (d) for a brief using a proportional serif font. The length of this brief, including footnotes, is 2,977 words.

_____
Robert I. Fassbender

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief that complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

_____
Robert I. Fassbender

CERTIFICATE OF SERVICE

I hereby certify that I caused this Non-Party Brief to be hand-delivered to the Supreme Court of Wisconsin on March 24, 2021.

I further certify that on March 24, 2021, I caused a copy of this Non-Party Brief to be served upon all parties of record via U.S. Mail to their respective counsel:

_____
Robert I. Fassbender

Clean Wisconsin, Inc.
Kathryn A Nekola
Evan Feinauer
634 W. Main St., Ste. 300
Madison, WI 53703-2687

Lynda Cochart
Amy Cochart
Roger DeJardin
Sandra Winnemueller
Chad Cochart
Robert David Lee
Andrea Gelatt
612 W. Main St., Ste. 302
Madison, WI 53703

Wisconsin Department of Natural Resources
Gabe Johnson-Karp
Jennifer L Vandermeuse
P.O. Box 7857
Madison, WI 53707-7857

Kinnard Farms, Inc.
Jordan J Hemaidan
Joseph D Brydges
Nancy Cruz
P.O. Box 1806
Madison, WI 53701-1806

Wisconsin Legislature
Lisa M. Lawless
511 N. Broadway, Ste. 1100
Milwaukee, WI 53202
Eric M. McLeod
Kirsten Adrienne Atanasoff
P.O. Box 1379
Madison, WI 53701-1379