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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' REPLY BRIEF

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INTRODUCTION

Intervenor Business Associations reassert here that the Court in *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, did not address high capacity well programs in the context of Act 21, that Act 21's explicit authority requirement arises from several provisions that make clear that Chapter 281 preambles provisions are not the source of lawmaking power for DNR, and that the *Lake Beulah* standard for additional review was inconsistent with Act 21 and sufficiently vague to create substantial regulatory uncertainty and unnecessary litigation.

I. The Supreme Court Did Not Consider 2011 Wis. Act 21 in its *Lake Beulah* Decision.

The circuit court found, and DNR and Clean Wisconsin assert, that the Court in *Lake Beulah* interpreted DNR's authority and duties relating to the high capacity well program in the context of Act 21; in particular, application of Wis. Stat. § 227.10 (2m). CW Br. at 21-23. More specifically, they assert the *Lake Beulah* Court found explicit authority at Wis. Stat. § 281.11, Chapter 281's preamble provisions. CW Br. 22. This assertion is a direct contradiction of prior positions by DNR.

On May 31, 2011, amici in *Lake Beulah*, including four associations that are intervenors here, requested the Court to consider the

applicability of the newly enacted Act 21. App.182–87. All parties rejected that request. The Court filed its opinion in *Lake Beulah* on July 6, 2011. The Court provided no opportunity to brief Act 21. Amici in *Lake Beulah* first learned of the Court's rejection of their request for supplemental authorities upon publication of the *Lake Beulah* decision and the record reflects that there was no decision or discussion by the Court separate from the oft cited footnote. The Court's only rationale for rejecting the request to consider Act 21 was that they shared the position of the parties that Act 21 did not affect the analysis of the case. 2011 WI 54 at ¶39 n.31. Nowhere in the body of the 48-page decision did the Supreme Court discuss Act 21 or its provisions.

The argument that the *Lake Beulah* Court addressed Act 21 is a recent phenomenon. For example, Petitioner Pleasant Lake Management District filed documents in this case that state the *Lake Beulah* Court did not address Act 21. In the February 8, 2016, letter by their counsel, Carl Sinderbrand, to Attorney General Brad Schimel, Petitioner urges the attorney general not to issue an opinion in response to the Assembly request because Wis. Stat. § 227.10(2m) was not addressed by the *Lake Beulah* court and was at issue in three pending cases:

> As you know, the Wisconsin Supreme Court issued a decision in 2011 in *Lake Beulah Management Dist.* v. *DNR* that upheld and reinforced DNR's duty to protect state waters under both the constitutional Public Trust Doctrine and pertinent state statutes. *The Court did not address the effect of Wis. Stat. § 227.10(2m)*, which had been enacted shortly before the decision but after the agency actions at

> issue in the case. Since that time, the effect of § 227.10(2m) has been raised in a number of DNR proceedings, including cases related to both high capacity wells and permits for the discharge of pollutants to waters of the state (e.g., New Chester Dairy, Kinnard Farms, Richfield Dairy).

R. 115 at 4. (Emphasis added.)

The circuit court found that the *Lake Beulah* Court rejected Intervenor Business Associations 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." App. 22. We agree. It would be bizarre 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 *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, recognized the *new* explicit authority requirement of Act 21 without any reference to the *Lake Beulah* opinion. They found that "[U]nder 2011 Wis. Act 21, the Legislature significantly altered our administrative law jurisprudence by imposing an 'explicit authority requirement' on our interpretations of agency powers." *Palm*, at ¶51. The Court in *Palm* also put Act 21's explicit authority requirement in chronological context:

> In opposition to Palm's claims, the Legislature raised legislatively-imposed directives that courts are to follow when interpreting the scope of agency authority. To place this contention in context, the reader should note that there is history underlying how courts have interpreted administrative agency powers. **Formerly,** court decisions permitted Wisconsin administrative agency powers to be implied.

Id. (emphasis added).

While *Lake Beulah* was not decided in the context of Act 21, the Court did use the magic term "explicit." *Lake Beulah*, at ¶39. But when using the term, the Court did not cite Wis. Stat. § 227.10(2m), or otherwise provide a context as to what it meant.

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. *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 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). Intervenor Business Associations described the legislative history of Act 21 for that purpose: To show the term "explicit" was purposefully chosen by the legislature to make it clear that agency lawmaking powers do not arise out of statutory preambles. Clean Wisconsin dismissed this legislative history

by finding that "citations to friendly individual officials are unpersuasive and should not be considered." CW Br. 28.

The plain meaning of the term "explicit" is "leaving nothing implied." Webster's New World College Dictionary (4th Edition). The legislative history of Act 21 confirms this plain meaning. We briefed the legislative history of Act 21 extensively in our opening brief and will not repeat that history here except to reiterate that the term "explicitly" was carefully and deliberately inserted into the act to replace "expressly."

This record debunks Clean Wisconsin's assertion that this legislative history reflects the views of one friendly legislator. The amendment focusing solely on swapping out "expressly" for "explicitly" was voted on by the full Senate and the full Assembly. Each house understood fully why the term explicitly was used in Act 21 prior to its enactment.

DNR and Clean Wisconsin are incorrect in their assertion the preamble provisions in Act 21 relating to rulemaking are not relevant when assessing explicit authority. Context is important when interpreting statutes. 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*. *See*,

Wis. Stat. § 227.10(2m), 227.11 (2)(a)1., and 227.11 (2)(a)2. Enabling statutes that do not provide rulemaking power to agencies do not provide regulatory power to agencies. There is no permit program in the State of Wisconsin that can be operational without underlying rulemaking authority. DNR and Clean Wisconsin suggest that rules and permit standards are mutually exclusive. But rules are the foundation of every permit program. We know of no enabling statute that purportedly provides regulatory powers without rulemaking authority, as DNR and Clean Wisconsin assert here. Thus, 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.

The proposition by DNR and Clean Wisconsin that Wis. Stat. § 227.10 (2m) is the sole source of Act 21's explicit authority requirement is also debunked by this Court. In *Palm*, the Court found the statutory construct of Act 21's explicit authority requirement includes Wis. Stat. §§ 227.11 (2)(a)1.-3., provisions that Court found "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. 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*.

We agree with DNR that Act 21 does not change the substantive requirements in other chapters, including Chapter 281, but it does instruct a court how to interpret these chapters. If the delegation of authority at issue is not in plain sight, it does not exist.

III. The Lake Beulah Standard Directing DNR When to Provide Additional Environmental Review of High Capacity Well Applications Is Inconsistent with Act 21.

In this case DNR sought to conform its high-capacity-well program to Act 21's explicit authority mandate by reviewing the environmental impact of proposed wells only where specifically authorized by statute. None of the eight wells at issue in this case fit any of the statutory criteria for environmental review, so, following Act 21's imperative, DNR approved the wells without conducting an additional environmental review beyond the statutory review requirements. DNR did not use standard set forth in *Lake Beulah* relating to additional environmental review because it was inconsistent with Act 21.

Intervenor Business Associations respectfully request the Court to reevaluate its role in establishing alternative criteria for additional environmental review for high capacity well applications. That is, beyond being inconsistent with Act 21, the *Lake Beulah* standard is operationally

vague and unworkable. It created substantial regulatory uncertainty, unnecessary litigation, and overt politicization of DNR. If it were a legislative delegation, one could fairly argue that the *Lake Beulah* standard is so broad and vague it lacked any intelligible principles to guide agencies or the regulatory community.

The fundamental dispute before the Court is what standards DNR must follow to determine whether additional environmental review of a high capacity well permit application is necessary. On the one hand, the legislature prescribed standards at Wis. Stat. § 281.34 that sets forth with clarity when DNR must conduct additional environmental review. On the other hand, the *Lake Beulah* standard that DNR and Clean Wisconsin argue should override the requirements of Wis. Stat. § 281.34 are vague.

Under the *Lake Beulah* standard, DNR would use its "expertise" and "discretion" upon presentation of "sufficient concrete, scientific evidence" to illuminate when its public trust duties would be "implicated." 2011 WI 54, at ¶4. 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 froze the program from within as DNR staff and those they regulate found it unworkable.

DNR argues that the "most glaring example" of why Wis. Stat. § 281.34 needs to be overridden is the requirement for a comprehensive environmental assessment for wells proposed within 1,200 feet of high-quality waters. DNR asserts that this standard is "absurd" because it precludes additional environmental review for wells located a few feet beyond that distance. It is questionable whether DNR hydrologists and engineers would agree with such a proposition.

Permit writers and applicants need clarity. The legislature set 1,200 foot threshold based on legislative facts provided at public hearings. Based upon that information, they determined that high-capacity wells beyond 1,200 feet would not, as a matter of policy, require additional environmental reviews. This provides regulatory certainty to farmers who need these wells to make a living and provide us food. The *Lake Beulah* standard removes that threshold and is akin to removing speed limits on highways.

That is not to say that a quantitative standard like that 1,200 foot criteria should be cast in stone. The legislature continually reassesses whether the criteria in Wis. Stat. § 281.34 is sufficient to protect the waters of the state. One of the most significant reassessment efforts to date is currently ongoing.

The impact of high-capacity wells versus rainfall on lakes and streams is a debate coming soon to the legislature. 2017 Wis. Act 10

directs DNR to complete a study of the impact of high-capacity wells on certain water bodies in the central sands region. DNR plans to issue their final report and recommendations to the legislature in the spring of 2021.[1] There were over 300 people who testified in the last legislative debate relating to high capacity wells. There will be a similar interest from public relating to the Act 10 study.

The legislature has authorized close to $1 million for this study. It will provide legislative facts that may or may not lead to an adjustment to the Wis. Stat. § 281.34 parameters for additional environmental review. But DNR and Clean Wisconsin are attempting to preempt this by convincing the Court that Chapter 281's preamble provisions trump these legislatively prescribed standards. This is not a debate the Court is equipped to resolve. Virtually every party in this case participates in this debate at the legislature, most recently in the context of Act 10. It is fair to say Clean Wisconsin is simply seeking a *do-over* from the Court.

Moreover, vague standards not only bring uncertainty to both regulators and the regulated, but they also have other real-world implications such as increased litigation and politicalizing administrative agencies. For example, this case has been winding through the court system for over four years. As noted earlier, the *Lake Beulah* standard has

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

spawned at least three other cases. It also gave rise to competing attorney general positions on Act 21. This legal haranguing was inevitable given the vagueness of the *Lake Beulah* standard. No one every litigated over whether a well was less or more than 1,200 feet from a quality water body.

There were no legal storms prior to the creation of the *Lake Beulah* standard because the standards were clear. In a November 2020 information memorandum, the nonpartisan Wisconsin Legislative Council noted that:

> Before the Wisconsin Supreme Court issued *Lake Beulah*, DNR generally did not expand the scope of its inquiry into the potential environmental impacts of a proposed high capacity well beyond the specific requirements in s. 281.34 (4), Stats.

Regulation of High Capacity Wells, Wisconsin Legislative Council, (last accessed Mar. 24, 2021) https://docs.legis.wisconsin.gov/misc/lc/information_memos/2020/im_2020_11

The *Lake Beulah* standard also essentially turned DNR into a political football. Their positions changed 180 degrees simply based upon who was elected attorney general not because the law or facts changed. This political whiplash was unfair to DNR, but it was particularly unjust to those farmers that were granted high capacity wells. At the circuit court, DNR defended its permits. Now DNR seeks to rescind its approval over permits that lie at the heart of permittees' livelihood. This litigation also

circumvents rights arising from statutorily required procedures for rescinding high capacity well permits.

These farmers reasonably expected the attorney general and DNR would continue to defend their permits. They were wrong, presenting a situation in which other parties must take up the mantel. But for the legislative and business intervenors, no one before this Court would be defending DNR permits. Clean Wisconsin and the attorney general could simply do a deal to settle the matter.

Vague standards arising from broad statutory delegations also create unnecessary separation of powers tensions. The legislature is the sole lawmaking body under Wisconsin's Constitution. As noted in *Palm*, the Court disfavors statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration. *Palm,* at ¶ 32 (citing *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005)). The Court allows the legislature to delegate but "such a delegation is allowed only if there are 'adequate standards for conducting the allocated power.'" *Palm,* at ¶ 33.

The *Lake Beulah* standard is an inadequate standard for DNR to conduct lawmaking powers. But Act 21's explicit authority requirement provided an invaluable tool for courts to discern the scope of legislative delegations to agencies for lawmaking purposes. Consistent with many of the concepts embraced by the Court, legislative delegations of lawmaking

authority to agencies should be unequivocal and clear; that is, explicit. It must arise out of enabling statutes. Wis. Stat. § 281.34 is DNR's sole enabling statute for the purposes of high-capacity wells.

CONCLUSION

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

DATED this 24th day of March 2021.

Respectfully Submitted,

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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 2,891 words.

Dated this 24th day of March 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 24th day of March 2021.

Robert I. Fassbender (1013985)

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March 2021, I caused a copy of this reply brief to be served upon each of the following persons via U.S. Mail, First Class:

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