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

**NON-PARTY BRIEF OF WISCONSIN
ENVIRONMENTAL HEALTH NETWORK**

Submitted by:

Attorney John S. Greene (SBN 1002897)
1926 Keyes Avenue
Madison, WI 53711
Phone: 608.692.1927
jsgreenelaw@gmail.com

*Attorney for Wisconsin Environmental
Health Network*

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INTEREST OF AMICUS CURIAE

The Wisconsin Environmental Health Network (WEHN) is an association of Wisconsin healthcare professionals dedicated to providing science-based information about the risks to human health from existing or potential environmental threats, including exposure to toxins. The goal of WEHN is to prevent harm to the health of Wisconsin residents from environmental causes.

WEHN pursues this central goal by educating healthcare professionals, the public and policymakers about the potential human health impacts from pollution and other environmental factors, and by advocating for effective regulatory protection against such threats.

The issues in this case strike at the heart of WEHN's core mission. Removing agency discretion in the permitting process would have significant real-world health impacts on the victims of environmental contamination, and would thwart the clear intent of previous legislatures to prevent such harm through enactment of a wide array of regulatory laws. WEHN believes its perspective will aid the Court in evaluating and deciding the issues this case raises.

ARGUMENT

The environmental permitting system provides an essential means of protecting human health from pollution and contamination resulting from industrial and agricultural activities. Under the argument offered by Kinnard Farms and the Legislature, Act 21 impliedly repealed numerous statutes previous legislatures enacted to protect public health and the environment. This interpretation clashes with the language of the act, as well as settled legal principles, and should be rejected.

I. Livestock Waste Poses Serious Threats To Human Health

Humans face a wide variety of health threats from environmental sources: toxins, air pollutants, volatile organic compounds, radon, heavy metals, radioactive substances, viruses and bacteria, along with many others. While some of these are naturally occurring, many arise directly from human activities.

A fundamental purpose of environmental regulation is the protection of human health from harmful effects of industrial and agricultural activities. Apart from general regulatory laws and rules, the permitting process is a core tool to facilitate desirable economic activity while, through the imposition of appropriate restrictions and conditions, preventing undue harm to those affected by the activity.

This case well illustrates the role and importance of the permitting process in protecting human health from human-caused pollution. While the outcome will have broad application to many types of regulated activities, because it arises in the context of a wastewater discharge permit for a concentrated animal feeding operation (CAFO), we will focus on the primary pollutants involved with CAFOs, by way of example.

The primary threat to human health from CAFOs comes from the vast quantities of waste produced by the livestock, which must be stored and then disposed of. The Kinnard Farms permit is illustrative. As of 2019, the Kinnard CAFO contained over 8000 cows, which generate well over 100 million gallons of

manure and process wastewater annually.¹ That waste must go somewhere, namely onto over 11,000 acres of cropland in Kewaunee County.²

Livestock waste carries multiple potential threats to human health, including antibiotics, bacteria and other pathogens (including antibiotic-resistant bacteria), hormones, nitrogen, and phosphorous.”³ Ensuring that these substances stay out of the groundwater, and by extension the drinking water, is critical to protecting the health of the one-quarter of Wisconsin’s population who obtain their drinking water from the state’s 800,000 private wells.⁴

The pathogens potentially borne by livestock waste include *E. coli* (*Escherichia coli*), *Cryptosporidium*, *Giardia*, *Campylobacter*, and *Salmonella*, among others.⁵ These pathogens are “capable of causing severe gastrointestinal disease, complications, and sometimes death in humans.”⁶

Unfortunately, many private wells in the vicinity of the Kinnard CAFO have been contaminated by *E. coli*, resulting in

¹ Kinnard Farms website, <https://kinnardfarms.com/our-history/> (accessed Mar. 19, 2021); Wisconsin DNR website, <https://dnr.wisconsin.gov/topic/CAFO/KinnardFarm.html> (accessed Mar. 19, 2021).

² *Id.*

³ *Precautionary Moratorium on New and Expanding Concentrated Animal Feeding Operations*, <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2020/01/13/precautionary-moratorium-on-new-and-expanding-concentrated-animal-feeding-operations> (accessed Mar. 19, 2021); *CAFOs and Public Health: The Issue of Antibiotic Resistance*, <https://www.extension.purdue.edu/extmedia/ID/cafo/ID-349.pdf> (accessed Mar. 19, 2021).

⁴ Wisconsin DNR, *Wells*, <https://dnr.wisconsin.gov/topic/Wells> (accessed Mar. 19, 2021).

⁵ See *Precautionary Moratorium*, *supra* n. 3.

⁶ *Id.*

illness.⁷ Overall, between 5% and 10% of a common strain of *E. coli* develop a potentially life-threatening complication called hemolytic uremic syndrome, which can cause kidney damage.⁸ Children under five most at risk, as are the elderly and people with compromised immune systems.⁹

Pathogens are not the only source of concern in animal waste. The breakdown of manure results in the production of large quantities of nitrates, which are also potentially very harmful to humans. The most well-known health effect is “blue baby syndrome,” or methemoglobinemia. This condition, which can be fatal if untreated, primarily affects babies less than six months old who ingest water from nitrate-polluted wells.¹⁰ Nitrates also pose a risk for pregnant women, by increasing the risk of premature births, very low birth weight and birth defects.¹¹

Nor are the adverse health effects of exposure to nitrates limited to pregnant women and newborns. Nitrates also increase the risk of thyroid disease and colon cancer.¹² A recent research study concluded that nitrate contamination might account for between 66 and 233 cases of colorectal cancer annually in Wisconsin, in addition to other types of cancer.¹³

⁷ Kinnard App. 020-021; R.34:670-71.

⁸ *E. coli* Infection, <https://my.clevelandclinic.org/health/diseases/16638-e-coli-infection> (accessed Mar. 22, 2021).

⁹ *Id.*

¹⁰ Wisconsin Dept. of Health Services, *Nitrate in Private Wells*, <https://www.dhs.wisconsin.gov/water/nitrate.htm> (accessed Mar. 19, 2021).

¹¹ *Id.*

¹² *Id.*

¹³ Environmental Working Group News and Analysis, Evans and Mathewson, *Study: Nitrate in Wisconsin’s Drinking Water Linked to Cancer, Preterm Births and Up to \$74 Million in Yearly Healthcare Costs*, <https://www.ewg.org/news-and-analysis/2020/12/study-nitrate-wisconsin-s-drinking-water-linked-cancer-preterm-births-and>.

Nitrates are the most widespread pollutant in Wisconsin's groundwater, as a result of the land disposal of animal waste.¹⁴ An estimated 8 to 10% of Wisconsin private wells exceed the safety standard of 10 parts per million of nitrates.¹⁵ This widespread contamination "is increasing in extent and severity" in Wisconsin.¹⁶ Agricultural activity accounts for approximately 90% of nitrate contamination of Wisconsin groundwater.¹⁷

Not surprisingly, land-applied animal waste frequently ends up contaminating the groundwater, which in turn ends up in both private and public drinking water wells.

The problem is even worse where the local geology promotes readier infiltration of pollutants into the groundwater, as in the case of Kewaunee County.¹⁸ Extensive well testing in Kewaunee County has revealed that 25-30% of wells in the county contain water unsafe to drink, either from coliform bacteria or excessive nitrate levels, or both.¹⁹

The problem of well water in Kewaunee County contaminated by animal waste has been widely publicized.²⁰

¹⁴ Wisconsin Groundwater Coordinating Council, Report to the Legislature, Fiscal Year 2020, at 110, <https://dnr.wi.gov/topic/groundwater/documents/GCC/Report/FullReport.pdf>.

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 110.

¹⁷ *Id.* at 4.

¹⁸ Note 10, *supra*, at 103.

¹⁹ Final Report, DNR Project 227, *Assessing Groundwater Quality in Kewaunee County, Wisconsin and Characterizing the Timing and Variability of Enteric Pathogen Contamination with the Dolomite Aquifer in Northeastern Wisconsin*, <https://www.wri.wisc.edu/wp-content/uploads/Final-Report-Kewaunee-County-Groundwater-Quality-DNR-Project-227.pdf>, at 1, 7.

²⁰ *New research indicates tainted Kewaunee County Wells Tied to Manure Pits*, Green Bay Press Gazette (Mar. 4, 2019);

Many residents of Kewaunee County (which is home to seventeen CAFOs)²¹ have been forced to consume bottled water because their wells are contaminated.²²

On paper, the laws recognize the potential harm from contamination of wells. For example, the CAFO rules explicitly bar contamination of wells with fecal matter or bacteria. Wis. Admin. Code § NR 243.14(2)(b)3. Yet according to Kinnard Farms and the Legislature, Act 21 precludes DNR or an ALJ from imposing commonsense requirements to protect the health of the CAFO neighbors, because those exact requirements did not appear in the statute or administrative code. As discussed next, this interpretation of Act 21 would destroy the health protections embedded in a variety of regulatory laws, and impliedly repeal a host of statutes that protect the public.

<https://www.greenbaypressgazette.com/story/news/investigations/2019/03/04/tainted-kewaunee-county-drinking-water-wells-tied-manure-pits/3054018002/>

²¹Wisconsin DNR, CAFO Permittees, Kewaunee County, https://dnr.wi.gov/topic/AgBusiness/data/CAFO/cafo_cty.asp?CountyChoice=Kewaunee&Submit=Submit (accessed Mar. 19, 2021).

²² Fox 11 “Investigates Kewaunee County’s groundwater contamination,” FOX11 (May 10, 2017), <https://fox11online.com/news/fox-11-investigates/fox11-investigates-kewaunee-countys-groundwater-contamination>.

II. Act 21 Did Not Impliedly Repeal All Permitting Statutes Which, By Necessity and Design, Contain Broad Standards

Kinnard Farms' and the Legislature' extreme interpretation of Act 21 would imperil the state's ability to protect human health and the environment through one of the mainstays of our regulatory system—namely the issuance of permits. It would impliedly repeal numerous regulatory statutes that safeguard public health and other public rights through broad, general standards, implemented through individualized permits tailored to specific circumstances and threats. Neither the language of Act 21 nor fundamental principles of statutory construction support this assault on the permit process.

Act 21 provides that a permit condition must be “explicitly required or explicitly permitted by statute” or administrative rule. Wis. Stat. § 227.10(2m). Kinnard Farms and the Legislature interpret this language as prohibiting agencies from imposing any condition on a permit unless the legislature itself has formally approved that exact condition—verbatim—either by statute or by approval of administrative rules. Under this view, the statutes and rules provide an exclusive list of all possible permit terms, and the administrative law judge or agency crafting a permit can only select from among those possibilities; there is no ability to develop a new condition tailored to the unique circumstances of the particular permit application.

This interpretation rests on the flawed premise that a broad statute is incompatible with “explicit” authority. This Court's precedents show otherwise: “through Wis. Stat. ch. 281, the legislature has explicitly provided the DNR with the broad authority and a general duty . . . to manage, protect, and maintain waters of the state.” *Lake Beulah Mgmt. Dist. v. State*

Dep't of Nat. Res., 2011 WI 54, ¶ 39, 335 Wis. 2d 47, 72-73, 799 N.W.2d 73, 85-86.

While agencies of course must have authority from the legislature to issue permits, there are many statutes on the books which, to fulfill the legislative purpose of protecting the public, must afford the implementing agency some discretion and flexibility in carrying out their authority. It is simply not possible for a legislature to anticipate and enact legislation to address all of the possible circumstances that can arise in a complex and fast-changing world.

In fact, the very genesis of administrative law was the recognition of the limits of relying on legislation or the tort system to address injuries to human health caused by industrial activities. As an observer noted in 1935, the need to effectively protect the public from harmful industrial activities could not be satisfied by the then-existing legal system, in part because of the inability of legislation to keep pace with rapid changes, and address fact-specific situations that continually arise. Metzler, *The Growth and Development of Administrative Law*, 19 Marq. L. Rev. 209, 216 (1935). Over the last century, the legislature has repeatedly recognized the need for a flexible system of administrative regulation to address the complex and constantly changing conditions of modern society.

Many statutes have broad standards reflecting the legislature's understanding that legislation cannot anticipate and address every unique circumstance that regulators may encounter. Here are some examples from the environmental arena.

Wis. Stat. § 30.025(3) & (4) authorizes permits to utilities "upon stated conditions deemed necessary to assure" that the project "[d]oes not unduly affect . . . public rights and interests in

navigable waterways; [t]he effective flood flow capacity of a stream; [t]he rights of other riparian owners; or [w]ater quality.”

Wis. Stat. § 30.12(2m) authorizes permits to contain site-specific restrictions to prevent “significant adverse impacts to the public rights and interests, . . . [e]nvironmental pollution, as defined in s. 299.01(4) . . . or [m]aterial injury to the riparian rights of any riparian owner.” *Id.* § 30.12(2m)(a)-(c)). Similarly, Wis. Stat. § 30.20(2) requires contracts for removal of material from lakebeds to “contain any conditions that [DNR] determines are necessary for the protection of the public interest and the interests of the state.”

Likewise, Wis. Stat. § 31.185(5) authorizes DNR to include in dam removal permits “such conditions as it deems reasonably necessary in the particular case to preserve public rights in navigable waters, to promote safety, and to protect life, health and property.”

In the realm of water pollution, the legislature has recognized the continual evolution of technology, along with the need for broad standards and corresponding discretion to shape permit terms. Wis. Stat. § 283.31(4) provides that DNR “shall prescribe conditions for permits issued under this section to assure compliance with” effluent limitations, water quality standards and the like. In a similar vein, Wis. Stat. § 283.31(6) authorizes DNR to require that sources of water pollution comport with “the best technology available for minimizing adverse environmental impact.”

Broad grants of authority are not limited to the environmental statutes. The legislature has authorized health professional licensing boards such as the Medical Examining Board and Dentistry Examining Board, comprised in large of licensed health professionals, to impose whatever terms and conditions they consider appropriate on the reinstatement of

revoked licenses. *See, e.g.*, Wis. Stat. §§ 448.02(6), 447.07(5). Such explicit but extremely broad authority clearly relies on the expertise of those boards to impose conditions based on specific circumstances and has an obvious connection to protecting the public health.

Similarly, the legislature has given broad authority to other agencies. *See, e.g.*, Wis. Stat. §§ 348.105(5)(b) (authorizing DOT to “impose any reasonable conditions . . . that it deems necessary for the safety of travel and protection of the highways” when permitting the transportation of radiological materials); 348.25(3) (authorizing DOT to impose “reasonable conditions” on certain permits); 93.06(8) (authorizing DATCP, based on “pertinent circumstances or acts,” to condition licenses for regulated entities such as grain dealers, commercial feed producers, milk and vegetable contractors, pesticide manufacturers and applicators, food inspectors, meat processors, retail food establishments, and more.)

Nothing in the language of Act 21 signifies that it was intended to impliedly repeal the regulatory statutes enacted by previous legislatures during the past century, to protect the health of Wisconsin’s citizens and its environment. Yet that is precisely the consequence of the argument made by Kinnard Farms and the Legislature.

Their theory runs headlong into the settled principle that “[r]epeals by implication are not favored in the law. The earlier act will be considered to remain in force unless it is so manifestly inconsistent and repugnant to the later act that they cannot reasonably stand together.” *Union Cemetery v. City of Milwaukee*, 13 Wis. 2d 64, 71, 108 N.W.2d 180, 183 (1961)(citations omitted).

In the specific context of this case, the legislature has explicitly authorized DNR to issue permits with conditions that will prevent CAFO discharges from polluting groundwater and

contaminating drinking water wells. Those conditions surely include such commonsense, reasonable measures as setting a numerical cap on the number of cows that can be housed at the facility and requiring monitoring of nearby private wells to ensure that any contamination is detected before it can cause serious harm to the neighbors of the CAFO. To hold otherwise would preclude DNR from imposing measures essential to protect human health.

III. Kinnard Farms' and the Legislature's Interpretation of Act 21 Would Have Unintended Consequences Detrimental Even to Permit Applicants

The position espoused by Kinnard Farms and the Legislature is obviously intended to make it easier to obtain permits, by limiting the discretion of the issuing agency to attach permit conditions. Yet it could unintentionally have quite the opposite effect.

Had their interpretation of Act 21 governed the permit proceeding, the ALJ would have had to make an all-or-nothing decision on the permit. The citizens who petitioned for a hearing on Kinnard's CAFO permit did so because of well-founded concerns that the CAFO's waste discharges could contaminate their wells and threaten the health of their families. The combination of the large number of CAFOs in the area, along with very vulnerable geology (namely shallow, fractured bedrock), had already resulted in a "proliferation of contaminated wells in the area."²³ Kinnard App.020, 024; R.34:670, 674.

²³ *Karst and shallow carbonate bedrock in Wisconsin*, Wisconsin Geological and Natural History Survey, Factsheet 02 (2009), <https://dnr.wi.gov/topic/nonpoint/documents/nr151/20161028/ShallowCarbonateWells.pdf>.

As the ALJ found, the severe threat posed by the proposed animal waste discharges made it “essential” to impose permit conditions that would ensure compliance with the general statutory standards. Kinnard App.021, 027; R.34:671, 677. Waiting until significant pollution and contamination occurred would be too late to protect the health of the neighbors.

Given the very real environmental threats posed by the massive waste load from the expanded CAFO, had the ALJ lacked any discretion to attach conditions necessary to ensure compliance with the statutory prohibitions against causing exceedances of groundwater standards or contaminating wells, the proper outcome would have been to deny the permit outright.

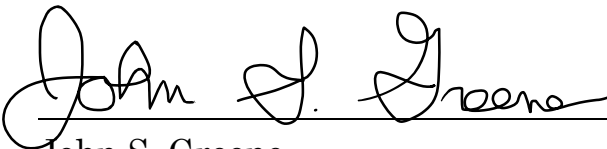
Ironically, under these circumstances the permit applicant may prefer to accept special permit conditions (such as a numerical animal limit and monitoring) that would have satisfied the objecting neighbors’ concerns. But under Kinnard Farms’ and the Legislature’s interpretation of Act 21, this solution would not be available, since under their view the provisions necessary to ensure compliance would be void and unenforceable—either by the state or affected third parties. Perversely, this could render the entire permit void and vulnerable to legal challenge.

And had the ALJ simply approved the permit with no conditions ameliorating the concerns about contamination, the permit would have been subject to challenge as violating the statutory and regulatory standards. The extreme interpretation of Act 21 pushed by Kinnard Farms and the Legislature thus could impede rather than promote the issuance of CAFO permits.

CONCLUSION

For the reasons stated above, the Wisconsin Environmental Health Network respectfully requests the Court to affirm the decision below.

Respectfully submitted this 24th day of March, 2021.

By: 

John S. Greene
State Bar No. 1002897
1926 Keyes Avenue
Madison, WI 53711
Phone: 608-692-1927
jsgreenelaw@gmail.com

Attorney for Wisconsin Environmental
Health Network

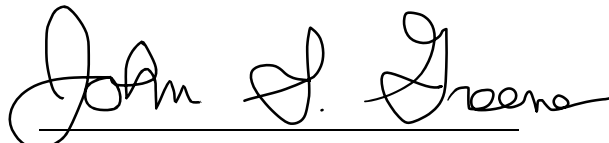
CERTIFICATION

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 2884 words.

I further certify that when an electronic copy of this brief is submitted to the Court, it will comply with the requirements of Wis. Stat. § 809.19(12) and will be identical in content to the text of the paper copy of the brief.

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

Dated: March 24, 2021



John S. Greene