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
WISCONSIN FARMERS UNION
and CLEAN WISCONSIN,
Intervenors-Respondents.

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

Although owners of point sources (including CAFOs) are liable for unauthorized discharges, they are statutorily exempt from liability for agricultural stormwater discharges. Yet a DNR rule eliminates this liability protection for one category of livestock farms: unpermitted large CAFOs.[1]

Another DNR rule creates automatic liability for unpermitted large CAFOs. This rule's failure-to-apply liability is in addition to the statutory liability for an unauthorized discharge.[2]

DNR and WFU largely overlook these liability concerns, characterizing this case as a challenge to a permitting requirement.

Because these two DNR rules unlawfully create liability, this Court should reverse.

ARGUMENT

I. This case is justiciable.

Contrary to DNR's and WFU's arguments, this case is justiciable.

A. This case is ripe.

"By definition, the ripeness required in declaratory judgment actions is different from the ripeness required in other actions." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶43, 309 Wis. 2d 365, 749 N.W.2d 211. Indeed, the Wisconsin Supreme Court has recognized that facial

[1] This brief refers to Appellants as the "Dairy Groups," Respondents as "DNR," and Intervenor-Respondents as "WFU."

[2] WFU uses the phrase "Duty to Apply." That's a misnomer because this rule requires large CAFOs to *have* a permit, not just apply for one. Similarly, "failure-to-apply" liability under this rule is actually liability for not *having* a permit.

"challenges to ordinances are generally ripe the moment the challenged ordinance is passed." *Id.* ¶44 n.9.

Likewise, regulated entities may "challenge agency regulations in pre-enforcement suits" and "generally need not violate a law in order to challenge the law." *State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 54 (D.C. Cir. 2015) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-53 (1967)).

The Dairy Groups may bring this pre-enforcement facial challenge to two DNR rules. To be ripe, "the facts [must] be sufficiently developed to allow a conclusive adjudication." *Olson*, 2008 WI 51, ¶43. The facts here are sufficiently developed because this declaratory-judgment action raises only questions of law: whether two DNR rules conflict with state statutes. This type of claim raises only "a question of law." *Wisconsin Hosp. Ass'n v. NRB*, 156 Wis. 2d 688, 705, 457 N.W.2d 879 (Ct. App. 1990).[3]

Regarding Wis. Admin. Code § NR 243.11(3)(a), the Duty-to-Apply Rule, WFU's justiciability arguments overlook a crucial aspect of this case: the Dairy Groups challenge the *liability* that this rule creates. WFU contends that, to present justiciable challenges to this rule, the Dairy Groups must show they have "members who are unlawfully required to have a WPDES permit." (WFU's Br. 22.) WFU is wrong because the Dairy Groups aren't just challenging a permitting requirement; they are challenging the failure-to-apply *liability* that this permitting requirement creates. The Dairy Groups may challenge the legality of this

[3] The third issue presented should refer to Wis. Admin. Code § NR 243.03(2), not Wis. Admin. Code § NR 243.11(3). (*See* Dairy Groups' Br. 11.)

liability before its members expose "themselves to forfeitures or prosecution." *See Olson*, 2008 WI 51, ¶43 (citation omitted).

Regarding Wis. Admin. Code § NR 243.03(2), the Stormwater Rule, WFU argues the Dairy Groups must establish they have "members who have been held liable, or are at credible risk of liability, for a discharge that should not generate liability, *i.e.*, an agricultural storm water discharge." (WFU's Br. 25.) Besides failing to cite legal authority to support that argument, WFU fails to explain what is not credible about the risk of liability under this DNR rule. The Dairy Groups may challenge this rule before their members expose themselves to liability under it.

B. The Dairy Groups have standing to challenge both DNR rules.

"The doctrines of standing and ripeness are closely related, and in cases like this one perhaps overlap entirely." *Smith v. Wisconsin DATCP*, 23 F.3d 1134, 1141 (7th Cir. 1994). Here, the Dairy Groups have standing for the same reason this case is ripe: they may seek declaratory relief to protect their members from potential liability under two DNR rules.

"The Supreme Court has stated that 'there is ordinarily little question' that a regulated individual or entity has standing to challenge an allegedly illegal statute or rule under which it is regulated." *State Nat. Bank of Big Spring*, 795 F.3d at 53 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992)).

The Dairy Groups have standing to challenge DNR rules that regulate their members.

1. Standing is liberally applied.

Wisconsin courts liberally construe the law of standing, *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶19, 402 Wis. 2d 587, 977 N.W.2d 342, and the Uniform Declaratory Judgments Act, *Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶18, 259 Wis. 2d 107, 655 N.W.2d 189.

An organization has "associational standing" if "a member of the organization would have had standing to bring the action in his own name.'" *Munger v. Seehafer*, 2016 WI App 89, ¶¶49, 54, 372 Wis. 2d 749, 890 N.W.2d 22 (citation omitted).

Wisconsin's test for standing has "two parts: first, whether the challenged action caused direct injury to the [plaintiff's] interest and second, whether the interest affected was one recognized by law." *Metro. Builders Ass'n of Greater Milwaukee v. Vill. of Germantown*, 2005 WI App 103, ¶13, 282 Wis. 2d 458, 698 N.W.2d 301.

Under the first prong, a "risk of pecuniary loss" is sufficient. *See Lake Country*, 2002 WI App 301, ¶23. An injury "need not have already occurred" for a plaintiff to have standing. *Chenequa Land Conservancy, Inc. v. Vill. of Hartland*, 2004 WI App 144, ¶17, 275 Wis. 2d 533, 685 N.W.2d 573. So, "a contingent liability can confer standing." *Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1300 (10th Cir. 2008).

Under the second prong, "the allegedly adversely affected interest" must "be one protected, recognized, or regulated by an identified law." *Friends of Black River Forest*, 2022 WI 52, ¶31. The second prong is satisfied if a statute has "substantive criteria" for enforcing a claim. *Id.* ¶33.

2. The Dairy Groups' members satisfy the two-part standing test.

The Dairy Groups have associational standing because they have members who satisfy the two-prong standing test.

The first prong is satisfied here because the two DNR rules impose costs and potential liability on the Dairy Groups' members. The Duty-to-Apply Rule exposes large CAFOs to failure-to-apply liability if they don't have a WPDES permit, separate from any liability for an unauthorized discharge. (Dairy Groups' Br. 29-31.) Also, the Duty-to-Apply Rule imposes "significant costs" on the Dairy Groups' members. (R. 80:2; 81:2.) The Stormwater Rule deprives an unpermitted large CAFO of liability protection for any of its stormwater runoff. (Dairy Groups' Br. 34-38; R. 80:2-3; 81:2-3.) The Dairy Groups' members' pecuniary interest in avoiding these forms of liability satisfies the first prong of the standing test.

The second prong is also satisfied here. The law authorizes "an action for declaratory judgment as to the validity of [a state agency] rule." Wis. Stat. § 227.40(1). This statute provides substantive criteria for such a claim: a court shall declare a rule invalid if 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 v. O'Connell*, 2000 WI 76, ¶24, 236 Wis. 2d 211, 612 N.W.2d 659.

3. DNR's and WFU's arguments on standing are unpersuasive.

DNR and WFU don't seem to dispute that the Dairy Groups satisfy the second prong of the standing test. Instead, DNR argues the Dairy Groups fail the first prong because their members are statutorily required to have WPDES permits. (DNR's Br. 32-33.) That argument fails for two reasons.

First, it goes to the merits of the Dairy Groups' claims, not to standing. "The question of whether the injury alleged will result from the agency action in fact is a question to be determined on the merits, not on a motion to dismiss for lack of standing." *Friends of Black River Forest*, 2022 WI 52, ¶22 (citation omitted).

Second, DNR's argument ignores that the statutory liability for an unauthorized discharge is distinct from the failure-to-apply liability created by the Duty-to-Apply Rule. (*See* Dairy Groups' Br. 29-31.) This DNR rule injures the Dairy Groups' members in a redressable way: if this rule were invalidated, the Dairy Groups' members would no longer be exposed to failure-to-apply liability. They would still be subject to liability for an unauthorized discharge if they discharged without a WPDES permit, but the mere failure to have a WPDES permit would no longer be a freestanding basis for liability.

DNR next argues the Dairy Groups' asserted harms are too hypothetical or remote. (DNR's Br. 33-34.) That argument misses the mark because even an alleged injury that is "remote in time" can support standing. *Friends of Black River Forest*, 2022 WI 52, ¶21 (citation omitted). "Plaintiffs do not need to await actual legal action or even a clearly expressed threat of legal action against them in order to have standing for a declaratory judgment." *Planned Parenthood of Wisconsin,*

Inc. v. Schimel, 2016 WI App 19, ¶18, 367 Wis. 2d 712, 877 N.W.2d 604. If a large-CAFO member of the Dairy Groups were to no longer have a valid WPDES permit, the Duty-to-Apply Rule would subject that member to failure-to-apply liability. The Dairy Groups may challenge the validity of this liability pre-enforcement.

Regarding the Stormwater Rule's narrow definition of "agricultural storm water discharge," DNR first argues that the injury stemming from this rule is speculative because the Dairy Groups "do not identify anyone who does not have a permit or even anyone likely to lose their permit and face this injury." (DNR's Br. 34.) But "potential defendants" may seek declaratory relief "without subjecting themselves to forfeitures or prosecution." *Olson*, 2008 WI 51, ¶43 (citation omitted).

DNR next argues the Dairy Groups' asserted injury isn't redressable because "invalidating the rule would not remedy their claimed injury." (DNR's Br. 35.) Not so. The Stormwater Rule eliminates the point-source liability protection for a large CAFO's stormwater runoff if the CAFO doesn't have a valid WPDES permit. (Dairy Groups' Br. 34-38.) This rule also exposes unpermitted large CAFOs to liability for a rain-caused discharge to *surface* water, even though the relevant statute doesn't limit the "agricultural storm water" liability protection to discharges to groundwater. (Dairy Groups' Br. 37-38.) If this rule were invalidated, the Dairy Groups' members would no longer be at risk of point-source liability for a discharge caused by rain. This risk of liability is redressable.

WFU suggests that Wis. Stat. § 227.40(1) authorizes this lawsuit only if the Dairy Groups' *own* legal rights and privileges are impaired. (WFU's Br. 21-22.) This statute, however, authorizes an organization to

bring a declaratory-judgment action on behalf of its members to challenge an agency rule. *Wisconsin Hosp. Ass'n*, 156 Wis. 2d at 701-03.

C. The Dairy Groups stated viable claims.

An argument that plaintiffs failed to state a claim "tests the legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. "Plaintiffs must allege facts that plausibly suggest they are entitled to relief." *Id.* ¶31.

The Dairy Groups meet that low plausibility threshold. They thoroughly explained why the two DNR rules are unlawful. (Dairy Groups' Br. 19-44.)

II. 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).

DNR argues the uniformity mandate in Wisconsin Stat. § 283.11(2)(b) applies only to non-point-source urban stormwater, not agricultural stormwater. But DNR identifies no statutory language drawing that distinction. Instead, it points to the years that various statutory language was adopted. (DNR's Br. 53; *see also* WFU's Br. 40-41.) DNR doesn't persuasively explain why agricultural-stormwater discharges are exempt from the uniformity mandate simply because the urban-stormwater program is older.

DNR doesn't meaningfully address the Dairy Groups' text-based statutory argument. (*See* Dairy Groups' Br. 20-22.) Wisconsin Stat. § 283.11(2)(a) refers to "rules concerning storm water discharges for which permits are issued under [Wis. Stat. §] 283.33," but subsection (2)(b) doesn't. Subsection (2)(b) broadly refers to "[r]ules concerning storm water discharges." Wis. Stat. § 283.11(2)(b). DNR's argument

reads "for which permits are issued under [Wis. Stat. §] 283.33" into section 283.11(2)(b). Courts, however, don't read language into statutes. *State v. Lickes*, 2021 WI 60, ¶24, 397 Wis. 2d 586, 960 N.W.2d 855.

WFU's similar argument treats the first clause of Wis. Stat. § 283.11(2)(a) as if it read, "Except as provided in par. (b)." (*See* WFU's Br. 40.) But subsections (2)(a) and (2)(b) make no reference to each other.

DNR and WFU incorrectly treat the Dairy Groups' claims against the Stormwater Rule as a challenge to a "permitting requirement." (DNR's Br. 54; WFU's Br. 42.) The Dairy Groups are challenging this rule because it unlawfully narrows the class of livestock farms that may receive liability protection for their stormwater runoff. Because federal law doesn't limit this liability protection to permitted farms, the uniformity mandate forbids DNR from doing so.

WFU alternatively argues the Stormwater Rule "places no additional burden on large CAFOs" and thus satisfies the uniformity mandate. (WFU's Br. 41.) But this rule *does* create an additional burden by requiring large CAFOs to have a permit in order to be protected from liability for their discharges that are caused by rain. (Dairy Groups' Br. 24.)

III. 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).

DNR argues the uniformity mandate in Wis. Stat. § 283.11(2)(a) doesn't apply to the Duty-to-Apply Rule because Wisconsin law generally is broader than the CWA. (DNR's Br. 50.) But under that logic, DNR

could always escape the uniformity mandate by pointing to the breadth of Wisconsin law.

DNR next argues the uniformity mandate "comes into play only for limited categories of standards where Wisconsin law must track federal standards, such as for 'effluent limitations'…." (DNR's Br. 51.) That argument lacks legal support. As here, DNR in *Maple Leaf* argued "that the uniformity provision is not applicable to permit conditions that are neither standards nor effluent limitations per se." *Maple Leaf Farms, Inc. v. DNR*, 2001 WI App 170, ¶12, 247 Wis. 2d 96, 633 N.W.2d 720. But this Court did *not* adopt that test, holding more broadly that the uniformity "provision applies only where the federal program regulates the activity in question." *Id.* ¶16. The uniformity provision "would not apply where the federal government has chosen not to regulate at all." *Id.*

WFU argues that NPDES permitting isn't an "activity" that is subject to the uniformity mandate. (WFU's Br. 39.) But the uniformity mandate applies to rules that "relate to point source discharges." Wis. Stat. § 283.11(2)(a). That phrase is broad enough to cover a permitting requirement. (Dairy Groups' Br. 28.)

WFU argues this Court in *Maple Leaf* rejected an argument "that is the same as the one [the Dairy Groups make] here." (WFU's Br. 38.) WFU misstates the Dairy Groups' argument. The plaintiff in *Maple Leaf* argued the uniformity mandate bars DNR from adopting a rule regarding any activity that "the federal program does not regulate." *Maple Leaf*, 2001 WI App 170, ¶11. The Dairy Groups, by contrast, recognize that the uniformity mandate doesn't apply to "a non-existent federal program." (Dairy Groups' Br. 32.)

Instead, the Dairy Groups simply argue that DNR's rules must not exceed federal NPDES permitting requirements. As WFU seemingly recognizes, the Duty-to-Apply Rule has a federal counterpart. (WFU's Br. 34-35.) The federal counterpart doesn't create failure-to-apply liability, but this DNR rule does. That's why this DNR rule violates the uniformity mandate. (Dairy Groups' Br. 28-31.)

DNR suggests the Duty-to-Apply Rule's permitting requirement falls into the category of "preventive environmental practices," which are exempt from the uniformity mandate. (DNR's Br. 51.) Even if the uniformity mandate doesn't apply to this category, the permitting requirement is more akin to discharge limits, which must comply with the uniformity mandate. After all, WPDES permits contain specific discharge limits. *See* Wis. Stat. § 283.31(3).

DNR argues the Dairy Groups "would read the uniformity provision to prohibit *any* departure from federal law, as long as it relates to WPDES permitting." (DNR's Br. 52.) Not so. The Dairy Groups recognize "the uniformity mandate in section 283.11(2)(a) does not apply to regulations of discharges to groundwater—but the permitting requirement at issue is not such a regulation." (R. 82:42.)

WFU suggests the permitting requirement is a regulation of discharges to groundwater. (WFU's Br. 39.) But the rule's text doesn't even mention groundwater. *See* Wis. Admin. Code § NR 243.11(3)(a). Under WFU's logic, the uniformity mandate wouldn't apply to any DNR rule because Wisconsin law applies to groundwater.

WFU further argues the uniformity mandate doesn't apply to rules that are promulgated under statutory chapters in addition to chapter

283 because otherwise groundwater rules would be impermissible. (WFU's Br. 36-37.) WFU is wrong for two reasons.

First, the Dairy Groups concede the uniformity mandate doesn't apply to regulations of discharges to groundwater because federal law has no counterpart regulation. (R. 82:42.) But this concession has no bearing on the Duty-to-Apply Rule because it has a federal counterpart.

Second, regardless of other possible statutory authority, the Duty-to-Apply Rule *was* promulgated under Wis. Stat. ch. 283. (Dairy Groups' Br. 27-28.) The uniformity mandate thus applies to this rule. The uniformity mandate applies to "all rules promulgated by the [DNR] *under this chapter* as they relate to point source discharges…." Wis. Stat. § 283.11(2)(a) (emphasis added). The statute does *not* say "under *only* this chapter." WFU's argument improperly reads the word "only" into the statutory text.

WFU argues the associated-terms canon of statutory construction supports its narrow view that the uniformity mandate applies only to "expressly promulgated limits or standards." (WFU's Br. 37-38.) But, as WFU's cited case recognizes, this canon is "not an invariable rule." *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶66, 327 Wis. 2d 572, 786 N.W.2d 177 (lead op.) (citation omitted). WFU argues the uniformity mandate applies to things like "monitoring and inspection requirements" or "best management practices," but WFU doesn't explain why those things are distinguishable from the Duty-to-Apply Rule's permitting requirement. (WFU's Br. 38.) And even if "point source discharges" has a meaning similar to "effluent limitations," as WFU suggests, the Duty-to-Apply Rule's permitting requirement is "relate[d] to … effluent limitations." *See* Wis. Stat. § 283.11(2)(a). Why? Because WPDES

permits must contain effluent limitations. Wis. Stat. § 283.31(3)(a), (4). WFU's argument ignores the broad statutory language, "relate to." Wis. Stat. § 283.11(2)(a).

WFU argues the Dairy Groups' reading of the uniformity mandate would create statutory surplusage. But "the canon against surplusage is not absolute" because "redundancy occurs in statutes." *State v. Lira*, 2021 WI 81, ¶40, 399 Wis. 2d 419, 966 N.W.2d 605 (citation omitted). If anything, WFU's argument would create a surplusage problem by depriving "point source discharges" of any unique meaning in Wis. Stat. § 283.11(2)(a). WFU doesn't explain what kinds of rules, under its theory, would be "rules relate[d] to point source discharges" without also falling into one of the other categories listed in subsection (2)(a).

DNR argues the legislature didn't raise uniformity concerns when DNR adopted the Duty-to-Apply Rule. (DNR's Br. 52.) But legislative inaction "has no bearing on whether [executive action] was lawful." *Fabick v. Evers*, 2021 WI 28, ¶40, 396 Wis. 2d 231, 956 N.W.2d 856.

WFU argues the Duty-to-Apply Rule complies with the uniformity mandate because federal law also requires discharging CAFOs to have a permit. (WFU's Br. 34-35.) WFU's argument, however, ignores that federal law no longer imposes failure-to-apply liability on CAFOs, but the first sentence of the Duty-to-Apply Rule creates such liability. (Dairy Groups' Br. 28-31.)

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

DNR argues the Stormwater Rule is authorized by the "same statutes" that supposedly authorize the Duty-to-Apply Rule. (DNR's Br.

47.) The Dairy Groups discuss below in Argument § V why those statutes don't authorize the Duty-to-Apply Rule.

DNR and WFU incorrectly treat the Dairy Groups' claims as just challenging a *permitting requirement* in both rules. The Dairy Groups are challenging the failure-to-apply *liability* that the Duty-to-Apply Rule creates and the *liability* that the Stormwater Rule creates for unpermitted large CAFOs' stormwater runoff.

Relatedly, DNR is wrong to treat the Dairy Groups' claim as alleging a lack of statutory authority for the Stormwater Rule. The Dairy Groups do *not* argue that this rule lacks explicit statutory authority as required by Wis. Stat. § 227.11(2)(a)1. and 2.[4]

Instead, the Dairy Groups argue the Stormwater Rule "conflicts with state law." Wis. Stat. § 227.10(2). (Dairy Groups' Br. 34.) This rule creates a conflict by requiring large CAFOs to *have a WPDES permit* in order to be *exempt from WPDES permitting requirements and liability*. DNR doesn't meaningfully grapple with this argument.

DNR just takes issue with the Dairy Groups' argument that Wis. Stat. § 283.01(12) eliminates liability for agricultural stormwater discharges. DNR argues that "there exists an entire body of statues [*sic*] and regulations governing agricultural nonpoint source pollution." (DNR's Br. 47.) True, but DNR misses the point. Wisconsin Stat. § 283.01(12)(a) "exempts agricultural storm water discharges from *point source* regulation." (Dairy Groups' Br. 38 (emphasis added).) In other words, this statute eliminates liability *under the point-source regulatory regime* for certain discharges. DNR doesn't dispute this point.

[4] Because this rule interprets "agricultural storm water discharges" in Wis. Stat. § 283.01(12), it might be authorized by Wis. Stat. § 227.11(2)(a).

DNR tries to distinguish the Dairy Groups' cited cases. (DNR's Br. 48-49.) But the Dairy Groups cited those cases for the well-settled—and apparently undisputed—principle that agricultural stormwater discharges are exempt from point-source permitting requirements and point-source liability.

WFU argues the Stormwater Rule just recognizes that "large CAFOs need to apply for and have WPDES permits." (WFU's Br. 28.) That assertion ignores—and doesn't refute—the Dairy Groups' concern that this rule narrows the class of CAFOs eligible for the permitting and liability exemption for stormwater discharges under Wis. Stat. § 283.01(12)(a). (Dairy Groups' Br. 34-38.)

If WFU is suggesting that rain-related discharges by CAFOs can never be agricultural stormwater discharges (*see* WFU's Br. 43), it is wrong. A statute defines "point source" to include CAFOs, but it then exempts "agricultural storm water discharges" from this definition. Wis. Stat. § 283.01(12)(a). The statute thus "exempt[s] [CAFO] discharges from regulation to the extent that they constitute agricultural stormwater." *See Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 507 (2d Cir. 2005).

V. 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. No statute explicitly authorizes Wis. Admin. Code § NR 243.11(3)(a).

DNR and WFU cobble together a slew of statutes that, they argue, authorize the Duty-to-Apply Rule. None of those statutes authorizes the failure-to-apply liability that this rule creates.

Wis. Stat. § 283.001. Because the circuit court relied on this statute, the Dairy Groups already explained why this statute doesn't explicitly authorize the Duty-to-Apply Rule. (Dairy Groups' Br. 40-44.)

Wis. Stat. § 283.31(1). This provision simply bans unauthorized discharges. It doesn't mention rulemaking and thus doesn't explicitly authorize DNR to adopt rules. WFU argues this statutory provision authorizes the Duty-to-Apply Rule, which "simply prevents … large CAFOs from discharging without a permit." (WFU's Br. 27.) WFU is wrong. This rule's *second* sentence "merely reflects the ban on unauthorized discharges in Wis. Stat. § 283.31(1)," but the rule's *first* sentence creates failure-to-apply liability, which lacks explicit statutory authorization. (Dairy Groups' Br. 30.)

Wis. Stat. § 283.31(3)(d)1. This provision merely requires DNR to include certain conditions in a WPDES permit when it issues one. Because this provision doesn't mention rulemaking, it doesn't explicitly authorize rulemaking.

Wis. Stat. § 283.37(1). This statute authorizes DNR to "promulgate rules *relating to applications* for permits under this chapter," and such rules must require "discharging" point-source operators to have on file "a completed permit *application*." Wis. Stat. § 283.37(1) (emphases added). By applying to *discharging* point sources, this statute implements Wis. Stat. § 283.31(1)'s ban on unauthorized discharges. The Duty-to-Apply Rule, however, goes further. This rule isn't one *relating to permit applications*, nor does it require point-source operators to have an *application* on file. It requires large CAFOs to "have a WPDES permit." Wis. Admin. Code § NR 243.11(3)(a). To require an actual *permit* is to require more than that a permit *application* be on file. Also, the Duty-to-

Apply Rule creates liability for not having a permit, regardless of whether DNR can prove a CAFO is discharging. Section 283.37(1) doesn't authorize DNR to create such liability.

Wis. Stat. § 283.37(2). This provision contains no language explicitly enabling rulemaking. It simply places a duty on certain owners and operators of point sources. This statute relates to a small number of point-source operators, those *wishing* to cause a discharge from a *new* source. And it specifies when they must *apply* for a permit. The Duty-to-Apply Rule, by contrast, requires large CAFOs to *have* a WPDES permit, regardless of how many discharges they wish to make. *See* Wis. Admin. Code § NR 243.11(3)(a).

Wis. Stat. § 283.39. This statute merely requires DNR to adopt rules for notifying any "interested members of the public" of complete permit applications. Wis. Stat. § 283.39(1). This statute doesn't authorize DNR to adopt rules *requiring permits*.

Wis. Stat. § 283.41(1). Although this statute authorizes DNR to adopt rules *for notifying* the federal government and other states of completed applications for discharges, it doesn't authorize DNR to adopt rules *requiring permits*.

Wis. Stat. § 283.53(5)(a). This provision requires that "[a]ny permittee who wishes to continue to discharge after the expiration date of the permittee's permit shall file an application for reissuance of the permit at least 180 days prior to its expiration." Wis. Stat. § 283.53(3)(a). This provision doesn't explicitly authorize—or even mention—rulemaking. It simply imposes a duty on permittees by stating when a permit-renewal application is due.

Wis. Stat. § 160.001(3)-(7). DNR quotes subsection (4) in passing and does a "see also" citation to subsections (3), (5), and (7). (DNR's Br. 40-41.) This Court should decline to consider DNR's reliance on this statute because courts "do not usually address undeveloped arguments." *State v. Gracia*, 2013 WI 15, ¶28 n.13, 345 Wis. 2d 488, 826 N.W.2d 87.

At any rate, this statute doesn't explicitly authorize the Duty-to-Apply Rule. This statute's only explicit rulemaking authority is in subsection (6), which uses the phrase "adopt rules." But subsection (6) doesn't explicitly authorize DNR to adopt rules that *require permits*.

Neither does subsection (4). This subsection is merely a "statement of legislative intent," *League of Wisconsin Municipalities v. Dep't of Commerce*, 2002 WI App 137, ¶18, 256 Wis. 2d 183, 647 N.W.2d 301, and a "declaration of legislative intent … does not confer rule-making authority on the agency," Wis. Stat. § 227.11(2)(a)1. Subsection (4) grants agencies "considerable latitude in constructing rules," *League of Wisconsin Municipalities*, 2002 WI App 137, ¶18, but it doesn't itself authorize rulemaking. Because subsection (6) uses the phrase "adopt rules" but subsection (4) doesn't, subsection (4) doesn't explicitly authorize rulemaking. "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).

Wis. Stat. § 160.19(1). WFU cites this statute in a string citation. (WFU's Br. 28.) WFU doesn't develop an argument explaining how this statute explicitly authorizes the Duty-to-Apply Rule. This Court should

decline to consider this argument because it is undeveloped. *See Gracia*, 2013 WI 15, ¶ 28 n.13. Tellingly, DNR doesn't cite this statute in its brief.

Wis. Stat. § 281.11. This statute requires liberal construction of certain promulgated rules. But that requirement doesn't provide explicit authority to promulgate any particular rule. As its title indicates, this statute is simply a statement of legislative policy and purpose. Such statements do "not confer rule-making authority." Wis. Stat. § 227.11(2)(a)1.

Wis. Stat. § 281.12. This statute doesn't use the words "rule," "regulation," "adopt," or "promulgate" even once. As its title indicates, this statute is simply a statement of DNR's general powers and duties. Such statements do "not confer rule-making authority." Wis. Stat. § 227.11(2)(a)2.

Wis. Stat. § 227.11(2)(a). This statute allows an agency to "promulgate rules *interpreting the provisions of any statute* enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute." Wis. Stat. § 227.11(2)(a) (emphasis added). WFU seems to suggest this statute allows any rule that an agency deems necessary to effectuate the purpose of a statute. (WFU's Br. 33.) This statute, however, just authorizes rules that *interpret statutory provisions*. WFU fails to explain how the Duty-to-Apply Rule interprets a statute. WFU doesn't even identify which statute this rule supposedly interprets.

B. Legislative history is unhelpful here.

WFU argues that legislative inaction supports its broad view of DNR's rulemaking authority. (WFU's Br. 29-30.) But legislative inaction is "a weak reed upon which to lean." *Green Bay Packaging, Inc. v.*

DILHR, 72 Wis. 2d 26, 36, 240 N.W.2d 422 (1976) (citation omitted). That observation is especially potent here because the legislature significantly reformed our state's administrative law several years after DNR last revised the Duty-to-Apply Rule. As WFU recognizes, "[s]ince 2007, Chapter NR 243 has gone unchanged." (R. 41:18.) Years later, in 2011, the legislature eliminated implied agency authority, prohibiting agency rulemaking without explicit statutory authority. (Dairy Groups' Br. 39, 41.)

C. *Maple Leaf* doesn't help save the Duty-to-Apply Rule.

DNR argues that *Maple Leaf* helps show that the Duty-to-Apply Rule has explicit statutory authority. It doesn't. As DNR seems to recognize, this Court in *Maple Leaf* relied on Wis. Stat. § 283.001 when upholding conditions in a WPDES permit. (*See* DNR's Br. 42.) DNR fails to explain why a case involving a challenge to *permit conditions* is relevant to the present case, which disputes DNR's *rulemaking authority*.

And if *Maple Leaf* were relevant to rulemaking authority, the legislature abrogated *Maple Leaf* to the extent it might suggest that Wis. Stat. § 283.001 authorizes rulemaking. (Dairy Groups' Br. 41-42.) DNR advances several arguments against this legislative abrogation, but they are unpersuasive. (DNR's Br. 44-46.)

First, DNR argues that the supreme court relied on *Maple Leaf* in *Clean Wisconsin, Inc. v. DNR*, 2021 WI 71, 398 Wis. 2d 386, 961 N.W.2d 346 ("*Clean Wisconsin I*"). Crucially, though, the court in *Clean Wisconsin I* didn't suggest that Wis. Stat. § 283.001 authorizes rulemaking. Instead, the court cited that statute just once for general background, and it ultimately relied on different statutes as providing

explicit authority for the disputed permit conditions. (Dairy Groups' Br. 42-43.) Further undercutting *Maple Leaf*'s reliance on Wis. Stat. § 283.001, the supreme court has recognized that the legislature imposed an explicit-authority requirement on state agencies in 2011. *Clean Wisconsin, Inc. v. DNR*, 2021 WI 72, ¶30, 398 Wis. 2d 433, 961 N.W.2d 611 ("*Clean Wisconsin II*"). Contrary to *Maple Leaf*, one of the statutes enacted in 2011 "prevents courts from finding implicit agency-rule-making authority in general policy or purpose statements that contain no explicit rule-making authorization." *Id.* ¶30.

Second, DNR suggests this Court is powerless to conclude the legislature abrogated *Maple Leaf*'s reliance on Wis. Stat. § 283.001. Not true. When the legislature overrules case law by amending a statute, this 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). In 2011, the legislature abrogated the notion that Wis. Stat. § 283.001 implicitly confers rulemaking authority. (Dairy Groups' Br. 41-42.)

Third, DNR argues the supreme court rejected "virtually the same theory" about legislative abrogation in *Clean Wisconsin II*. (DNR's Br. 45.) It didn't. DNR relies on the off-point observation that Wis. Stat. ch. 227 doesn't "strip an agency of the legislatively granted explicit authority it already has." (DNR's Br. 44 (quoting *Clean Wisconsin II*, 2021 WI 72, ¶24).) The Dairy Groups don't argue that Wis. Stat. § 227.11(2)(a) strips DNR of any explicit authority it already has. They argue the Duty-to-Apply Rule doesn't have legislatively granted explicit authority.

D. DNR and WFU don't develop their public-trust argument.

WFU and DNR each devote a few paragraphs to the constitutional public-trust doctrine. (DNR's Br. 45-46; WFU's Br. 30-31.) But DNR doesn't explain why the public-trust doctrine sheds any light on whether the legislature abrogated *Maple Leaf*'s reliance on Wis. Stat. § 283.001. This Court should reject DNR's and WFU's public-trust argument as undeveloped. "Constitutional claims are very complicated from an analytic perspective, both to brief and to decide. A one or two paragraph statement that raises the specter of such claims is insufficient…." *Cemetery Servs., Inc. v. Wisconsin Dep't of Regul. & Licensing*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998).

At any rate, the public-trust argument rests on the misleading premise that "large CAFOs [will] no longer need to have permits" if the Dairy Groups prevail in this case. (WFU's Br. 30.) The Dairy Groups' challenge to the Duty-to-Apply Rule is ultimately about the *failure-to-apply liability* that this rule creates. Even if this Court invalidates the rule's failure-to-apply liability, Wis. Stat. § 283.31(1) will still require discharging CAFOs to have WPDES permits. *See Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 751-52 (5th Cir. 2011) (holding "EPA does not have the authority to create" liability "for failing to apply for a permit," even though federal statutes require discharging CAFOs to apply for a permit). Therefore, CAFOs will still be "strictly liable for discharging without a permit and subject to severe civil and criminal penalties." *Id.* at 743.

In short, the public-trust doctrine isn't at issue here.

E. *Clean Wisconsin I* and *II* don't help save the Duty-to-Apply Rule.

DNR argues that *Clean Wisconsin I* and *II* support its view that the Duty-to-Apply Rule has explicit statutory authority. (DNR's Br. 42-44.) They don't.

Clean Wisconsin I and *II* didn't involve a challenge to an agency rule. The "core issue" in *Clean Wisconsin I* was whether certain conditions in a WPDES permit had explicit authority in statutes or rules, as required by Wis. Stat. § 227.10(2m). *Clean Wisconsin I*, 2021 WI 71, ¶21. Similarly, *Clean Wisconsin II* addressed whether certain WPDES permit conditions were explicitly authorized as required by section 227.10(2m). *See, e.g.*, *Clean Wisconsin II*, 2021 WI 72, ¶¶20-21. The supreme court noted that "this case is not about the DNR's rule-making power; [Wis. Stat. §] 227.11(2)(a) is therefore irrelevant." *Id.* ¶30.

The present case, by contrast, is about DNR's rulemaking power. Unlike in *Clean Wisconsin I* and *II*, Wis. Stat. § 227.11(2)(a) is highly relevant here and negates DNR's reliance on statutes that don't explicitly confer rulemaking power.

DNR argues that "the court explicitly recognized 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).'" (DNR's Br. 43 (quoting *Clean Wisconsin I*, 2021 WI 71, ¶18).) But the Dairy Groups explained why that language does "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." (Dairy Groups' Br. 43 n.8.) DNR doesn't refute this point.

CONCLUSION

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

Dated this 22nd day of August 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 5,959 words.

Dated this 22nd day of August 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 22nd day of August 2024.

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