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WISCONSIN SUPREME COURT
No. 18AP59

CLEAN WISCONSIN, INC. and
PLEASANT LAKE MANAGEMENT
DISTRICT,

Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent-Appellant,

Appeal No. 2018AP59

Circuit Court Case No.
2016CV002817, 2016CV002818
2016CV002819, 2016CV002820
2016CV002821, 2016CV002822
2016CV002823, 2016CV002824

WISCONSIN MANUFACTURERS & COMMERCE,
DAIRY BUSINESS ASSOCIATION
MIDWEST FOOD PRODUCTS ASSOCIATION
WISCONSIN POTATO & VEGETABLE GROWERS ASSOCIATION
WISCONSIN CHEESE MAKERS ASSOCIATION
WISCONSIN FARM BUREAU FEDERATION
WISCONSIN PAPER COUNCIL and
WISCONSIN CORN GROWERS ASSOCIATION

Intervenors-Co-Appellants

WISCONSIN LEGISLATURE,

Intervenor

On Certification by Court of Appeals, Dis. II, January 16, 2019,

On Appeal from Final Order of The Dane County Circuit Court,
The Honorable Valerie L. Bailey-Rihn, Presiding

INTERVENORS-CO-APPELLANTS' INITIAL BRIEF

Robert I. Fassbender (1013985)
Great Lakes Legal Foundation
Attorney for Intervenors-Co-Appellants
10 East Doty Street, Suite 504
Madison, WI 53703
Telephone: (608) 310-5315

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ISSUES PRESENTED

1. Did DNR lawfully approve eight high capacity wells without conducting an additional environmental review not required by statute or rule, given that Act 21 prohibits agencies from enforcing any requirement that is not "explicitly" permitted, and given that no statute explicitly authorizes additional environmental review for these wells?

The circuit court answered no.

2. Is Petitioners' claim that DNR failed to "consider . . . cumulative impacts" when approving the wells barred by Wis. Stat. § 281.34(5m), which prohibits any person from "challeng[ing] an approval . . . of a high capacity well based on the lack of consideration of [ ] cumulative environmental impacts"?

The circuit court answered no.

STATEMENT OF THE CASE

Intervenor-Co-Appellants Business Associations are aligned in this case with Intervenor Wisconsin Legislature and recognize the Statement of the Case set forth in their opening brief as an accurate description of the nature of the case along with other components required under Wis. Stat. § 809.19(1)(d). We have nothing further to add in that regard.

STANDARD OF REVIEW

This case addresses the scope of DNR's authority to consider environmental impact, and therefore review is de novo. *Andersen v. DNR*, 2011 WI 19, ¶25, 332 Wis. 2d 41, 796 N.W.2d 1. The proper interpretation of Section 281.34(5m) is also reviewed de novo. *State v. Reyes Fuerte*, 2017 WI 104, ¶18, 378 Wis. 2d 504, 904 N.W.2d 773. "[D]ue weight shall be accorded the experience, technical competence, and specialized knowledge of [DNR], as well as [any] discretionary authority conferred upon it." Wis. Stat. § 227.57(10).

STATEMENT OF INTERVENORS-CO-APPELLANTS INTEREST

Intervenor-Co-Appellants Business Associations' (Hereafter, "Intervenor Business Associations") members own and operate businesses in nearly every category of agricultural, business, and industrial activity. Many member's businesses own and operate high capacity wells that are regulated by DNR, and many others are contemplating the construction of high capacity wells to support planned business development and expansion activities.[1]

Water is essential both for the agricultural and manufacturing sectors. Groundwater is often the only source of water for these operations. For example, it would be virtually impossible to grow adequate quality potatoes

[1] Intervenor Business Associations' brief in support of intervention. R. 83. (Br. Support Pet. to Intervene, pp. 5.)

and vegetables in the central sands area without high capacity well irrigation.[2]

Intervenor Business Associations have member companies who were lawfully issued DNR permits that were subsequently invalidated by the circuit court.[3] At the time of their petition to intervene, Intervenor Business Associations had over 60 members that were issued high capacity well permits under the DNR policies rejected by the circuit court. If the circuit court decision is upheld, the loss of high capacity well permits, as well as the inability to obtain permits for expanding or establishing new operations, will cause economic harm to Intervenors' member companies, many of whom are small, family-run businesses.

Intervenor Business Associations were part of a coalition of over 30 business groups supporting Act 21.[4] Their members are adversely affected when courts or agencies find expansive regulatory authorities in general, preamble statutory provisions. Also, Intervenor Business Associations and their members have and continue to participate in the development of

[2] Br. Support Pet. to Intervene, pp.13

[3] *Id*.

[4] Eye On Lobbying, Wisconsin Ethics Commission, 2011-2012 Legislative Session, January 2011 Spec. Sess. Assemb. B. 8. https://lobbying.wi.gov/What/BillInformation/2011REG/Information/7927. (all websites in this Brief were last visited on Feb. 3, 2021) (The websites cited in this Brief provide background information that is judicially noticeable as "legislative facts." *See State v. Barnes*, 52 Wis. 2d 82, 87 & n.2, 187 N.W.2d 845 (1971); *e.g., Andersen v. DNR*, 2011 WI 19, ¶ 31, 332 Wis. 2d 41, 796 N.W.2d 1 (citing DNR website)

Wisconsin's high capacity well permitting program. Expansive, unclear findings of agency regulatory authority by the courts also create substantial regulatory uncertainty. For example, those conditions giving rise to additional environmental review for high capacity wells were debated and negotiated within the legislative process to provide clear and objective criteria for when additional environmental review is required. The Court in *Lake Beulah* layered another, ill-defined threshold triggering additional environmental review that created a high degree of regulatory uncertainty for business requiring high capacity wells to operate. That uncertainty resulted in a paralysis of the permit program that hurt Intervenor Business Associations members needing high capacity wells to operate.

INTRODUCTION

Through 2011 Wis. Act 21 (Act 21), the legislature fundamentally altered the statutory threshold needed before administrative agencies can regulate. They found the well-worn judicial principles of *express* and *necessarily implied* authority were insufficient to constrain the ever-expanding administrative state. In light of Act 21, courts are now to apply an explicit authority doctrine when assessing the scope of legislative lawmaking powers delegated to administrative agencies.

Act 21 created Wis. Stat. § 227.10 (2m) prohibiting administrative agencies from imposing regulatory mandates not *explicitly* allowed by statute

or administrative 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, 391 Wis. 2d 497, 942 N.W.2d 900, 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. 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. In that regard, the Court found that Act 21 "prevent[s] 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*.

Act 21 clarifies that general, prefatory statutes that broadly describe an agency's power or duties are not grants of plenary authority. Rather, such statutes must be paired with explicit delegations in enabling statutes that clearly define and limit an agency's authority to make law. Like Act 21, the Court in *Lake Beulah Mgmt. Dist. V. Wisconsin Dep't of Nat. Res.*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, distinguished general statutes and implementing statutes setting forth comprehensive regulatory schemes, finding that provisions in implementing statutes can revoke or limit general statutes. But the Court, using pre-Act 21 methodology, nevertheless found no conflict between the comprehensive regulatory scheme for high capacity wells and the sweeping DNR authorities the Court found in Chapter 281 prefatory clauses. *Id*. at ¶42.

To discern DNR's regulatory powers over high capacity wells the Court's decision in *Lake Beulah* heavily relied upon those same prefatory clauses that were directly targeted by Act 21, effectively overruling its central holding. The Court used interpretive tools that were made obsolete by Act 21—allowing specific statutes to control general ones only when a true conflict prevents *harmonizing* the general and specific statutes. Most troubling was the Court substituting the legislature's judgment with their

own when finding that DNR had the power and duty to consider vague judicial criteria that would trigger environmental review that was not prescribed in the high capacity well statutes. It was inevitable that the Court would have to reconcile *Lake Beulah* with the limitations on agency regulatory authority imposed by Act 21.

ARGUMENT

I. Agencies Are Only Afforded That Authority Clearly Delegated to Them by the Legislature in Enabling Statutes.

Administrative agencies are creations of the legislature. As such, the legislature may expand or diminish their authorities, or if desired, they may "wipe out the agency entirely." *Schmidt v. Dept. of Res. Dev.*, 39 Wis. 2d 46, 57, 158 N.W.2d 306 (1968).

When the legislature delegates authority to an administrative agency, it does so through an enabling statute that specifies the agency's "powers, duties and scope of authority." *Martinez v. Dep. Of Indus. Labor and Human Relations*, 165 Wis. 2d 687, 698, 478 N.W.2d 582 (1992). Only enabling statutes reveal the boundaries of the powers delegated to administrative agencies by the legislature. *See*, *Koschkee v. Taylor*, 2019 WI 76, ¶15, 387 Wis. 2d 552, 929 N.W.2d 600 ("The powers delegated to administrative agencies by the legislature include the power to promulgate rules within the boundaries of enabling statutes passed by the legislature.")

Delegation issues are necessarily entwined with separation of powers concepts. Wisconsin was a leader in recognizing the nature of legislative regulatory delegation. In 1928, Wisconsin Supreme Court Justice Rosenberry explained how agencies may acquire lawmaking powers otherwise vested in the legislature:

> The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate—is a power which is vested by our Constitution in the Legislature and may not be delegated. When, however, the Legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose.

State v. Whitman, 196 Wis. 472, 220 N.W. 929, 941 (1928).

The court recognized in *Schmidt* the necessity for the legislature to "fix limits" in which the agency may operate. *Schmidt*, at 59. Although the Court left open the issue of more substantive limits on the delegation of legislative authority, it recognizes that the delegation of legislative power to the executive is valid only if "the purpose of the delegating statute is ascertainable and there are procedural safe-guards to insure that the board or agency acts within that legislative purpose," *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d 526, 536, 182 N.W.2d 257 (1971). This Court has approved "broad grants of legislative powers," but acknowledged the need for "procedural and judicial safeguards against arbitrary, unreasonable, or oppressive conduct of the agency," *Westring v. James*, 71 Wis. 2d 462, 468, 238 N.W.2d 695 (1976) (citing *Schmidt v. Dep't of Res. Dev*., 39 Wis. 2d 46,

158 N.W.2d 306 (1968)). While "the nature of the delegated power still plays a role in Wisconsin's non-delegation doctrine," ... "[t]he presence of adequate procedural safeguards is the paramount consideration." *Panzer v. Doyle*, 2004 WI 52, ¶79 & n.29, 271 Wis. 2d 295, 680 N.W.2d 666; see also *Id.* at ¶¶54-55. The legislature, through Act 21, and the Court, through this line of cases, agree that lawmaking powers granted to agencies must be clear, unequivocal, and limited.

But in other in cases, the courts unmoor agency authorities from the fixed limits of their enabling statutes. Courts found sweeping regulatory powers arising from broad, vague pronouncements in statutory preambles that set no limits. Using an interpretive tool, now debunked by Act 21, courts looked at more specific enabling statutes' provisions only to discern whether they were in clear conflict with these broad general statutes. If there is no contradiction, the authorities are said to be *harmonized*. *See*, *Jones v. State*, 226 Wis. 2d 565, 575-76, 594 N.W.2d 738 (1999), holding that specific statutes control general ones only when there is truly a conflict and courts are to harmonize statutes to avoid conflicts when a reasonable construction of the statutes permits that. This turned legislative lawmaking delegation analysis on its head. Rather than looking to enabling statutes for clearly defined limits to agencies' lawmaking authorities, the enabling statutes

became relevant only if they preclude the general subject matter powers in question.[5]

One of the issues the Court should address involves a tyranny of vague terms the courts use when analyzing agency lawmaking powers; finding it comes from subject matter jurisdiction, general statutes, general powers and duties provisions, enabling statutes, among other concepts ill-defined by statute or case law. Intervenor Business Associations, agencies, courts, and arguably all of Wisconsin citizens, need clarity. The Court has an opportunity to clear the fog that blurs the line between statutory provisions that are merely aspirational or jurisdictional in nature and those enabling statutes that actually grant Wisconsin agencies regulatory power over us.[6]

For example, the idea of *subject matter jurisdiction* was discussed in *Capoun Revocable Trust v. Ansari*, 2000 WI App 83, 234 Wis. 2d 335, 610 N.W.2d 129. George and Mary Capoun brought an action against their neighbor, Ansari, seeking to block the issuance of a permit by DNR for the

[5] "The obvious problem with this approach is that the court was not treating statutes as the sole source of agency power, but as the opposite: a limit on some extra-statutory agency authority." Kirsten Koschnick, Comment, *Making "Explicit Authority" Explicit: Deciphering Wis. Act 21's Prescriptions for Agency Rulemaking Authority*, 2019 Wis. L. Rev. 993, 1020 (citing *Capoun Revocable Tr. v. Ansari*, 2000 WI App 83, 234 Wis. 2d 335, 610 N.W.2d 129, 135).

[6] This analysis should focus on the clarity of enabling statutes versus the vagueness of non-enabling statutory provisions. The latter can be mostly fluff. For example, the Wisconsin Legislative Reference Bureau, charged with turning legislators' policy concepts into statutory language, no longer includes "statements of legislative intent, purpose, findings" in bill drafts. Wisconsin Legislative Reference Bureau, Bill Drafting Manual (2017-2018), §7.01 (1) (Statement of Legislative Intent, Purposes, or Findings). Aspirational language may serve us well in certain proclamations such as the Declaration of Independence, but it is not helpful in limiting the reach of regulatory agencies.

retention pond Ansari had already constructed on his property without a permit. The DNR enabling statute, Wis. Stat. § 30.19, provided it was unlawful to construct or enlarge any artificial waterway "unless a permit has been granted by the department or authorization has been granted by the legislature." Wis. Stat. § 30.19 (1997-98).

In what would become a harbinger of things to come, the court starts its agency delegation analysis at the 30,000-foot level with the observation that:

> We note the legislature formed the DNR in 1965 'to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water.' In creating Wis. Stat. ch. 30, the legislature established a framework to regulate the state's navigable waters and delegated the enforcement of ch. 30 to the DNR.
>
> *Capoun,* at ¶11.

The court held that "DNR has *subject matter jurisdiction* to issue after-the-fact permits, as well as those issued prior to the commencement of construction." *Id.* at ¶13 (Emphasis added). It was noted that "This case demonstrates that, in practice, an agency's regulatory authority was satisfied so long as the agency action dealt with some subject-matter over which the agency had jurisdiction, regardless of whether the statutes specifically enabled the agency action in question." Koschnick, *supra,* at 1011.

Other court of appeals cases found legislative delegations to agencies arising from these sweeping pronouncements set forth in statutory prefatory clauses. In *Wisconsin Builders Ass'n. v. State Dep't. of Commerce*, 2009 WI

App 20, 316 Wis. 2d 301, 762 N.W.2d 845, the court of appeals found that Wis. Stat. § 101.14(4m)(b) does not set limits on the authority of the Department of Commerce despite the explicit statutory language contained therein that automatic fire sprinkler systems were only to be required for those multifamily dwellings that meet specific statutory criteria, such as exceeding 16,000 square feet or with more than 20 dwelling units. *See*, Wis. Stat. § 101.14(4m)(b). The court of appeals concluded that *under the Department's general powers, duties and jurisdiction provisions*, specifically Wis. Stat. § 101.02(15), "the Department has the *general authority* to enforce and administer all laws and lawful orders that require public buildings to be safe and that require the protection of the life, health, safety and welfare of ... the public or tenants in any such public building." *Wisconsin Builders Ass'n.*, at ¶10 (emphasis added).

In effect, the court of appeals rendered meaningless the explicit legislatively enacted thresholds for triggering sprinkler system requirements based on the surface area and number of units in a dwelling. Thus, the entire sprinkler system enabling legislation became unnecessary if the plenary powers under Wis. Stat. § 101.02 allow for any rules touching upon public building safety. By invoking "general authorities" the court gave the agency *carte blanche* authority over policies relating to building safety, which in turn, made the specific statutory fire sprinkler system provisions superfluous or meaningless. The deliberate, vigorous legislative process balancing safety

and costs was discarded in favor of empowering unelected bureaucrats using the vague concept of general authorities.

In *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 2010 WI App 85, 327 Wis. 2d 222, 787 N.W.2d 926, *aff'd in part, rev'd in part*, 335 Wis. 2d 47 (2011), the court of appeals concluded that broad general policy and purpose statutory provisions granted DNR the authority to regulate activities that confirmed in the enabling statute. The court noted:

> There are four statutes at issue here: two statutes provide a *broad, general grant of authority* to the DNR – Wis. Stat. §§ 281.11 and 281.12 – and two statutes create *specific rules* for high capacity wells – Wis. Stat. §§ 281.34 and 281.35.

Id. at ¶17 (emphasis added).

The court found: "We interpret these *general statutes* [Wis. Stat. §§ 281.11 and .12] as *expressly* delegating regulatory authority to the DNR necessary to fulfill its mandatory duty to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private."[7] *Id*. at ¶19 (emphasis added). Like the *Wisconsin Builders* case, the court of appeals in *Lake Beulah* rendered the specific high capacity well enabling statutory sections superfluous and meaningless because the supposed plenary powers conferred upon DNR under Wis. Stat. §§ 281.11 and 281.12 provides the agency with almost limitless authority that

[7] "Generally," defined as affecting all, is incompatible with the concept of "expressly," defined as for a specific or unique purpose. These court decisions fractured our sense of the English language, providing little guidance for the regulators or the regulated.

transcends the more specific and deliberately developed high capacity well enabling legislation set forth in Wis. Stat. §§ 281.34 and .35.[8]

Sweeping recitations of agencies powers and duties in statutory preambles have historically *not* been a source of agency powers. Both regulators and the regulated appreciate the regulatory certainty provided through clear legislative prescriptions in enabling statutes. The regulated community, quickly, and then the governor and the legislature took note of this drift away from specific powers set forth in enabling statutes to the murkier concept of *general* statutory authority. These concerns gave rise to Act 21's *explicit authority requirement*.

II. The Term "Explicit" Was Purposefully Chosen by the Legislature to Make it Clear that Agency Lawmaking Powers Do Not Arise Out of Statutory Preambles.

To determine the meaning of statutes courts focus on their text, context, and structure, and if helpful, legislative history.

> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely related statutes; and reasonably, to avoid absurd or unreasonable results.

State ex rel. Kalal v. Circuit Court, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. "[A]s a general matter, legislative history need not be and is not

[8] The target of Act 21, as reflected in its legislative history, was these two earlier appellate court decisions, and not the Wisconsin Supreme Court *Lake Beulah* decision. As discussed later, the *Lake Beulah* court undertook the same analysis with similar conclusions as the appellate court. Act 21 was NOT part of the Supreme Court's analysis when rendering its *Lake Beulah* decision.

consulted except to resolve an ambiguity in the statutory language, although legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation." *Id*. at ¶51 (citations omitted).

Two sections of Act 21 were aimed at the judicial trend of finding unfettered powers arising from general or prefatory statutory clauses. First, Wis. Stat. § 227.10 (2m) firmly anchors agency authority to explicit legislative delegations. Second, Wis. Stat. §§ 227.11 (2)(a)1. and 2. provide that statutory preambles—declarations of legislative intent, purpose, findings, or policy, as well as descriptions of an agency's general powers or duties— do not confer regulatory authority on agencies. In other words, the legislature does not use these preamble statutes to deal a regulatory wildcard into the hands of state agencies, allowing them to establish the policies of its choosing. Agencies must have an explicit delegation of authority to regulate. Effectively, through these sections created by Act 21, the legislature has said that when it creates agencies, it does not delegate any of its lawmaking powers in these general, jurisdictional sections:

Wis. Stat. § 227.10 (2m) provides:

> No agency may implement or enforce any standard, requirement, or threshold, including 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 rule* that has been promulgated in accordance with this subchapter. . . . (emphasis added).

Wis. Stat. §§ 227.11 (2)(a)1. and 2. provide in part:

> 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.
>
> A statutory provision describing the agency's general *powers* or *duties* 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. (emphasis added).

The dispositive language in Wis. Stat. § 227.10(2m) is the term "explicitly." Its plain meaning is:

> **Explicit**. 1. clearly stated and leaving nothing implied; distinctly expressed; definite; *distinguished from implicit*. *Webster's New World College Dictionary* (4th Edition), (emphasis added).

The operative meaning of "explicit" is "leaving nothing implied." As discussed later, the term "explicit" was deliberately chosen and vigorously advanced by the authors to tighten what had become the broad delegation portal arising from "expressly or necessarily implied" delegations.

Act 21 arose from a Special Legislative Session in 2011, which is a "session of the Legislature convened by the governor to accomplish a special purpose."[9] Act 21 was introduced as Assembly Bill 8 by the Committee on Assembly Organization by request of Governor Scott Walker. Spec. Sess. 2011 Assemb. B. 8. In essence, Gov. Walker was a co-author of Act 21 with Rep. Tom Tiffany.[10] Their reasoning behind Act 21 puts these key provisions in context and affirms their plain meaning.

[9] Wisconsin State Legislature Glossary. http://legis.wisconsin.gov/about/glossary/

[10] See History of Legislative Actions at: https://docs.legis.wisconsin.gov/2011/proposals/jr1/ab8

When introducing 2011 Special Session AB8 (SSAB8) that created Act 21, Gov. Walker specifically noted the Wisconsin appellate court case discussed above where the court ignored explicit enabling legislation relating to building sprinkler systems.

> The Wisconsin Department of Commerce implemented rules requiring sprinkler systems in all multifamily dwellings except certain townhouse units even though state law *explicitly* stated that the sprinkler systems were required on multifamily dwellings exceeding 16,000 square feet or more than 20 dwelling units.
>
> * * *
>
> Unelected bureaucrats are drafting rules and regulations based on the department's *general duties provisions*, not based on the more specific laws the legislature meant to govern targeted industries or activities. Instead of basing rules on the specific rule of law approved by the legislature, bureaucrats are empowering themselves to use the department's *overall duties provision*.
>
> Laws are created by the elected officials in the legislature who have been empowered by the taxpayers, not employees of the State of Wisconsin. The practice of creating rules *without explicit legislative authority* is a constitutionally questionable practice that grants power to individuals who are not accountable to Wisconsin citizens.
>
> Solution: Legislation states an agency may not create rules more restrictive than the regulatory standards or thresholds provided by the legislatures. Specifically stating that the departments broad statement of policies or general duties or powers provisions do not empower the department to create rules not *explicitly* authorized in the state statutes.

App. 214, Walker, *Regulatory Reform Informational Paper*, (Dec. 21, 2010), (emphasis ours).

Rep. Tiffany directly addressed the concept of regulatory delegations arising from general or prefatory clauses when noting an "agency's general powers do not confer rule-making authority. In other words, they can't use their mission statement in order to write a rule." App. 199, Jan. 2011 Spec.

Sess. Assemb. B. 8, *Excerpt of Transcript of Proceedings from Wisconsin State Legislature Assembly Floor Debate*, (February 2, 2011). While Gov. Walker and Rep. Tiffany focus on rulemaking authority, read together in the context of the whole legislation and its purpose, these sections—Wis. Stat. § 227.10(2m), 227.11 (2)(a)1., and 227.11 (2)(a)2.—were meant to eliminate use of implied authorities in preamble clauses by Wisconsin courts to find a *regulatory power*. Said another way, Act 21 makes it clear that explicit regulatory authority cannot be found in these preamble provisions. This is consistent with the well-recognized principle that agencies are legislative creations and only have those powers given to them by the legislature through enabling statutes.

Circling back to the import of the term "explicitly," the effort by the authors to reinstate that term in a floor amendment was an extraordinary legislative feat to address one word. As introduced, sections 1 and 3 of SSAB8 included the following language:

> **SECTION 1.** Section 227.10 (2m) of the statutes is created to read:
>
> **227.10 (2m)** No agency may implement or enforce any standard, requirement, or threshold as a term or condition of any license issued by the agency unless such implementation or enforcement is *expressly* required or permitted by statute or by a rule that has been promulgated in accordance with this subchapter.

Spec. Sess. 2011 Assemb. B. 8. (Emphasis added)

Contrary to the authors intent, the word "expressly" was used instead of "explicitly." The authors clearly understood the difference between these

two terms, deliberately choosing "explicitly" to shore up their intent regarding use of preamble clauses and to distinguish court decisions finding "express" authority where none exists. Rep. Tiffany stated in Assembly floor debate during concurrence on this amendment:

> The primary change that was made to [the assembly bill] in the Senate was changing the term expressly to explicitly. The courts have interpreted expressly very broadly, and in order for our legislation that comes out of this body today to reflect the intent that we want. It was important to change the word to explicitly and that was the primary change that was made to the bill in the Senate.

App. 199-210, Jan. 2011 Spec. Sess. Assemb. B. 8, *Excerpt of Transcript of Proceedings from Wisconsin State Legislature Assembly Floor Debate*, (May 7, 2011).

Senate Amendment 1 to SSAB8 replaced "expressly" with "explicitly." That amendment was concurred in by the Assembly on May 17, 2011.[11] The legislature continued to stress the import of the term explicit long after enactment of Act 21. [12]

The *Wisconsin Builder* and *Lake Beulah* line of cases that led to Act 21 reflects an effective, permissive and robust interaction between the executive, legislative and judicial branches. The legislative branch exercised

[11] History of Legislative Actions: https://docs.legis.wisconsin.gov/2011/proposals/jr1/ab8.

[12] Representative Vos, acting as chair to the Assembly Committee on Organization, when requesting a formal opinion from the Attorney General on behalf of the Assembly, expressed his understanding of the term "explicit." "[The] 'clear and unmistakable' standard is in essence the definition of the term 'explicit,' which is the requirement for a delegation under Wis. Stat. § 227.10(2m)." App. 157, Assembly Committee on Organization, *Letter to the Attorney General*, (Feb. 2016)

its core right to clarify or otherwise restate the law which they deemed the judiciary to have miscalculated. Then Judge (now Justice) Neil Gorsuch observed that if the executive or legislative branches believe the courts missed the mark, "the Constitution prescribes the appropriate remedial process. It's called legislation." *Guitierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (2016) (Gorsuch, J., concurring).

The legislature has clearly spoken on this fundamental matter. And the Court is beginning to listen.

III. The Court Recognizes the Choice of The Legislature to Limit Lawmaking Delegations to Agencies to Explicit Powers Set Forth in Enabling Statutes.

The explicit authority concept came to the forefront in this Court in 2020, starting with *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, 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 the Court unanimously found that DHS lacked explicit authority for their Medicaid recoupment practices.

In *Palm*, the Court discussed the historical backdrop for Act 21.

> Formerly, court decisions permitted Wisconsin administrative agency powers to be implied. In theory, 'any reasonable doubt pertaining to an agency's implied powers' was resolved 'against the agency.' However, the Legislature concluded that this theory did not match reality. Therefore, under 2011 Wis. Act 21, the Legislature significantly altered our administrative law jurisprudence by imposing an 'explicit authority requirement' on our interpretations of agency powers.

> The explicit authority requirement is codified at Wis. Stat. § 227.10(2m). Furthermore, Wis. Stat. § 227.11(2)(a)1.—3 . . .'prevent[s] 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.' The explicit authority requirement is, in effect, a legislatively-imposed canon of construction that requires us to narrowly construe imprecise delegations of power to administrative agencies.

Palm, at ¶¶51-52, (citations omitted).

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. *Id*. 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. Finally, the court found that under the statutory explicit authority requirement "we cannot expansively read statutes with imprecise terminology that purports to delegate lawmaking authority to an administrative agency." *Id.* at ¶ 55. In his dissent in *Palm,* Justice Hagedorn also noted that under Act 21 "agencies may not rely on general powers and duties provisions to promulgate rules." *Id*. at ¶180.

The Court in *Papa*, in a unanimous decision, similarly invoked the explicit authority requirement to define the scope of the Department of Health Services (DHS) Medicaid recoupment policies coined as its "Perfection Policy."

> The crux of this case is the scope of DHS's recoupment authority. 'No agency may implement or enforce any standard, requirement, or threshold, . . . unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a [promulgated] rule . . . .' Wis. Stat.

> § 227.10(2m). Thus, DHS may not implement or enforce the Perfection Policy unless it is explicitly required or permitted to do so by statute or a previously promulgated rule.12 Id. We look to the statutes and promulgated DHS rules to determine the scope of DHS's explicit recoupment authority. We begin with the relevant statutes.

Papa, at ¶32.

The Court concluded DHS's enabling statute "does not explicitly require or permit DHS to enforce a Perfection Policy." *Id.* at ¶42.

Finally, in *St. Ambrose Academy, Inc. v. Joseph T. Parisi*, the Court found broad statements of authority cannot override the specifics of enabling statutes.

> Heinrich also argues that the Order is authorized because Wis. Stat. § 252.03(2) states that she "may do what is reasonable and necessary for the prevention and suppression of disease," and that this Order constitutes a permissible restriction on "public gatherings." However, what is reasonable and necessary cannot be read to encompass anything and everything. Such a reading would render every other grant of power in the statute mere surplusage. And a reading that gives carte blanche authority to a local health officer to issue any dictate she wants, without limit, would call into question its compatibility with our constitutional structure. See *State ex rel. Adams v. Burdge*, 95 Wis. 390, 399-400, 70 N.W. 347 (1897).

Sup. Ct. Order, St. Ambrose Academy, Inc. v. Parisi, 2020AP1446-OA, (Sep. 10, 2020).

Act 21's explicit authority requirement and the cases in which this Court interprets regulatory delegations under Act 21 clarify how prefatory statutory clauses are not enabling. Only explicit delegations that are clear and limited are enabling statutes. This is consistent with pre-Act 21 decisions relating to the boundaries of agencies regulatory powers: Enabling statutes must specify the agency's "scope of authority" *Martinez*, at 698; only enabling statutes reveal the boundaries of the powers delegated to

administrative agencies, *Koschkee*, at ¶15; the legislature must "fix the limits" within which the law shall operate. *Whitman*, at 941; the purpose of the delegating statute must be "ascertainable" with "procedural safe-guards." *Watchmaking*, at 536.

Other authorities echo this principle set forth in Act 21 that a statutory prologue cannot be invoked when the text is clear: "It is a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists," *Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007); "the purpose clause cannot override the operative language" in the statute, Antonin Scalia, Brian Gardner, *Reading Law*, pp. 220; "[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion," *Food & Drug Admin. v. Brown & Williamson Tobacco Corp*, 529 U.S. 120, 160 (2000).

IV. Wis. Stat. §§ 281.11 and 281.12, including Any Public Trust Authorities Delegated Through Those Sections, Are Not Enabling for the Purpose of Regulating of High Capacity Wells.

This case involves the scope of regulatory authorities delegated by the legislature to DNR for the permitting of high capacity wells. Any analysis must be done under the new light of the explicit authority requirement found in 2011 Wis. Act 21.[13]

[13] Section 227.10(2m), created by Act 21 and effective June 8, 2011, did not exist until after the briefing and oral argument in the *Lake Beulah* Supreme Court case. But *amici* in that case,

The *Lake Beulah* Court found five sources providing DNR regulatory authority over high capacity wells.

> We conclude that, pursuant to Wis. Stat. § 281.11, § 281.12, § 281.34, and § 281.35 (2005-06), along with the legislature's delegation of the State's public trust duties, the DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state.

2011 WI 54, at ¶3.

This case turns on whether Wis. Stat. §§ 281.11 and 281.12 provides DNR regulatory powers beyond Wis. Stat. § 281.34.[14] In that regard, finding regulatory power delegations over high capacity wells in Chapter 281 preamble provisions is an impossible task because none exist. Wis. Stat. § 281.11 provides:

> **281.11 Statement of policy and purpose.** The department shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private. Continued pollution of the waters of the state has

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including several intervenors here, asked the court to consider Wis. Stat. § 227.10(2m) as a supplemental authority pursuant to Wis. Stat. § 809.19(10). App.182.

All parties in *Lake Beulah*, including DNR (when they oppose our position), asserted for multiple reasons that Wis. Stat. § 227.10(2m) was not relevant. The court took note of this consensus when finding they "agree with the parties that 2011 Wisconsin Act 21 does not affect our analysis in this case. Therefore, we do not address this statutory change any further." *Lake Beulah,* 2011 WI 54, ¶ 39 n. 31. Nowhere else in the 48-page decision did the supreme court reference Wis. Stat. § 227.10(2m) or other aspects of Act 21.

But the circuit court found that the *Lake Beulah* Court rejected DNR's position (when they supported us) and Intervenors' arguments relating to the effect of Act 21; in particular, application of Wis. Stat. § 227.10 (2m). The circuit court opined that "If these subsections were so radical as to limit the ability of the DNR to consider other factors not expressed in Wis. Stat. § 281.34 and § 281.35, the Wisconsin Supreme Court would have addressed it further." Decision, pp. 10. We agree. It would be absurd to interpret the *Lake Beulah* footnote to conclude this Court rendered its views on such sweeping changes to Wisconsin's administrative law in this way. Subsequent cases support that conclusion.

The Court in *Palm* recognized the *new* explicit authority requirement of Act 21 without any reference to the *Lake Beulah* opinion. *Lake Beulah* was without doubt not decided in the context of Act 21.

[14] There are certain regulatory powers relating to high capacity wells delegated by the legislature to DNR through Wis. Stat. § 281.35. But those delegations are not relevant here.

aroused widespread public concern. It endangers public health and threatens the general welfare. A comprehensive action program directed at all present and potential sources of water pollution whether home, farm, recreational, municipal, industrial or commercial is needed to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water. The purpose of this subchapter is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed in favor of the policy objectives set forth in this subchapter. In order to achieve the policy objectives of this subchapter, it is the express policy of the state to mobilize governmental effort and resources at all levels, state, federal and local, allocating such effort and resources to accomplish the greatest result for the people of the state as a whole. Because of the importance of Lakes Superior and Michigan and Green Bay as vast water resource reservoirs, water quality standards for those rivers emptying into Lakes Superior and Michigan and Green Bay shall be as high as is practicable.

Wis. Stat. § 281.12 provides:

281.12 General department powers and duties.

1) The department shall have general supervision and control over the waters of the state. It shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter. The department also shall formulate plans and programs for the prevention and abatement of water pollution and for the maintenance and improvement of water quality.

2) The department, on behalf of and at the direction of the governor, may submit an application to the federal environmental protection agency under 33 USC 1344 (g) seeking the delegation of authority to this state to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters of this state. If the federal environmental protection agency delegates this authority to this state, the department may assume that authority.

3) The department, upon request, shall consult with and advise owners who have installed or are about to install systems or plants, as to the most appropriate water source and the best method of providing for its purity, or as to the best method of disposing of wastewater, including operations and maintenance, taking into consideration the future needs of the community for protection of its water supply. The department is not required to prepare plans.

> 4) The department may enter into agreements with the responsible authorities of other states, subject to approval by the governor, relative to methods, means and measures to be employed to control pollution of any interstate streams and other waters and to carry out such agreement by appropriate general and special orders. This power shall not be deemed to extend to the modification of any agreement with any other state concluded by direct legislative act, but, unless otherwise expressly provided, the department shall be the agency for the enforcement of any such legislative agreement.

Wis. Stat. § 227.11 (2)(a)1. provides that a statutory provision containing a statement or declaration of legislative *purpose* or *policy* "does not confer rulemaking authority on the agency or augment the agency's rulemaking authority beyond the rulemaking authority that is explicitly conferred on the agency by the legislature." Wis. Stat. § 227.11 (2)(a)1.. Wis. Stat. § 281.11 is a statutory provision containing *purpose* and *policy* declarations, therefore it cannot be a source of authority for DNR to promulgate high capacity well regulations. In that vein, it references powers contained in other provisions of the subchapter, distinguishing prefatory clauses that are not self-executing from actual enabling statutes. Similarly, Wis. Stat. § 227.11 (2)(a)2. provides that a statutory provision describing the agency's general *powers* or *duties* does not confer rulemaking authority. And Wis. Stat. § 281.12 describes the DNR's general *powers* and *duties.* That provision also cannot provide rulemaking authority for DNR.[15]

[15] The distinction between rulemaking and permit conditions authority with respect to an agency's regulatory powers is mostly academic given every permit condition arises from process set forth in rules. For example, even if the Court affirmed Petitioners understanding of DNR's authority, DNR must still promulgate a rule prior to issuing permit conditions arising from that interpretation. See *Lamar Central Outdoor, LLC v. DHA* 2019 WI 109, ¶23, 389 Wis. 2d 486, 936 N.W.2d 573, holding that "[Chapter 227] describes only one pathway by which an agency can adopt a new

In addition, Wis. Stat. § 227.10(2m) provides that permit conditions are unenforceable unless that condition is explicitly required or explicitly permitted by statute or rule. Given Wis. Stat. § 227.11 (2)(a)1. and 2. cannot be a source of a rule, the only question here is whether those provisions contain the requisite explicit statutory authority relating to high capacity wells. Neither of these statutory sections even reference high capacity wells or their regulation. Consequently, they cannot possibly be found to contain explicit statutory authority for high capacity well regulation.

As noted, read together in context of the whole legislation and its purpose, these sections—Wis. Stat. §§ 227.10(2m), 227.11 (2)(a)1., and 227.11 (2)(a)2.—were meant to eliminate implied authorities in preamble clauses. Said another way, Act 21 makes it clear that explicit regulatory authority cannot be found in these preamble provisions.

Regardless, there is nothing explicit with respect to high capacity well regulatory powers contained in Wis. Stat. §§ 281.11 and 281.12. Wis. Stat. § 281.11 notes DNR is the state agency with oversight responsibilities related to the waters of the state. It also emphasizes the priority the state has on managing water resources. There is absolutely nothing in this section that could be reasonably considered an explicit delegation of regulatory powers

interpretation of an ambiguous statute: The agency must adopt a rule." It would be exceptional to find regulatory powers, including permit conditions for high capacity wells, that can be effectuated without rules. By not allowing rulemaking to arise from preambles, the legislature was clear that these provisions are not a source of regulatory powers.

over high capacity wells or otherwise. It is simply aspirational and jurisdictional.

The authorities, if any, set forth in Wis. Stats. § 281.12, merely allows DNR to: develop pollution prevention plans, § 281.12(1); to request delegation of federal permit authority from EPA, § 281.12(2); to consult and advise owners of water quantity and quality issues, § 281.12(3); and to enter into interstate agreements, subject to approval by the governor, § 281.12(4). No terms in Wis. Stat. § 281.12 provide explicit regulatory powers over high-capacity wells, or for that matter, any other regulatory powers.

Act 21 targeted what Rep. Tiffany called these agency "mission statements." In *Palm*, the Court found that Act 21 "prevent(s) 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.'" *Palm*, at ¶52 (citing *Koschnick, supra* at 996). Wis. Stats. §§ 281.11 and 281.12 are simply not enabling statutes.

V. The Sole Enabling Statute Providing DNR Authority to Regulate High Capacity Wells is Wis. Stat. §§ 281.34 and 281.35.

The *Lake Beulah* decision, when unpacked, reveals a consistency with the overall concepts underlying Act 21. Notably, the court acknowledged the difference between *general* statutes—Wis. Stats. §§ 281.11 and 281.12—and

the comprehensive permitting framework for high capacity wells set forth in Wis. Stat. §§ 281.34 and 281.35. Notably, the Court found:

> The legislature can, and in other contexts does, mandate that the DNR issue a permit when certain requirements are met, but the legislature has not done so for high capacity well permits. Finding no language expressly revoking or limiting the DNR's authority and general duty to protect and manage waters of the state, we conclude that the DNR retains such authority and general duty to consider whether a proposed high capacity well may impact waters of the state.

2011 WI 54, at ¶42 (citations omitted).

The *Lake Beulah* Court acknowledged the controlling nature of Wis. Stat. § 281.34 in *Lake Beulah II.* See, *Lake Beulah Mgmt. Dist. v. Village of East Troy*, 2011 WI 55, ¶2, 335 Wis. 2d 92, 799 N.W.2d 787. The Court in *Lake Beulah II* found a City of East Troy's ordinance attempting to regulate high capacity wells conflicts with the state's "framework for the comprehensive program within which the DNR regulates high capacity wells is set forth in Wis. Stat. § 281.34 and § 281.35." *Id.* at ¶16. So, in the same case but a different decision, the court emphasizes the preemptive nature of the comprehensive permitting framework set forth at Wis. Stat. §§ 281.34 and 281.35.

> The permitting scheme that the ordinance imposes in addition to the comprehensive permitting scheme in Wis. Stat. § 281.34 and § 281.35 does not merely provide additional requirements, but as this case demonstrates, may prohibit the operation of a high capacity well that is authorized by the DNR under the statute. Where the legislature has 'adopted a complex and comprehensive statutory structure,' an ordinance that runs counter to that structure violates the spirit of the legislation and is preempted.

Id. at ¶19.

The history of high capacity well legislation is also instructive regarding the legislature's preference that DNR's authorities be defined by explicit enabling legislation rather than by courts using general statutory provisions.

Until 1985, the general standard at Wis. Stat. § 281.34(5)(a), which protected public utility wells, was the only standard applicable to high capacity well permits. In 1985 Wis. Act 60, the legislature expanded DNR's permit authority for high capacity wells over 2 million gallons per day (gpd). In 2003 Wis. Act 310 ("Act 310"), the legislature expanded DNR's permit authority for high capacity wells once again, explicitly regulating wells with capacities of between 100,000 and 2 million gpd.

Act 310 also evidences the deliberative legislative approach desired for the regulation of high capacity wells. It created the Groundwater Advisory Committee (GAC) for purposes of reporting to the legislature in 2007 on any additional recommended changes to DNR's high capacity well permit authority. The 2007 GAC report to the legislature evaluated various changes to existing law, including expanding DNR authority to require additional environmental review for wells potentially affecting surface waters. The legislative committee rejected that proposal.[16]

[16] *2007 Report to Legislature*, Wisconsin Groundwater Advisory Committee (December 2007) http://www.friendsofthelittleploverriver.org/assets/Reports/2007-GAC-Final-Report.pdf.

Under the high capacity well program, any person owning property on which a high capacity well is to be located must obtain approval from DNR before construction of such well. Wis. Stat. § 281.34(2). A high capacity well is defined as any well or combination of wells on the same property that have the capacity to pump 100,000 gallons of water per day. Wis. Stat. § 281.34(1)(b). Every high capacity well application must include information allowing DNR to determine the proposed well complies with location, construction, installation, and operation requirements at Wis. Admin. Code NR § 812 (2020). Based on information in the application, DNR is to determine:

- When the proposed pumping rate and consumptive use triggers a "water loss" approval. Wis. Stat. § 281.35.
- If a public water supply well may be affected by the proposed well. Wis. Stat. § 281.34 (5)(a).
- If the location of the proposed well is near sensitive resources that would trigger Wisconsin Environmental Policy Act (WEPA) review or require additional conditions for approval. Such heightened environmental review is required for a high capacity well that:
    - Is located in a groundwater protection area.
    - Will result in a water loss of more than 95% of the amount of water withdrawn.
    - May have a significant environmental impact on a spring.

  Wis. Stat. § 281.34 (4).

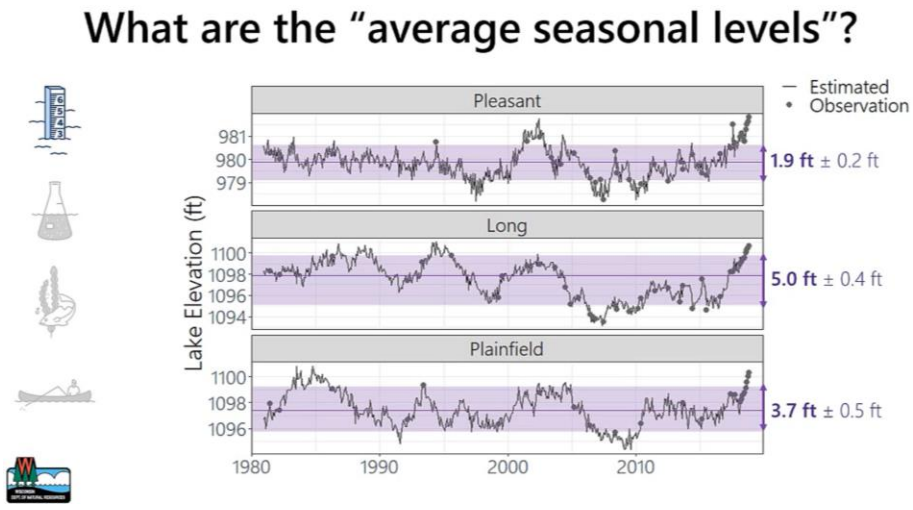
To address, in part, the concerns relating to cumulative impacts of high capacity wells, the legislature enacted 2017 Wis. Act 10. That law

requires DNR to evaluate and model the hydrology of three specified lakes and allows DNR to evaluate the hydrology of other streams and lakes in Wisconsin's central sands region. The purpose of the study is to determine whether existing and potential groundwater withdrawals are causing or are likely to cause a significant reduction of a navigable stream's or navigable lake's rate of flow or water level below its average seasonal levels. If DNR concludes such impacts either are or will be occurring, the agency must determine whether to recommend to the legislature mitigating measures. Wis. Stat. § 281.34 (7m)(c). If DNR issues a decision recommending legislative action, that decision shall include: "A description of the extent to which the department has determined that cumulative groundwater withdrawals in all or part of the area cause, or are expected to cause, a significant reduction of a navigable stream's or navigable lake's rate of flow or water level below its average seasonal levels." Wis. Stat. § 281.34 (7m)(c)1.

To date, DNR spent close to a million dollars on this study.[17] In the fall of 2020, DNR presented the study methodology to the public for comments. This winter, DNR will release their decision report which will include another opportunity for public comments. DNR plans to issue their

[17] Legislative Fiscal Bureau memo to Joint Committee on Finance (January 16, 2020); https://docs.legis.wisconsin.gov/misc/lfb/section_13_10/2020_01_16_natural_resources_hydrologic_study.pdf.

final report and recommendations to the legislature in the spring of 2021.[18] Obviously, the comprehensive regulatory scheme for regulating high capacity wells continues to evolve, but the idea that high capacity wells in the central sands will harm the lakes and rivers is simply not backed by the data. All three lakes involved in the study have water levels substantially higher than levels recorded over 40 years ago.[19]



Yet, it would be premature to speculate what might be DNR recommendations, if any, arising from this study. But that is the point. This litigation appears to be an attempt by the Petitioners to highjack the legislative process and preempt this ongoing scientific evaluation.

[18] DNR Central Sands Lakes Study web page. https://dnr.wisconsin.gov/topic/Wells/HighCap/CSLStudy.html.

[19] *The Central Sands Lake Study: Lake Characterization,* Wisconsin DNR, (Aug. 19, 2020), 58:38, https://widnr.widen.net/view/video/5lv9l2zxjs/Central%20Sands%20Lakes%20Study%20Methodology?u=kfkpym

The Wisconsin Legislature carefully crafted a graduated regulatory framework in Wis. Stat. §§ 281.34 and 281.35 to govern the permitting of high capacity wells by DNR. This includes the latest iteration to the program enacted by Act 10 to address the unique concerns over groundwater withdrawal in Wisconsin's central sands region, directing that DNR evaluate and model the hydrology of the region. Upon completion of this study, DNR must issue a decision on whether to recommend that the legislature enact mitigating measures. Petitioners were involved in the legislative process resulting in Act 10. Their desired outcome was not achieved, so they are requesting the Court to dictate their preferred policy choice.

It would be fair to say that none of the 310 organizations and individuals voicing their opinion at the committee hearing were completely satisfied with the bill. But legislative process in Wisconsin provides extensive opportunity for public input and debate. The Wisconsin Legislative Reference Bureau describes the process in a 67-page research bulletin.[20] Beyond extensive process requirements, Wisconsin's bicameral legislative body has a complex organizational, structural, and leadership framework. The legislature must also adhere to protocols for drafting, introduction, committee consideration, including public hearings, and floor action. And finally, gubernatorial approval, and legislative veto review. The Court should

[20] State of Wisconsin Legislative Reference Bureau, *Legislative Process in Wisconsin*, Research Bulletin 14-2, December 2014. http://legis.wisconsin.gov/lrb/media/1093/14rb2.pdf.

not be tempted to circumvent a legislative process better suited to develop laws. DNR's Act 10 study is an unambiguous prerequisite to any further regulation of high capacity wells. It is a legislative prerogative to pause further regulation pending the outcome of DNR analysis of the impacts high capacity wells may have on surface waters. It is an issue of utmost import, and getting it right is best left to the deliberations of elected officials, not to the courts.

In that regard, the *Lake Beulah* Court's primary error was substituting its judgement for the legislature's when setting set forth those triggering events for further environmental review of high capacity well permit applications.

> We conclude that, pursuant to Wis. Stat. § 281.11, § 281.12, § 281.34, and § 281.35 (2005-06), along with the legislature's delegation of the State's public trust duties, the DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state. Upon what evidence, and under what circumstances, the DNR's general duty is implicated by a proposed high capacity well is a highly fact specific matter that depends upon what information is presented to the DNR decision makers by the well owner in the well permit application and by citizens and other entities regarding that permit application while it is under review by the DNR.
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> * * *
>
> We use "general duty" to describe the DNR's broad obligation to protect waters of the state, which does not demand that the DNR take any particular action unless that duty is triggered by a proposed high capacity well permit application.
>
> * * *
>
> We further hold that to comply with this general duty, the DNR must consider the environmental impact of a proposed high capacity well when presented with sufficient concrete, scientific evidence of potential harm to waters of the state. The DNR should use both its expertise in water

> resources management and its discretion to determine whether its duty as trustee of public trust resources is implicated by a proposed high capacity well permit application, such that it must consider the environmental impact of the well or in some cases deny a permit application or include conditions in a well permit. At ¶4.

2011 WI 54, at ¶¶3-4 & n.7.

According to the Court, DNR would use its "expertise" and "discretion" upon presentation of "sufficient concrete, scientific evidence" to illuminate when its public trust duties would be "implicated." And once that threshold is breached, DNR is to impose permit conditions or deny the permits despite no comparable directives set forth in the legislature's comprehensive high capacity well permitting scheme. Rather than giving DNR guidance, this broad and vague judicial directive arising out of general statute and froze the program from within as DNR staff and those they regulate found it unworkable.

In contrast, the legislature, based upon decades of policy deliberations that included input from diverse interested parties across the state, enacted a better, more objective path to trigger additional environmental review. Moreover, this deliberate legislative process continues to gather more information through DNR's related central sands study in consideration of additional restrictions on high capacity wells.

Finally, others will brief the issue of delegation of public trust authorities. We don't dispute the import of the public trust doctrine. But this case turns on whether the legislature delegated its lawmaking authorities to

DNR for high capacity well regulations outside of Wis. Stat. §§ 281.34 and 281.35. If this enabling legislation is the sole source of DNR's regulatory powers over high capacity wells, whether DNR is exercising delegated constitutional public trust duties is irrelevant. In other words, the legislature does not have to grant its constitutional public trust authorities to DNR for DNR to regulate high capacity wells.

Regardless of the high-pitched public trust alarms, the only relevance of the public trust doctrine in this case is whether the legislature has fulfilled this public trust duties through enactment of what the Court acknowledged as "a comprehensive permitting framework for high capacity wells set forth in Wis. Stat. § 281.34 and § 281.35." *Lake Beulah II,* at ¶2. To suggest they have ignored their public trust duties is to ignore the decades of debate and deliberation the legislature has dutifully undertaken to balance competing interests on this vitally important issue. Therefore, the only public trust issue in this case is whether the legislature, not DNR, has fulfilled its public trust duties. We know of no precedent in which the Court can reasonably second-guess the legislature's efforts to regulate high capacity wells consistent with this public trust responsibility.

The Legislature in their brief argues that judicial review should be denied and the well authorizations affirmed because the Petitioner's challenge to the well was statutorily barred by Wis. Stat. § 281.34(5m). Wis. Stat. § 281.34(5m) provides that "[n]o person may challenge an approval, or

an application for approval, of a high capacity well based on the lack of consideration of the cumulative environmental impacts of that high capacity well together with existing wells." Wis. Stat. § 281.34(5m). Although we will not address this issue at length here, we agree with the Legislature that this challenge should have been statutorily barred by Wis. Stat. § 281.34(5m) because the basis for the Petitioner's challenge was based on the lack of cumulative impact review.

CONCLUSION

The decision of the Dane County Circuit Court should be reversed.

DATED this 4th day of February, 2021.

Respectfully Submitted,

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Robert I. Fassbender
State Bar #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 Business Associations

Wisconsin Manufacturers and Commerce
Dairy Business Association, Inc.
Midwest Food Processors Association
Wisconsin Potato and Vegetable Growers Association
Wisconsin Cheese Makers Association
Wisconsin Farm Bureau Federation
Wisconsin Paper Council
Wisconsin Corn Growers Association

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for an appellant brief produced with a proportional serif font. The length of this brief, including footnotes, is 9,723 words.

Dated this 4th day of February, 2021.

_____

Robert I. Fassbender (1013985)

CERTIFICATION REGARDING ELECTRONIC BRIEF

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

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy 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 4th day of February, 2021.

_____

Robert I. Fassbender (1013985)

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2021, I caused a copy of this motion to be served upon each of the following persons via U.S. Mail, First Class:

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

Carl A. Sinderbrand
Pleasant Lake Management District
P.O. Box 1767
Madison, WI 53701-1767

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

Lisa M. Lawless
Wisconsin Legislature
511 N. Broadway, Ste. 1100
Milwaukee, WI 53202

Eric M. McLeod
Lane E. B. Ruhland
P.O. Box 1379
Madison, WI 53701-1379

Dated this 4th day of February, 2021.

_____

Robert I. Fassbender (1013985)