No. 2024AP458

In the Wisconsin Court of Appeals

DISTRICT II

WISCONSIN DAIRY ALLIANCE INC. and
VENTURE DAIRY COOPERATIVE,
Plaintiffs-Appellants,
v.
WISCONSIN DEPARTMENT
OF NATURAL RESOURCES
and WISCONSIN NATURAL
RESOURCES BOARD,
Defendants-Respondents,
and
CLEAN WISCONSIN and
WISCONSIN FARMERS UNION,
Intervenors–Respondents.

On Appeal from an Order and
Judgment Entered in the
Calumet County Circuit Court,
the Honorable Carey J. Reed,
Presiding

OPENING BRIEF OF APPELLANTS

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INTRODUCTION

This lawsuit challenges two administrative rules that apply to certain livestock farms defined as large concentrated animal feeding operations ("CAFOs"). "CAFOs are large-scale industrial operations that raise extraordinary numbers of livestock." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 492 (2d Cir. 2005). "On average 90 percent of meat and eggs raised in the U.S. come from CAFOs."[1] Besides helping to feed the world, "CAFOs generate billions of dollars of revenue every year" nationwide. *Waterkeeper Alliance*, 399 F.3d. at 493. "CAFOs also promote rural economic development for economically depressed rural communities."[2] And, by achieving production efficiency, "CAFOs can provide a low-cost source of meat, milk, and eggs."[3]

Wisconsin law prohibits a "point source," including a CAFO, from discharging a pollutant into certain waters unless the discharge is done pursuant to a Wisconsin Pollutant Discharge Elimination System ("WPDES") permit. The federal Clean Water Act ("CWA") works the same way, prohibiting a discharge from a point source unless authorized by a National Pollutant Discharge Elimination System ("NPDES") permit.

As relevant here, a Wisconsin Department of Natural Resources ("DNR") rule requires virtually every large CAFO to have a WPDES permit. *See* Wis. Admin. Code § NR 243.11(3)(a). This rule thus creates

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[1] MOST Policy Initiative, Inc., "Concentrated Animal Feeding Operations," at 2, https://mostpolicyinitiative.org/wp-content/uploads/2021/01/ScienceNote_CAFOs.pdf.

[2] MOST Policy Initiative, *supra* note 1, at 2.

[3] MOST Policy Initiative, *supra* note 1, at 2.

"failure to apply" liability. This liability is distinct from statutory liability for an unauthorized discharge.

The other DNR rule at issue defines "agricultural storm water discharge" too narrowly. *See* Wis. Admin. Code § NR 243.03(2). Under Wis. Stat. ch. 283 and the CWA, agricultural storm water discharges are deemed nonpoint source discharges. As such, they are exempt from NPDES/WPDES permitting requirements and from liability for point source discharges.

Each of these DNR rules is unlawful for two reasons. Both rules violate the uniformity mandate in Wis. Stat. § 283.11(2), and both rules exceed the DNR's statutory authority.

The uniformity mandate has two provisions. One provision requires that "all rules promulgated by the [DNR] under this chapter as they relate to point source discharges . . . shall comply with and not exceed the requirements of the [CWA] and regulations adopted under that act." Wis. Stat. § 283.11(2)(a). The other provision mandates that "[r]ules concerning storm water discharges may be no more stringent than the requirements under the [CWA] and regulations adopted under that act." Wis. Stat. § 283.11(2)(b). The two DNR rules at issue violate these uniformity mandates.

The DNR rule defining "agricultural storm water discharge" violates the uniformity mandate in Wis. Stat. § 283.11(2)(b) because this rule is more stringent than federal law. Under this rule, a farm must have and comply with a WPDES permit for any of its run-off to qualify as an agricultural storm water discharge, but federal law does not impose such a permit requirement.

The DNR duty-to-apply rule violates the uniformity mandate in Wis. Stat. § 283.11(2)(a) because this rule exceeds and does not comply with federal law. A federal regulation previously required certain CAFOs to have an NPDES permit, but a federal court struck down that regulation. Federal law no longer imposes a duty to apply and corresponding failure-to-apply liability on CAFOs, but this DNR rule still does.

Besides violating the uniformity mandate, Wis. Admin. Code § NR 243.03(2)(b) conflicts with the statutory permitting and liability exemption for agricultural storm water discharges. This DNR rule requires large CAFOs to *have a WPDES permit* in order for their storm water discharges to be *exempt from permitting requirements*. This permit requirement is out of harmony with the statutory permit exemption.

The duty to apply in Wis. Admin. Code § NR 243.11(3)(a) is also illegal for a second reason: it exceeds the DNR's statutory authority. No statute explicitly authorizes the DNR to impose a duty to apply and corresponding failure-to-apply liability.

To be clear, if this Court concludes that these two DNR rules are invalid, unpermitted discharges will still be unlawful. *See* Wis. Stat. § 283.31(1). "If a CAFO discharges without a permit, it is strictly liable for discharging without a permit and subject to severe civil and criminal penalties." *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 743 (5th Cir. 2011) (citing 33 U.S.C. § 1319).

This lawsuit challenges only the two DNR rules at issue and nothing else. Whatever the result of this case, CAFOs will still need to comply with many regulations including the livestock facility siting and

expansion law,[4] the requirement that responsible parties remediate hazardous contamination,[5] and nutrient management plans that regulate the quantity and location of manure spreading.[6]

This Court should reverse.

ISSUES PRESENTED

1. Does Wis. Admin. Code § NR 243.03(2), which requires a large CAFO to have a WPDES permit in order for any of its storm water discharges to be exempt from liability and permitting requirements, violate the uniformity mandate in Wis. Stat. § 283.11(2)(b)?

The circuit court answered "no."

This Court should answer "yes" and reverse.

2. Does Wis. Admin. Code § NR 243.11(3), which imposes on large CAFOs a duty to apply for a WPDES permit and thus creates failure-to-apply liability, violate the uniformity mandate in Wis. Stat. § 283.11(2)(a)?

The circuit court answered "no."

This Court should answer "yes" and reverse.

3. Does Wis. Admin. Code § NR 243.11(3) exceed the DNR's statutory authority?

The circuit court answered "no."

This Court should answer "yes" and reverse if it reaches this issue.

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[4] *See* Wis. Stat. § 93.90; Wis. Admin. Code ch. ATCP 51.

[5] *See* Wis. Stat. § 292.11(3).

[6] The DNR and local governments require farmers who land apply manure to comply with nutrient management plans. *See, e.g.*, *Wilson Mut. Ins. Co. v. Falk*, 2014 WI 136, ¶ 49 n.17, 360 Wis. 2d 67, 857 N.W.2d 156.

4. Does Wis. Admin. Code § NR 243.11(3) exceed the DNR's statutory authority?

The circuit court answered "no."

This Court should answer "yes" and reverse if it reaches this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Wisconsin Dairy Alliance and Venture Dairy Cooperative do not request oral argument because the briefs should "fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant." *See* Wis. Stat. § 809.22(2)(b).

Wisconsin Dairy Alliance and Venture Dairy Cooperative request publication because this case is "of substantial and continuing public interest." *See* Wis. Stat. § 809.23(1)(a)5.

STATEMENT OF THE CASE

A. Legal background

Both federal and Wisconsin law ban the unpermitted "discharge" of pollutants into waters of this state. *See* 33 U.S.C. §§ 1311(a), 1342; Wis. Stat. § 283.31(1). Under the CWA, the U.S. Environmental Protection Agency (EPA) is authorized to administer the NPDES scheme, a permitting system by which facilities may obtain permission to discharge pollutants into the nation's waters in compliance with a permit. *See* 33 U.S.C. § 1342.

The federal government has delegated authority to administer this program to the State of Wisconsin. *See Andersen v. DNR*, 2011 WI 19, ¶¶ 33–37, 332 Wis. 2d 41, 796 N.W.2d 1; *see also* 33 U.S.C. § 1342(b);

Wis. Stat. ch. 283. Pursuant to this federal delegation, Wisconsin has enacted a comprehensive and complex regulatory regime known as WPDES, which governs discharges of pollutants into waters of the state. *See* Wis. Stat. ch. 283; *see also, e.g.*, Wis. Admin. Code NR chs. 102, 104, 105, 200–299.

WPDES regulations generally must be uniform with the CWA. "[Wisconsin Stat. §] 283.11(2) provides generally that all [rules on effluent limitations, standards of performance for new sources, and other effluent prohibitions and pretreatment standards] must comply with and not exceed the requirements of the [CWA] and regulations adopted thereunder." *Andersen*, 2011 WI 19, ¶ 43. The purpose of this uniformity mandate is to ensure that Wisconsin businesses do not have a disadvantage against competition in other states. *See Niagara of Wisconsin Paper Corp. v. DNR*, 84 Wis. 2d 32, 45, 48, 268 N.W.2d 153 (1978).

The CWA and the WPDES regime apply only to "point sources." The law achieves this limitation by defining "discharge of pollutant" and "discharge of pollutants" to mean "any addition of any pollutant to the waters of this state *from any point source*." Wis. Stat. § 283.01(5) (emphasis added). Federal law provides a similar definition that limits the CWA's reach to discharges from point sources. *See* 33 U.S.C. § 1362(12).

Point sources "are discrete places where pollutants are discharged." *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 289 (3d Cir. 2015). One example is "a drainpipe at a wastewater treatment plant." *Id.* By contrast, nonpoint sources "are diffuse sources of pollution." *Id.* Examples include "farms or roadways, from which runoff drains into a

watershed." *Id.* The CWA does not regulate discharges from nonpoint sources because such discharges "are virtually impossible to isolate to one polluter." *United States v. Earth Scis., Inc.*, 599 F.2d 368, 371 (10th Cir. 1979).

Under Wisconsin law and as relevant here, a point source is "[a] discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, [or] concentrated animal feeding operation . . . from which pollutants may be discharged . . . into the waters of the state . . . ." Wis. Stat. § 283.01(12)(a). But "agricultural storm water discharges and return flows from irrigated agriculture" are excluded from this definition of "point source." Wis. Stat. § 283.01(12)(a).

Federal law's definition of "point source" is virtually identical to Wisconsin's. *See* 33 U.S.C. § 1362(14). Like Wisconsin law's, the CWA's definition expressly includes CAFOs and expressly *excludes* "agricultural stormwater discharges and return flows from irrigated agriculture." U.S.C. § 1362(14).

At issue here, one DNR rule requires that "any person owning or operating a large CAFO that stores manure or process wastewater in a structure that is at or below grade or that land applies manure or process wastewater shall have a WPDES permit." Wis. Admin. Code § NR 243.11(3)(a).[7]

[7] This rule uses some terms of art. "'Large CAFO' means an animal feeding operation that has 1,000 animal units or more at any time." Wis. Admin. Code § NR 243.03(31). "Animal units" are calculated under Tables 2A and 2B in Wis. Admin. Code § NR 243.05. For example, 1,000 animal units equals 700 individual milking cows. Wis. Admin. Code § NR 243.05, Table 2B, https://docs.legis.wisconsin.gov/code/admin_code/nr/200/243.pdf. Process wastewater is "water that comes into contact with animal feed and manure." *Clean Wisconsin, Inc. v. DNR*, 2021 WI 71, ¶ 19, 398 Wis. 2d 386,

The other DNR rule at issue here defines "agricultural storm water discharge," and the definition varies based on a CAFO's size. This term means,

> [f]or unpermitted animal feeding operations with 300 to 999 animal units, a precipitation-related discharge of manure or process wastewater pollutants to surface waters from a land application area that may occur after the owner or operator of the animal feeding operation has land applied manure or process wastewater in compliance with a nutrient management plan that meets the nutrient management requirements of this chapter.

Wis. Admin. Code § NR 243.03(2)(a). "For permitted CAFOs," the term "agricultural storm water discharge" means

> a precipitation related discharge of manure or process wastewater pollutants to surface waters from a land application area that may occur after the owner or operator of the CAFO has land applied the manure or process wastewater in compliance with the nutrient management requirements of this chapter and the terms and conditions of its WPDES permit.

Wis. Admin. Code § NR 243.03(2)(b).

Federal law defines "agricultural stormwater discharge" at 40 C.F.R. § 122.23(e). That definition can apply to large CAFOs even if they do not have an NPDES permit. *See* 40 C.F.R. § 122.23(e)(1)–(2).

Agricultural stormwater run-off does not require an NPDES (or WPDES) permit because such run-off is not a "point source" discharge.

961 N.W.2d 346. Finally, as for land application, "treated manure from CAFOs is typically applied to cropland as fertilizer. This fertilizing process is called land application." *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 753 n.39 (5th Cir. 2011).

"The CWA specifically exempts 'agricultural stormwater discharges and return flows from irrigation agriculture' from the definition of a point source." *Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002) (citing 33 U.S.C. § 1362(14)). "Because these water discharges are not considered to be point sources, there is no requirement that a property owner discharging these waters have an NPDES permit." *Id.* (citing 33 U.S.C. §§ 1311, 1342). In other words, "agricultural stormwater run-off has always been considered nonpoint-source pollution exempt from the [CWA]." *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994).

Because such run-off is exempt from the CWA's permitting requirements, it is also exempt from liability under the CWA. The agricultural stormwater exemption removes "liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather—even when those discharges came from what would otherwise be point sources." *Waterkeeper Alliance*, 399 F.3d at 507. In other words, "a discharge could be regulated, and liability imposed, where 'the run-off was primarily caused by the over-saturation of the fields rather than the rain." *Id.* at 508 (quoting *Southview Farm*, 34 F.3d at 121); *see also Maple Leaf Farms, Inc. v. DNR*, 2001 WI App 170, ¶¶ 24, 26, 30, 247 Wis. 2d 96, 633 N.W.2d 720 (relying on *Southview Farm* and holding that "overapplication of manure" can lead to liability for a discharge).

B. Factual and procedural background

On behalf of their affected members, Wisconsin Dairy Alliance and Venture Dairy Cooperative (collectively, the "Dairy Groups") filed this declaratory-judgment action to challenge the validity of two DNR rules that significantly affect CAFOs. (R. 3.)

The circuit court issued an order allowing Clean Wisconsin and Wisconsin Farmers Union to intervene in this case as defendants. (R. 31.)

The Dairy Groups and DNR filed cross-motions for summary judgment. (R. 36; 50.)

On January 31, 2024, the circuit court granted the DNR's motion for summary judgment and denied the Dairy Groups' motion for summary judgment. (R. 88.) Relying on Wis. Stat. § 283.001 and *Maple Leaf*, 2001 WI App 170, the court concluded that the two DNR rules at issue have statutory authority and do not violate the uniformity mandate in Wis. Stat. § 283.11(2). (R. 94:44–49.) The circuit court entered a final order dismissing this case on May 7, 2024. (R. 102.)

The Dairy Groups appeal that decision. (R. 90.)

SUMMARY OF ARGUMENT

I. Wisconsin Admin. Code § NR 243.03(2) requires a large CAFO to have a WPDES permit in order for any of the farm's run-off to constitute an agricultural storm water discharge, which is exempt from liability. Similarly, Wis. Admin. Code § NR 243.11(3) requires virtually every large CAFO to obtain a WPDES permit, thus creating failure-to-apply liability for any large CAFO without a valid WPDES permit. These two DNR rules are unlawful because they exceed federal law and thus violate the uniformity mandate in Wis. Stat. § 283.11(2).

A. Section NR 243.03(2) violates the uniformity mandate in Wis. Stat. § 283.11(2)(b) because this rule is more stringent than federal law. To be exempt from liability for stormwater discharges, federal law requires a CAFO to comply with nutrient management practices. But to satisfy this liability exemption under § NR 243.03(2), a large CAFO must

not only comply with nutrient management practices but must also have and comply with a WPDES permit.

B. Section NR 243.11(3) violates the uniformity mandate in Wis. Stat. § 283.11(2)(a) because this rule fails to comply with and exceeds federal law. Previously, an EPA rule required certain CAFOs to obtain an NPDES permit, thereby creating failure-to-apply liability that was in addition to the statutory liability for an unauthorized discharge. But that federal rule no longer exists because a federal court invalidated it, concluding that the EPA lacked statutory authority to create such failure-to-apply liability. Because § NR 243.11(3) imposes a duty to apply and corresponding failure-to-apply liability, it illegally exceeds federal law.

II. Both of these DNR rules are unlawful for another, independent reason: they exceed the DNR's statutory authority.

A. Section NR 243.03(2) exceeds the DNR's statutory authority. Agricultural storm water discharges are beyond the scope of Wis. Stat. ch. 283 because they are *not* point source discharges. Yet this DNR rule requires large CAFOs to have a WPDES permit in order to qualify for this statutory permitting and liability exemption.

B. Section NR 243.11(3) also exceeds the DNR's statutory authority. For a rule to be lawful, Wis. Stat. § 227.11(2)(a)1. and 2. require a state agency to explicitly have statutory authority to promulgate the rule. The DNR has no explicit authority to create the failure-to-apply liability that it embodied in § NR 243.11(3).

STANDARD OF REVIEW

This Court "review[s] a grant of summary judgment de novo." *Munger v. Seehafer*, 2016 WI App 89, ¶ 46, 372 Wis. 2d 749, 890 N.W.2d 22. "Summary judgment is appropriate where no genuine issue of

material fact exists and the moving party is entitled to judgment as a matter of law." *Premier Cmty. Bank v. Schuh*, 2010 WI App 111, ¶ 4, 329 Wis. 2d 146, 789 N.W.2d 388; *see also* Wis. Stat. § 802.08(2).

This Court reviews de novo whether a rule exceeds an agency's statutory authority or conflicts with a statute. *Debeck v. DNR*, 172 Wis. 2d 382, 386, 493 N.W.2d 234 (Ct. App. 1992).

ARGUMENT

I. The narrow definition of "agricultural storm water discharge" in Wis. Admin. Code § NR 243.03(2) violates the uniformity mandate in Wis. Stat. § 283.11(2)(b).

A. Wisconsin Stat. § 283.11(2)(b) requires the DNR's rules concerning storm water discharges to be no more stringent than federal requirements.

Wisconsin Stat. § 227.40 "posits three grounds for attacking the validity of a rule." *Seider v. O'Connell*, 2000 WI 76, ¶ 23, 236 Wis. 2d 211, 612 N.W.2d 659. As relevant here, a "court shall declare the rule . . . invalid if it finds that it . . . exceeds the statutory authority of the agency." Wis. Stat. § 227.40(4)(a). "[A] party challenging the validity of an administrative rule on the grounds that the rule 'exceeds the statutory authority of the agency' may use Wis. Stat. § 227.11(2) as well as Wis. Stat. § 227.10(2) to articulate the basis for the challenge." *Seider*, 2000 WI 76, ¶ 24. Section 227.10(2) provides that "[n]o agency may promulgate a rule which conflicts with state law." Wis. Stat. § 227.10(2).

The relevant statute here is Wis. Stat. § 283.11. This statute mandates that "[r]ules concerning storm water discharges may be no more stringent than the requirements under the [CWA] and regulations adopted under that act." Wis. Stat. § 283.11(2)(b). Under this statute's plain language, an agency rule is invalid if it is (1) a rule concerning

storm water discharges and (2) more stringent than the requirements under the CWA and the CWA's regulations.

B. Section NR 243.03(2) is more stringent than federal law and thus violates the uniformity mandate in Wis. Stat. § 283.11(2)(b).

Wisconsin Admin. Code § NR 243.03(2)(b) is both (1) a rule concerning storm water discharges and (2) more stringent than the requirements under the CWA and the CWA's regulations. This DNR rule is thus invalid because it violates the uniformity mandate in Wis. Stat. § 283.11(2)(b).

1. Section NR 243.11(3) is a rule concerning storm water discharges.

As just noted, the uniformity mandate in Wis. Stat. § 283.11(2)(b) applies to "[r]ules concerning storm water discharges." Section NR 243.03(2) defines the term "[a]gricultural storm water discharge." It is therefore a rule concerning storm water discharges.

In the circuit court, the Intervenors and DNR argued that this uniformity mandate applies only to rules concerning storm water permits under Wis. Stat. § 283.33. (R. 41:45; 51:54–55.) They are wrong for two reasons.

First, Wis. Stat. § 283.11(2)(b) does not refer to Wis. Stat. § 283.33 or otherwise limit the uniformity mandate's scope. This omission is significant. "Where the legislature uses two different phrases, . . . in two paragraphs in the same section, it is presumed to have intended the two phrases to have different meanings." *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2019 WI 24, ¶ 29, 385 Wis. 2d 748, 924 N.W.2d 153 (alteration in original) (citation omitted). When a statutory provision contains modifying language, the absence of that language from a closely

related provision indicates a different meaning. *See State v. Lickes*, 2021 WI 60, ¶ 23, 397 Wis. 2d 586, 960 N.W.2d 855. Courts do not read language into statutes. *Id.* ¶ 24.

The text of the preceding statutory paragraph, Wis. Stat. § 283.11(2)(a), contains several modifiers and limitations on its scope. It states: "Except for *rules concerning storm water discharges for which permits are issued under s. 283.33*, all rules promulgated by *the department* under *this chapter* as they relate to point source discharges . . . shall comply with and not exceed the requirements of the [CWA] and regulations adopted under that act." Wis. Stat. § 283.11(2)(a) (emphasis added). Subsection (2)(a) thus expressly refers to Wis. Stat. § 283.33, "the department" (*i.e.*, the DNR), and "this chapter" (*i.e.*, Wis. Stat. ch. 283).

By contrast, the text Wis. Stat. § 283.11(2)(b) does not mention Wis. Stat. § 283.33 or contain other modifiers that are present in subsection (2)(a). Instead, the text of subsection (2)(b) broadly applies to "[r]ules concerning storm water discharges." Unlike subsection (2)(a), subsection (2)(b) does *not* limit its reach to rules promulgated by the DNR under Wis. Stat. ch. 283, nor does it refer to permits issued under Wis. Stat. § 283.33. Because subsection (2)(a) refers to Wis. Stat. § 283.33 but subsection (2)(b) does not, these two paragraphs are presumed to have different meanings. *See Milwaukee Dist. Council 48*, 2019 WI 24, ¶ 29. Section 283.11(2)(b) is thus *not* limited to rules related to § 283.33.

Second, Wis. Stat. § 283.11(2)(b) refers broadly to the CWA, not just the federal counterpart to Wis. Stat. § 283.33. It states that "[r]ules concerning storm water discharges may be no more stringent than the requirements under the *federal water pollution control act, 33 USC 1251 to 1387*, and regulations adopted under that act." Wis. Stat.

§ 283.11(2)(b) (emphasis added). As the Intervenors seem to recognize, 33 U.S.C. § 1342(p) is the federal counterpart to Wis. Stat. § 283.33. (R. 41:45.) If this uniformity mandate were limited to rules concerning Wis. Stat. § 283.33, it would have required uniformity with 33 U.S.C. § 1342(p). It instead broadly requires consistency with the CWA. *See* Wis. Stat. § 283.11(2)(b). This broad reference to the CWA helps confirm that "[r]ules concerning storm water discharges" does *not* mean "rules concerning storm water discharges for which permits are issued under s. 283.33." *Compare* Wis. Stat. § 283.11(2)(a), *with* Wis. Stat. § 283.11(2)(b).

In short, the uniformity mandate in Wis. Stat. § 283.11(2)(b) broadly applies to "[r]ules concerning storm water discharges." Section NR 243.03(2) is such a rule. This uniformity mandate thus applies to § NR 243.03(2).

2. Section NR 243.11(3) is more stringent than federal law.

Because § NR 243.03(2) is a rule concerning storm water discharges, the only question under Wis. Stat. § 283.11(2)(b) is whether this rule is more stringent than federal law. It is. This rule therefore conflicts with state law and is invalid.

Under federal law, "a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge." 40 C.F.R. § 122.23(e). To meet this definition, "the manure, litter or process wastewater" must have "been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure." 40 C.F.R. § 122.23(e). Even "*unpermitted*

Large CAFOs" may meet this definition. 40 C.F.R. § 122.23(e)(1)–(2) (emphasis added).

This federal regulation thus does *not* limit the definition of "agricultural stormwater discharge" to only CAFOs of a certain size or CAFOs with an NPDES permit. To the contrary, agricultural stormwater discharges do not require an NPDES permit because they are not "point source" discharges. *Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002); *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994).

Agricultural stormwater discharges are thus exempt from liability under the CWA. The agricultural stormwater exemption removes "liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather—even when those discharges came from what would otherwise be point sources." *Waterkeeper Alliance*, 399 F.3d at 507. In other words, "a discharge could be regulated, and liability imposed, where 'the run-off was primarily caused by the over-saturation of the fields rather than the rain and that sufficient quantities of manure were present so that the run-off could not be classified as "stormwater."'" *Id.* at 508 (quoting *Southview Farm*, 34 F.3d at 121).

The DNR's definition, by contrast, has different requirements for CAFOs depending on their size and whether they have a permit. "For *unpermitted* animal feeding operations with 300 to 999 animal units," DNR defines "agricultural storm water discharge" consistently with 40 C.F.R. § 122.23(e). *See* Wis. Admin. Code § NR 243.03(2)(a) (emphasis added). "For *permitted* CAFOs," however, an agricultural storm water discharge is limited to a CAFO that land applies "manure or process

wastewater in compliance with the nutrient management requirements of this chapter and *the terms and conditions of its WPDES permit*." Wis. Admin. Code § NR 243.03(2)(b) (emphases added). Run-off from an *unpermitted* CAFO with 1,000 or more animal units, *even if caused by rain*, falls outside the DNR's definition of "agricultural storm water discharge." *See* Wis. Admin. Code § NR 243.03(2).

The DNR's definition is thus more stringent than 40 C.F.R. § 122.23(e). This federal rule does not require a CAFO of any size to have an NPDES permit to qualify for the agricultural storm water liability exemption. But the DNR rule requires a large CAFO to have a WPDES permit and comply with it to qualify for this liability protection. *See* Wis. Admin. Code § NR 243.03(2). By requiring a permit and permit compliance, § NR 243.03(2)'s requirements for satisfying the agricultural storm water liability exemption are more stringent than the federal requirements.

So if a large CAFO does not have a WPDES permit, it is necessarily liable for a precipitation-related discharge under the DNR rule—even if that same farm would not have been liable if it had such a permit. The federal rule does not automatically expose an unpermitted large CAFO to liability for a discharge caused by rain. The requirements for obtaining liability protection under § NR 243.03(2) are more stringent than the corresponding requirements under federal law.

It bears emphasizing that state and federal rules require a CAFO to comply with a nutrient management plan (NMP) to satisfy the agricultural storm water liability exemption. *See* 40 C.F.R. § 122.23(e); Wis. Admin. Code § NR 243.03(2). (*See also* R. 79:6.) This federal requirement was upheld in *Waterkeeper Alliance*, 399 F.3d at 508–09.

This NMP requirement helps ensure that run-off constitutes a storm water discharge only if it was actually caused by rain. *See id.* The Dairy Groups do not challenge the NMP requirement in § NR 243.03(2). If this Court invalidates the permit requirement in § NR 243.03(2), CAFOs will still need to comply with NMPs to qualify for the agricultural storm water liability protection. As the EPA recently emphasized, "unpermitted discharges from Large CAFOs that do not apply manure in accordance with site-specific nutrient management practices, and lack documentation to this effect, are violating EPA regulatory requirements and would be subject to enforcement." (R. 79:6.)

In sum, § NR 243.03(2) violates the uniformity mandate in Wis. Stat. § 283.11(2)(b) to the extent this rule requires a large CAFO to have and comply with a WPDES permit to qualify for agricultural storm water liability protection.

C. The circuit court was wrong to rely on *Maple Leaf* in holding that § NR 243.03(2) does not violate the uniformity mandate.

The circuit court did not discuss in depth the uniformity mandate in Wis. Stat. § 283.11(2), but the court heavily relied on *Maple Leaf,* 2001 WI App 170. (R. 94:46–49.) *Maple Leaf* does not apply to the storm water rule at issue here for two independent reasons.

First, the court in *Maple Leaf* did not address Wis. Stat. § 283.11(2)(b) because that case did not involve a rule concerning storm water discharges. "[A]n opinion does not establish binding precedent for an issue if that issue was neither contested nor decided." *Silver Lake Sanitary Dist. v. DNR*, 2000 WI App 19, ¶ 13, 232 Wis. 2d 217, 607 N.W.2d 50. *Maple Leaf* thus provides no support for the circuit court's conclusion that Wis. Admin. Code § NR 243.03(2) satisfies the uniformity

mandate in Wis. Stat. § 283.11(2)(b). Instead, the *Maple Leaf* court addressed Wis. Stat. § 283.11(2)(a), holding that "this provision applies only where the federal program regulates the activity in question . . . . It would not apply where the federal government has chosen not to regulate at all." *Maple Leaf*, 2001 WI App 170, ¶ 16.

Second, even if the *Maple Leaf* analysis regarding Wis. Stat. § 283.11(2)(a) also applies to subsection (2)(b), the DNR storm water rule at issue here violates the uniformity mandate in subsection (2)(b) for the reasons stated above. Specifically, 40 C.F.R. § 122.23(e) regulates the activities in question: NPDES permitting and agricultural storm water discharges. A comparison between these two state and federal rules shows that § NR 243.03(2) is more stringent than its federal counterpart in 40 C.F.R. § 122.23(e). *See supra* at 22–24.

* * *

In sum, Wis. Admin. Code § NR 243.03(2) violates the uniformity mandate in Wis. Stat. § 283.11(2)(b). This DNR rule requires a large CAFO to have and comply with a WPDES permit to qualify for the agricultural storm water liability exemption, but federal law does not impose such a requirement. Because this DNR rule conflicts with state law, it is invalid under Wis. Stat. §§ 227.10(2) and 227.40(4)(a).

II. Because the duty to apply and corresponding failure-to-apply liability in Wis. Admin. Code § NR 243.11(3)(a) fail to comply with and exceed federal requirements, this rule violates the uniformity mandate in Wis. Stat. § 283.11(2)(a).

A. Wisconsin Stat. § 283.11(2)(a) requires the DNR's rules related to point source discharges to comply with and not exceed federal requirements.

Wisconsin's uniformity mandate requires, as relevant here, that "all rules promulgated by the [DNR] under this chapter as they relate to point source discharges . . . shall comply with and not exceed the requirements of the [CWA] and regulations adopted under that act." Wis. Stat. § 283.11(2)(a). Under this plain language of the statute, a DNR rule is invalid if the following elements are met: (1) the DNR promulgated the rule under Wis. Stat. ch. 283; (2) the rule relates to point source discharges; and (3) the rule exceeds or does not comply with the CWA and the EPA's regulations under the CWA. *See id.*

Those three elements are met here, as explained below. Wisconsin Admin. Code § NR 243.11(3) is thus invalid to the extent that it creates failure-to-apply liability.

B. Section NR 243.11(3)(a) is subject to and violates Wis. Stat. § 283.11(2)(a).

1. The DNR promulgated § NR 243.11(3)(a) under Wis. Stat. ch. 283.

Turning to the first prong of the uniformity analysis, § NR 243.11(3) was "promulgated by the [DNR] under [Wis. Stat. ch. 283]." *See* Wis. Stat. § 283.11(2)(a). Indeed, the DNR promulgated this entire chapter of the administrative code under Wis. Stat. ch. 283. *See* Wis.

Admin. Code § NR 243.01(1) ("The authority for promulgation of this chapter is in chs. 281 and 283, Stats.").

2. Section NR 243.11(3)(a) is a rule related to point source discharges.

Turning to the second prong of the uniformity analysis, § NR 243.11(3) is "relate[d] to point source discharges." *See* Wis. Stat. § 283.11(2)(a). The term "relating to" has a "broad" ordinary meaning—"'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)). Under that broad definition, this DNR rule is related to point source discharges because it requires a specific type of point source to obtain a discharge permit. This rule creates requirements for CAFOs, which are point sources under Wis. Stat. § 283.01(12)(a). And this rule requires CAFOs to obtain a WPDES permit, which governs discharges. *See* Wis. Stat. § 283.31(3).

3. Section NR 243.11(3)(a) fails to comply with or exceeds federal requirements.

Turning to the third and final prong of the uniformity analysis, § NR 243.11(3) "exceed[s] the requirements of the [CWA] and regulations adopted under that act." *See* Wis. Stat. § 283.11(2)(a).

Previously, an EPA rule required a CAFO to obtain an NPDES permit if the farm was "constructed, operated, and maintained in a manner such that the CAFO will discharge." *Nat'l Pork Producers*, 635 F.3d at 750. That EPA rule meant "that a CAFO can be held liable for failing to apply for a permit, in addition to being held liable for the discharge itself." *Id.* at 746. As the court explained that EPA rule in *National Pork Producers*, "If a CAFO discharges and does not have a

permit, the CAFO will not only be liable for discharging without a permit, but also prosecuted for failing to apply for a permit—failure to apply liability." *Id.* at 749.

The Fifth Circuit invalidated that EPA rule. The court held "that the EPA does not have the authority to create this [failure to apply] liability." *Id.* at 751. Although the EPA may assess penalties for "unlawful discharges of pollutants," the court held that "the imposition of failure to apply liability is an attempt by the EPA to create from whole cloth new liability provisions." *Id.* (citation omitted). Instead, the EPA's "authority to assess monetary penalties by administrative proceeding is limited to unlawful discharges of pollutants." *Id.* at 752–53 (quoting *Serv. Oil, Inc. v. EPA*, 590 F.3d 545, 550 (8th Cir. 2009)). The court relied on *Waterkeeper Alliance*, where the Second Circuit invalidated a similar EPA rule. *Id.* at 749–50, 753.

The relevant federal rule no longer imposes failure-to-apply liability. It now states that "[a] CAFO must be covered by a permit at the time that it discharges." 40 C.F.R. § § NR 102. This current rule simply echoes the liability for unauthorized discharges that is established in 33 U.S.C. § 1311(a). Indeed, in August 2023, the EPA declined to promulgate a rule that would have required CAFOs to either obtain an NPDES permit or prove that they do not discharge. (R. 79:3–5.) The EPA relied on *Waterkeeper Alliance* and *National Pork Producers* when it declined to adopt a presumption that certain CAFOs discharge. (R. 79:3–5.)

In contrast to current federal law, the first sentence of Wis. Admin. Code § NR 243.11(3)(a) creates failure-to-apply liability. The first sentence states that "[e]xcept as provided in par. (b), any person owning

or operating a large CAFO that stores manure or process wastewater in a structure that is at or below grade or that land applies manure or process wastewater shall have a WPDES permit." Wis. Admin. Code § NR 243.11(3)(a).

By imposing a duty to apply for a permit, this DNR rule creates liability for the mere failure to apply for a permit. A person may be prosecuted for any violation of Wis. Stat. ch. 283 "or any rule promulgated under this chapter." Wis. Stat. § 283.91(2) & (3). If a large CAFO does not have a valid WPDES permit, then it may be penalized for not having a permit as required by the first sentence of § NR 243.11(3)(a).

The failure-to-apply liability imposed by the first sentence of § NR 243.11(3)(a) is separate from liability for an unauthorized discharge. Wisconsin Stat. § 283.31(1) bans the unauthorized discharge of a pollutant into a water of the state. The *second* sentence of § NR 243.11(3)(a) echoes that ban: "A discharge of pollutants from manure or process wastewater to waters of the state by an unpermitted animal feeding operation with 1,000 animal units or more is prohibited." Wis. Admin. Code § NR 243.11(3)(a).

The first two sentences of § NR 243.11(3)(a) thus do two different things. The first sentence creates liability for any large CAFO that does not have a valid WPDES permit. The second sentence merely reflects the ban on unauthorized discharges in Wis. Stat. § 283.31(1); it does not create a new form of liability. If the first sentence of § NR 243.11(3)(a) simply forbade unauthorized discharges, then it would be superfluous with the second sentence. "Construction of statutes and administrative rules should avoid whenever possible interpretations that render

language superfluous." *State v. Harenda Enterprises, Inc.*, 2008 WI 16, ¶ 54, 307 Wis. 2d 604, 746 N.W.2d 25. The first sentence of § NR 243.11(3)(a) has independent meaning; it creates a duty to apply and corresponding failure-to-apply liability.

So, this failure-to-apply liability is *in addition to* the liability that may be imposed on a large CAFO for an unauthorized discharge. If the state cannot prove that a large CAFO had an unauthorized discharge, the farm may still be prosecuted for violating the duty to apply in the first sentence of § NR 243.11(3)(a). And if the state can prove an unauthorized discharge, the farm may be penalized both for the discharge and for the failure to have a valid permit.

For these reasons, § NR 243.11(3)(a) fails to "comply with" or otherwise "exceed[s] the requirements of the [CWA] and regulations adopted under that act." *See* Wis. Stat. § 283.11(2)(a). As noted, before getting struck down in court, an EPA rule required a CAFO to obtain an NPDES permit if the farm was "designed, constructed, operated, and maintained in a manner such that the CAFO will discharge." *Nat'l Pork Producers*, 635 F.3d at 750. Similarly, the duty to apply in § NR 243.11(3)(a) stems from the DNR's "position" that certain activities by large CAFOs "will" result in a discharge into waters of the state. Note to Wis. Admin. Code § NR 243.12(1)(d). The duty to apply in § NR 243.11(3)(a) thus essentially mirrors the federal duty to apply that was invalidated in *National Pork Producers*. Because the CWA and its regulations no longer impose a duty to apply and corresponding failure-to-apply liability on CAFOs, § NR 243.11(3)(a) exceeds federal law. This DNR rule is thus invalid under Wis. Stat. § 283.11(2)(a).

C. The circuit court was wrong to rely on *Maple Leaf* in holding that § NR 243.11(3)(a) does not violate the uniformity mandate.

As noted above, the circuit court did not clearly explain its conclusion that § NR 243.11(3)(a) does not violate the uniformity mandate in Wis. Stat. § 283.11(2), but the court discussed *Maple Leaf*.

Maple Leaf is distinguishable from the present case. In *Maple Leaf*, the court held that the uniformity mandate in Wis. Stat. § 283.11(2)(a) "applies only where the federal program regulates the activity in question . . . . It would not apply where the federal government has chosen not to regulate at all." *Maple Leaf*, 2001 WI App 170, ¶ 16. This uniformity mandate bars the DNR from adopting limits that are "more stringent than the federal limits." *See id.* ¶ 19. This uniformity mandate applies, "for example, where the EPA has imposed specific discharge limits for defined categories of industrial discharges and the DNR has superimposed more stringent limits." *Id.* ¶ 16.

In other words, the uniformity mandate applies only if a DNR rule has a federal counterpart in the CWA or the CWA's regulations. After all, for a regulation to more stringent, it must be more stringent "than something else." *Andersen*, 2011 WI 19, ¶ 57. If the federal "something else" does not exist, then a DNR rule has nothing with which to comply. Under *Maple Leaf*, uniformity with a non-existent federal program is neither possible nor required.

Maple Leaf illustrates those points. In *Maple Leaf*, the farm argued "that because the federal program does not regulate off-site manure spreading, the uniformity provision effectively eliminates the DNR's authority to impose permit conditions on this activity." *Maple Leaf*, 2001 WI App 170, ¶ 11 (footnote omitted). The DNR conceded that the federal

program did not regulate off-site manure spreading. *Id.* ¶ 11 n.5. This Court rejected the farm's argument. It concluded that the uniformity mandate was inapplicable, noting that "the federal government has chosen not to regulate." *Id.* ¶ 20. In other words, because the DNR's regulation of off-site manure spreading had no federal counterpart, Wis. Stat. § 283.11(2)(a) did not require that DNR program to comply with a non-existent federal program.

Here, by contrast, the CWA regulates the activity in question: NPDES permitting for CAFOs. The federal program has a counterpart with which the DNR rule can (and must) comply. Unlike in *Maple Leaf*, here a court can compare the DNR rule at issue with the federal counterpart to determine whether the DNR rule is more stringent. Because the federal government has chosen to regulate this area of the law, the uniformity mandate in Wis. Stat. § 283.11(2)(a) applies here. As explained above, to the extent that Wis. Admin. Code § NR 243.11(3)(a) creates failure-to-apply liability, it exceeds federal requirements and thus violates the uniformity mandate in Wis. Stat. § 283.11(2)(a).

* * *

In sum, Wis. Admin. Code § NR 243.11(3)(a) conflicts with the uniformity mandate in Wis. Stat. § 283.11(2)(a). This DNR rule imposes a duty to apply for a WPDES permit and thus creates failure-to-apply liability, but federal law no longer does. Because this DNR rule conflicts with state law, it is invalid under Wis. Stat. §§ 227.10(2) and 227.40(4)(a).

III. Wisconsin Admin. Code § NR 243.03(2) conflicts with the statutory liability exemption for agricultural storm water discharges and is thus unlawful.

"No agency may promulgate a rule which conflicts with state law." Wis. Stat. § 227.10(2). "A rule out of harmony with the statute is a mere nullity." *Seider*, 2000 WI 76, ¶ 26 (citation omitted).

Here, the DNR's definition of "[a]gricultural storm water discharge" in Wis. Admin. Code § NR 243.03(2) is invalid because it conflicts with statutory liability protection for such discharges. Wisconsin statutes exempt agricultural storm water discharges from WPDES permitting requirements and from liability under Wis. Stat. ch. 283. Yet this DNR rule requires certain CAFOs to have a WPDES permit to qualify for this statutory permitting and liability exemption. This rule is out of harmony with the statutes.

Before addressing storm water run-off, a little background on the WPDES permitting scheme and point sources is helpful. As noted above, Wisconsin law bans the unpermitted "discharge of any pollutant into any waters of the state." Wis. Stat. § 283.31(1). A discharge of a pollutant is "any addition of any pollutant to the waters of this state *from any point source*." Wis. Stat. § 283.01(5). Federal law operates the same way. *See* 33 U.S.C. §§ 1311(a), 1362(12).

So, "[a]ll owners and operators of *point sources* in Wisconsin must obtain a WPDES permit in order to discharge pollutants into the waters of the State." *Clean Wisconsin, Inc. v. DNR*, 2021 WI 71, ¶ 3 n.3, 398 Wis. 2d 386, 961 N.W.2d 346 (hereafter "*Clean Wisconsin I*") (emphasis added). The discharge ban in Wis. Stat. § 283.31(1) does *not* apply to a *nonpoint* source. *See Froebel v. DNR*, 217 Wis. 2d 652, 671, 579 N.W.2d 774 (Ct. App. 1998).

As explained above, a point source is "[a] discernible, confined, and discrete conveyance . . . from which pollutants may be discharged . . . into the waters of the state . . . ." Wis. Stat. § 283.01(12)(a). Crucially, though, "agricultural storm water discharges" are excluded from that definition of "point source." Wis. Stat. § 283.01(12)(a). Such discharges are thus exempt from the permitting requirements and liability that apply to point sources.

Federal law operates the same way. As one federal court has explained, "Because [agricultural stormwater] discharges are not considered to be point sources, there is no requirement that a property owner discharging these waters have an NPDES permit." *Closter Farms*, 300 F.3d at 1297 (citing 33 U.S.C. §§ 1311, 1342). In other words, "agricultural stormwater run-off has always been considered nonpoint-source pollution exempt from the [CWA]." *Southview Farm*, 34 F.3d at 120. This exemption removes "liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather—even when those discharges came from what would otherwise be point sources." *Waterkeeper Alliance*, 399 F.3d at 507. In other words, "a discharge could be regulated, and liability imposed, where 'the run-off was primarily caused by the over-saturation of the fields rather than the rain.'" *Id.* at 508 (quoting *Southview Farm*, 34 F.3d at 121).

The DNR's permit requirement in § NR 243.03(2)(b) thus conflicts with Wisconsin's statutory scheme. This DNR rule requires a CAFO with more than 999 animal units to have a WPDES permit in order for any of its run-off to qualify as an agricultural storm water discharge. *See* Wis. Admin. Code § NR 243.03(2)(b). In other words, the DNR requires CAFOs of a certain size to *have a WPDES permit* in order to qualify for

the statutory storm water *permitting and liability exemption*. The legislature has not authorized the DNR to require CAFOs to go through the permitting process in order to qualify for this statutory permitting exemption. By defining "agricultural storm water discharge" in a way that requires large CAFOs to *have a permit* in order to satisfy this statutory *permitting exemption*, this DNR rule is out of harmony with the statutory scheme.

This DNR rule thus creates liability that is out of harmony with the statutes. As just explained, a CAFO is not liable for a discharge that was caused by rain. *Waterkeeper Alliance*, 399 F.3d at 507–08; *Southview Farm*, 34 F.3d at 120–21; *see also Maple Leaf*, 2001 WI App 170, ¶¶ 24, 26, 30 (relying on *Southview Farm* and holding that "overapplication of manure" can lead to liability for a discharge). Yet under § NR 243.03(2)(b), a large CAFO *would be liable* for a discharge caused by rain if that farm did not have and comply with a valid WPDES permit. Under this DNR rule, whether a large CAFO is liable for a discharge caused by rain hinges on whether the farm has a valid WPDES permit. If a large CAFO lacks a valid WPDES permit, then its discharge caused by rain would fall outside the DNR's definition of "agricultural storm water discharge" in § NR 243.03(2)(b). This exposure to liability conflicts with the statutory scheme that eliminates liability for such nonpoint source discharges.

A closely related flaw with this DNR rule is that it applies only to discharges "to surface waters." Wis. Admin. Code § NR 243.03(2)(a) & (b). State law exempts "agricultural storm water discharges" from the potential liability and permitting requirements that apply to point sources. *See* Wis. Stat. § 283.01(12)(a). This statute does *not* read

"agricultural storm water discharges *to surface water*." Yet § NR 243.03(2) applies these legal protections only to discharges to surface water, thus exposing certain farms to liability for discharges to groundwater even if rain caused those discharges. "The decision to write an exception into a statute is best reserved for the legislature." *Seider*, 2000 WI 76, ¶ 40. By carving out an exception for discharges to groundwater, this DNR rule conflicts with the legal protections that Wis. Stat. § 283.01(12)(a) creates for agricultural storm water discharges.

Other statutory provisions confirm that the legal protections for agricultural storm water discharges are not limited to discharges to surface water. "'Discharge of pollutant' or 'discharge of pollutants' means any addition of any pollutant to the *waters of this state* from any point source." Wis. Stat. § 283.01(5) (emphasis added). And the term "[w]aters of the state" includes "surface water *or groundwater*." Wis. Stat. § 283.01(20) (emphasis added).

Case law also confirms that the legal protections for agricultural storm water discharges apply to both surface water and groundwater. As just explained, a discharge caused by rain is exempt from liability and permitting requirements for point sources because it is a nonpoint source discharge. Under federal law, "the CWA's exemption for agricultural storm water discharge" does not "allow farmers to get away with spreading animal waste on fields without regard for *absorption capacity* or runoff potential." *Maple Leaf*, 2001 WI App 170, ¶ 24 (emphasis added) (citing *Southview Farm*, 34 F.3d at 120–21). State law operates similarly by providing that an "*overapplication* of manure" would "be a discharge, either because of runoff to surface waters or *percolation of pollutants to groundwater*." *Id.* ¶ 26 (emphasis added). In other words, "a CAFO's

overapplication of manure to fields can be a discharge to *groundwater* under the statute…." *Id.* Yet under § NR 243.03(2), any unpermitted large CAFO's discharge *to groundwater* is subject to point source liability and permitting requirements—even if the discharge was caused by rain, *i.e.*, even if the discharge was *not* caused by *overapplication* of manure.

In short, § NR 243.03(2)(b) is invalid because it conflicts with state law. This DNR rule imposes permit requirements and potential liability where the statutes have created an exemption from permit requirements and liability. This DNR rule requires a large CAFO to have a WPDES permit for any of the farm's surface water run-off to be exempt from liability and permitting requirements, and this rule eliminates these legal protections for any discharge to groundwater. This rule is out of harmony with Wis. Stat. § 283.01(12)(a), which exempts agricultural storm water discharges from point source regulation. Because this DNR rule conflicts with state law, it is invalid under Wis. Stat. §§ 227.10(2) and 227.40(4)(a).

IV. Wisconsin Admin. Code § NR 243.11(3)(a), which creates a permit requirement and failure-to-apply liability, is unlawful because it has no explicit statutory authority.

A. State agencies, including the DNR, may not adopt rules without explicit statutory authority to do so.

Again, "a party challenging the validity of an administrative rule on the grounds that the rule 'exceeds the statutory authority of the agency' may use Wis. Stat. § 227.11(2) as well as Wis. Stat. § 227.10(2) to articulate the basis for the challenge." *Seider*, 2000 WI 76, ¶ 24. As explained above, the duty to apply in Wis. Admin. Code § NR 243.11(3)(a) is invalid under Wis. Stat. § 227.10(2) because this duty to apply conflicts with the uniformity mandate in Wis. Stat. § 283.11. As explained next,

this duty to apply is invalid for another reason: it lacks explicit statutory authority as required by Wis. Stat. § 227.11(2).

"Formerly, court decisions permitted Wisconsin administrative agency powers to be implied." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 51, 391 Wis. 2d 497, 942 N.W.2d 900. However, "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." *Id.* (citation omitted); *see also Clean Wisconsin, Inc. v. DNR*, 2021 WI 72, ¶ 20, 398 Wis. 2d 433, 961 N.W.2d 611 (hereafter "*Clean Wisconsin II*") (noting that Act 21 "contained significant revisions to Wis. Stat. ch. 227," including the creation of the explicit authority requirement).

One of these significant revisions was the creation of Wis. Stat. § 227.11(2)(a)1. to 3. *See* 2011 Wis. Act 21, § 3, https://docs.legis.wisconsin.gov/2011/related/acts/21.pdf. "That statute prevents courts from finding implicit agency-rule-making authority in general policy or purpose statements that contain no explicit rule-making authorization." *Clean Wisconsin II*, 2021 WI 72, ¶ 30. "The explicit authority requirement is, in effect, a legislatively-imposed canon of construction that requires [courts] to narrowly construe imprecise delegations of power to administrative agencies." *Palm*, 2020 WI 42, ¶ 52.

As relevant here, "[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." Wis. Stat. § 227.11(2)(a)1. (emphasis added). This statute also provides

that "[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." Wis. Stat. § 227.11(2)(a)2. (emphasis added).

"Black's Law Dictionary defines 'explicit' as 'clear, open, direct, or exact' and 'expressed without ambiguity or vagueness.'" *Clean Wisconsin I*, 2021 WI 71, ¶ 24 (quoting Explicit, Black's Law Dictionary 725 (11th ed. 2019)). "Similarly, the American Heritage Dictionary defines explicit as 'fully and clearly expressed; leaving nothing implied' and 'fully developed or formulated.'" *Id.* (quoting Explicit, American Heritage Dictionary (5th ed. 2011)). An agency may rely on explicit but broad authority, but it may not rely on implicit authority. *See Clean Wisconsin II*, 2021 WI 72, ¶¶ 22–24, 30; *Clean Wisconsin I*, 2021 WI 71, ¶¶ 24–25.

B. The duty to apply in Wis. Admin. Code § NR 243.11(3)(a) exceeds the DNR's explicit statutory authority.

Here, the circuit court held that Wis. Stat. § 283.001 authorized the two DNR rules at issue. (R. 94:44–48.) The court erred.

Because this statute merely declares "legislative intent, purpose, findings, or policy," this statute "does not confer rule-making authority on the [DNR]." *See* Wis. Stat. § 227.11(2)(a)1. This Court has recognized that "Wisconsin Stat. § 283.001(1) sets forth the policy and purpose of Wisconsin's WPDES program." *Maple Leaf*, 2001 WI App 170, ¶ 14. The language of the statute supports that view. The statute's title is "Statement of policy and purpose." Wis. Stat. § 283.001. Its text states that "[t]he *purpose* of this chapter is to grant to the [DNR] all authority necessary to establish, administer and maintain a state pollutant discharge elimination system to effectuate the policy set forth under sub.

(1) and consistent with all the requirements of the [CWA]." Wis. Stat. § 283.001(2). Subsection (1) identifies "the goal of the state of Wisconsin" and "the policy of the state of Wisconsin." Wis. Stat. § 283.001(1)(a)–(c). This statute merely declares legislative policy and purpose; it does not explicitly confer rulemaking authority.

Maple Leaf does not support the circuit court's reliance on Wis. Stat. § 283.001. For starters, that case involved a challenge to certain conditions that the DNR had imposed in a WPDES permit. *See Maple Leaf*, 2001 WI App 170, ¶¶ 1, 11. This Court's discussion of Wis. Stat. § 283.001 thus appears to be limited to the DNR's authority to impose permit conditions, not its rulemaking authority.

If *Maple Leaf* suggests that Wis. Stat. § 283.001 authorized rulemaking, any such holding was superseded by Wis. Stat. § 227.11(2)(a)1., which was codified ten years after *Maple Leaf* was decided. This Court in *Maple Leaf* stated that agency powers may be "implied from the language of the statute." *Maple Leaf*, 2001 WI App 170, ¶ 13. After 2011 Wisconsin Act 21, however, agencies no longer have implied authority. *Clean Wisconsin II*, 2021 WI 72, ¶¶ 22–24, 30; *Clean Wisconsin I*, 2021 WI 71, ¶¶ 24–25; *Palm*, 2020 WI 42, ¶ 51. Because § 283.001 is a legislative statement of policy and purpose, it "does not confer rule-making authority on the agency." *See* Wis. Stat. § 227.11(2)(a)1. Act 21 eliminated any implied rulemaking authority that § 283.001 may have otherwise created.

Here, the circuit court thought that it was bound by this Court's broad reading of Wis. Stat. § 283.001 in *Maple Leaf*. (R. 94:46.) The circuit court was wrong. "Case law can be superseded by statute or constitutional amendment." *State v. Johnson*, 2020 WI App 73, ¶ 27, 394

Wis. 2d 807, 951 N.W.2d 616, *rev'd on other grounds*, 2023 WI 39, 407 Wis. 2d 195, 990 N.W.2d 174. Although this Court may not "overrule, modify or withdraw language from a published opinion of the court of appeals," *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997), this Court may recognize that a statutory or constitutional amendment abrogated case law, *see e.g.*, *Johnson*, 2020 WI App 73, ¶ 27, *rev'd on other grounds*, 2023 WI 39; *State v. Hayes*, 2015 WI App 71, ¶ 8 n.3, 365 Wis. 2d 174, 870 N.W.2d 478. When the legislature overrules case law by amending a statute, a court's "role is to follow that legislative mandate." *Taylor v. City of Appleton*, 147 Wis. 2d 644, 646, 433 N.W.2d 293 (Ct. App. 1988). By enacting Wis. Stat. § 227.11(2)(a)1., the legislature overruled *Maple Leaf* to the extent that case suggests that Wis. Stat. § 283.001 confers rulemaking authority.

C. *Clean Wisconsin I* illustrates why Wis. Stat. § 283.001 does not explicitly authorize the duty to apply in Wis. Admin. Code § NR 243.11(3)(a).

Clean Wisconsin I highlights why Wis. Stat. § 283.001 does not explicitly confer rulemaking authority. In *Clean Wisconsin I*, the supreme court examined whether the DNR had explicit authority to impose certain conditions in a WPDES permit. *Clean Wisconsin I*, 2021 WI 71, ¶ 1. That case involved Wis. Stat. § 227.10(2m), "which dictates that '[n]o 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 rule* that has been promulgated in accordance with this subchapter.'" *Id.* ¶ 21 (alterations in original) (quoting Wis. Stat. § 227.10(2m)).

The court cited Wis. Stat. § 283.001 just once, when discussing general background on the WPDES permit program. *Id.* ¶ 17. Notably,

the court did *not* rely on § 283.001 as providing explicit authority for the challenged permit conditions.

Instead, the court held "that the DNR had the explicit authority to impose both the animal unit maximum and off-site groundwater monitoring conditions upon [the farm's] reissued WPDES permit, *pursuant to Wis. Stat. § 283.31(3)-(5) and related regulations*." *Clean Wisconsin I*, 2021 WI 71, ¶ 40 (emphasis added). That statute explicitly authorizes the DNR to "issue a permit" and requires the DNR to "prescribe conditions for permits." Wis. Stat. § 283.31(3) & (4). As the court recognized in *Clean Wisconsin I*, "Wisconsin Stat. § 283.31(3) allows the DNR to issue a permit 'for the discharge of any pollutant….'" *Clean Wisconsin I*, 2021 WI 71, ¶ 27 (quoting Wis. Stat. § 283.31(3)). "Wisconsin Stat. § 283.31(4) mandates that the DNR 'shall prescribe conditions for permits issued under this section to assure compliance with the requirements of sub. (3).'" *Id.* ¶ 28 (quoting Wis. Stat. § 283.31(4)). "Additionally, Wis. Stat. § 283.31(5) explicitly requires that the DNR issue permits that 'specify maximum levels of discharges.'" *Id.* ¶ 35 (quoting Wis. Stat. § 283.31(5)).[8]

Here, by contrast, Wis. Stat. § 283.001 does not confer rulemaking authority. This statute does not mention rulemaking at all. It therefore does not explicitly confer rulemaking authority. When the legislature

[8] In *Clean Wisconsin I*, the supreme court stated that "CAFOs are statutorily required to apply to the DNR for a WPDES permit because they are 'point sources' as defined in Wis. Stat. § 283.01(12)." *Clean Wisconsin I*, 2021 WI 71, ¶ 18. But the court did not mean that statutes impose a duty to apply like Wis. Admin. Code § NR 243.11(3) does. The court simply meant that statutes prohibit unpermitted discharges. As the court recognized, "[Wis. Stat. ch.] 283 prohibits the discharge of any pollutant into the waters of the state unless the DNR authorizes the discharge in a permit." *Id.* ¶ 17. Along these lines, the court also recognized that "[a]ll owners and operators of point sources in Wisconsin must obtain a WPDES permit *in order to discharge* pollutants into the waters of the State." *Id.* ¶ 3 n.3 (emphasis added).

authorizes or requires the DNR to engage in rulemaking, it explicitly says so, such as by stating that the DNR "may promulgate rules" or "shall promulgate rules." *See, e.g.*, Wis. Stat. § 283.33(8) ("The [DNR] shall promulgate rules for the administration of this section."); Wis. Stat. § 283.37 ("The [DNR] shall promulgate rules relating to applications for permits under this chapter…."); Wis. Stat. § 283.84(6) ("The [DNR] may promulgate rules for the administration of this section."); Wis. Stat. § 293.15 (8)–(10) (authorizing the DNR to "[p]romulgate rules" for certain purposes); Wis. Stat. § 285.30(2) ("The [DNR] shall adopt rules specifying emissions limitations for all motor vehicles not exempted under sub. (5)."); Wis. Stat. § 293.13(1)(a) (requiring the DNR to "[a]dopt rules" for certain purposes); Wis. Stat. § 287.03(1)(a) (requiring the DNR to "[p]romulgate rules necessary to implement this chapter").

The circuit court, however, did not identify any statute that explicitly authorizes or requires the DNR to "promulgate rules" to require operators or owners of certain point sources to obtain WPDES permits. Wisconsin Stat. § 283.001 does not create any such rulemaking authority.

* * *

In sum, the duty to apply in Wis. Admin. Code § NR 243.11(3)(a) lacks explicit statutory authority. The circuit court relied on Wis. Stat. § 283.001, but this statute merely provides a statement of legislative purpose and policy. Crucially, "a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency." Wis. Stat. § 227.11(2)(a)1. Because the duty to apply exceeds the DNR's statutory authority, it is invalid under Wis. Stat. § 227.40(4)(a).

CONCLUSION

This Court should reverse the circuit court's order and judgment.

Dated this 21st day of May 2024.

Electronically signed by

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of the relevant portions of this brief is 10,018 words.

Dated this 21st day of May 2024.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 21st day of May 2024.

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