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**COURT OF APPEALS OF WISCONSIN
DISTRICT IV**

Appeal No. 2024-AP-0673

SIERRA CLUB,

Petitioner-Appellant,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent.

**WISCONSIN PUBLIC SERVICE CORPORATION AND WISCONSIN
ELECTRIC POWER COMPANY,**

Applicants-Interested Persons.

**BRIEF OF APPLICANTS-INTERESTED PERSONS
WISCONSIN PUBLIC SERVICE CORPORATION AND
WISCONSIN ELECTRIC POWER COMPANY**

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COUNTER STATEMENT OF THE ISSUES

I. Whether Department of Natural Resources' ("DNR") 2021 Background Guidance document, which does not (unlike the regulations it relates to) have the force of law, and which does not implement legislation, is a "guidance document" under Wis. Stat. § 227.01(3m)(a), or a "rule" under Wis. Stat. § 227.01(13).

Disposition Below: The ALJ held that the air pollution concentrations contained in the 2021 Background Guidance do not have the force of law. Therefore, 2021 Background Guidance did not trigger the rulemaking process. The circuit court affirmed.

II. Whether, by not raising the argument below, Petitioner Sierra Club ("Petitioner") forfeited its argument that Wis. Stat. § 227.10(1) makes a distinction between "rules" and "statements of general policy" and requires that both be promulgated through the agency rule-making process.

Disposition Below: Petitioner did not fairly raise its Section 227.10(1) argument below, so the ALJ and the circuit court had no occasion to address it.

III. Whether, as an independent basis for affirmance, DNR's determination that batteries would "redefine the source" should be upheld on the grounds that adding batteries would "fundamentally alter" the Project's design and purpose as defined by Applicants Wisconsin Public Service Corporation ("WPSC") and Wisconsin Electric Power Company ("WEC") (collectively "Applicants") by converting the Project from one for generation to a hybrid generation-storage facility.

Disposition Below: Both the ALJ and the circuit court determined that, in addition to interfering with the Project purpose of

inertia, adding supplemental batteries would work a fundamental redesign of the Project because it would convert a project designed to generate electricity into a combination generation and storage facility.

IV. Was there substantial evidence in the record supporting the ALJ's factual finding that the addition of batteries would interfere with Applicants' stated purpose of providing "inertia" to the grid?

Disposition Below: At the contested case hearing, the ALJ found that adding battery storage to the Project would interfere with its ability to provide the grid-stabilizing critical function of inertia, which helps prevent grid disturbances from causing failures. That finding of fact was based on the testimony of five witnesses including Petitioner's expert. Petitioner, who did not contest at the hearing that batteries would reduce inertia, first raised the argument in the circuit court, which rejected Petitioner's position.

V. Did the ALJ, acting within her statutory authority as the final decision-maker for DNR, properly consider "interference with inertia" and Petitioner's failure to show that batteries would not require alterations to the Project space, as bases for upholding DNR's ultimate finding that adding batteries to the Project would redefine the design of the source?

Disposition Below: The ALJ determined that she had the authority to consider inertia and Petitioner's failure to show fundamental alterations would not be required as bases to uphold DNR's determination that batteries would redefine the design of the source. The circuit court agreed.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

The Court's opinion will not meet the criteria for holding oral argument or for publication. Wis. Stat. § 809.23(1)(a)1. This appeal principally turns on application of the substantial evidence standard of review to an extensive administration record. The relevant legal issues presented in this case are well established in Wisconsin.

STATEMENT OF THE CASE

Nature of the Case

Petitioner appeals DNR's decision to grant Air Pollution Control Construction Permit No. 21-RAB-082 ("Permit"), which authorized Applicants to build and operate seven natural gas-fueled reciprocating internal combustion engines ("RICE") at the Weston Generating Station near Wausau (the "Project"). The Project is a necessary component of Applicants' efforts to rapidly increase the proportion of "green" energy sources in their portfolio. The Project makes Applicants' extensive wind, solar, and battery storage projects viable by providing reliable electricity generation when wind and solar are not available. The Project replaces older, higher-polluting power plants (now retired) that previously served these functions.

Before DNR issued the Permit, the Project underwent two forms of administrative review under the Clean Air Act to confirm that the Project would comport with air quality standards. First, DNR evaluated whether the Project would result in violations of ambient air-quality standards. DNR modeled whether Project emissions of certain contaminants, combined with existing baseline concentrations, would exceed relevant standards. Second, DNR conducted a Best Available

Control Technology (“BACT”) analysis to determine the emissions controls appropriate for the Project.

Petitioner challenges both aspects of DNR’s Clean Air Act review. First, Petitioner argues DNR erred by using in its emissions modeling background pollution values from a guidance document, which Petitioner argues should be promulgated as a rule (Petitioner’s Issues Nos. 1 and 2 and Applicants’ Issues Nos. 1 and 2). Second, Petitioner contends that DNR erred by excluding battery storage from the BACT analysis on the grounds that it would “redefine the design of the source” (Petitioner’s Issues Nos. 3-4 and Applicants’ Issues Nos. 3-5).

The Court should reject both challenges.

First, DNR did not err in its modeling of air quality impacts. The document containing the background pollution values does not create new regulatory law to implement or interpret a statute. It merely explains and provides internal agency guidance about how DNR will apply the law. It also does not have the force of law. It is therefore a guidance document, which under Wisconsin law is not a rule and need not go through rulemaking.

Second, the ALJ did not err in excluding batteries from the BACT analysis because it would redefine the design of the source. The ALJ rejected Petitioner’s challenge, first, on grounds that Petitioner does not challenge on appeal—namely, that adding batteries would alter the Project’s essential design and change its fundamental purpose by making a power generation facility into one also for storing energy. Because Petitioner does not challenge this independent holding of the ALJ, the judgment must be affirmed. Petitioner challenges the ALJ’s other bases for her ruling—that batteries would interfere with

providing inertia and that Petitioner failed to show batteries would fit in the Project space—but these challenges also fail. Petitioner attacks the ALJ's factual findings, but they were supported by substantial evidence. The ALJ was also permitted to expand upon the rationales and evidence in DNR's response to comments, because the ALJ is not, as Petitioner argues, akin to a reviewing court. In reality, Petitioner's BACT appeal is a backdoor challenge to the mix of energy generation and storage assets in Applicants' portfolio. That is not an appropriate use of DNR's air-permitting process.

Statement of Facts

A. The Project

The Permit authorizes seven RICE generators that were built after the Permit issued. Each unit provides capacity of ~18.8 megawatts ("MW"), for a total of 128 MW of potential generation. R.110:9, AR01361. (For context, 128 MW is enough to power 77,000 homes.)

Applicants proposed the Project in April 2021 as part of their Generation Reshaping Plan ("Plan"), pursuant to which they are transitioning to renewable generation to reduce carbon emissions 80% by 2030. R.99:21, AR01186, S-App.80. Applicants are making substantial investments in solar and wind generation and 1,500+ MW of battery energy-storage systems. R.67:3, AR00731, S-App.50. Applicants have retired over 1,800 MW of less-efficient fossil-fuel generation, and expect to retire 1,600 MW more by 2026. R.100:1, AR01187, S-App.81.

Renewables like solar and wind are unpredictable and sometimes unavailable for extended periods. They also are incapable of providing

necessary grid-reliability functions. Applicants therefore must also maintain sufficient power generation sources that do not depend on the wind or the sun, can operate for periods longer than batteries store power, and supply essential grid-stability services. For the foreseeable future, natural gas-fired resources like the RICE engines are the lowest-emitting sources to provide that reliability. Applicants' Project is part of a carefully-considered, long-term planning effort to strike an appropriate balance between renewable capacity, battery storage, and reliable on-call backup sources like the Weston RICE generators. *See id.*; R.67:3, AR00731, S-App.50.

B. Permit Standards and Process

The Clean Air Act requires that any facility like the Project, with expected emissions exceeding specified thresholds, must have a so-called "major source" permit under the Prevention of Significant Deterioration provisions at 40 C.F.R. § 52.21 and Wis. Stat. § 285.63(3). Before a permit can issue, DNR must find that the project will meet certain requirements. Two are relevant:

Ambient Air Modeling. First, DNR confirms that the facility will not cause or exacerbate a violation of air-quality standards in Wis. Stat. §§ 285.63(1)(b), (3). DNR uses EPA-approved "air dispersion modeling" to assess whether project emissions, together with calculated background concentrations of pollutants, will exceed ambient air quality standards. EPA regulations—which DNR follows, *see* Wis. Admin. Code § NR 405.10(1)—specify how DNR performs the modeling, including how DNR determines background pollution concentrations. *See* 40 C.F.R. pt. 51, Appendix W.

"Best Available Control Technology." Second, DNR confirms that the facility will minimize emissions of certain regulated pollutants by

application of the “best available control technology” for each. 42 U.S.C. §§ 7475(a)(4), 7479(3); Wis. Stat. § 285.63(3)(a); Wis. Admin. Code § NR 405.08. BACT is defined as an “emission limitation” that is determined:

on a case-by-case basis, taking into account energy, environmental, and economic impacts, and other costs . . . achievable for such source or modification through application of production processes or available methods, systems, and techniques, including clean fuels, fuel cleaning or treatment or innovative fuel combination techniques for control of the air contaminant.

Id.; Wis. Admin. Code § NR 405.02(7).

Step 1 of this process asks permit applicants to “[i]dentify all available control options with potential application to the source and the targeted pollutant.” *In re Arizona Public Services Co.* (“Arizona”), 17 E.A.D. 323, 327 (EAB 2016). U.S. EPA’s NSR Workshop Manual establishes the process to determine which alternative production processes must be considered at Step 1. R.94:3-7, AR01095-99, A-App.0249-53; R.95:2-6, AR01111-15.

The range of control options that must be considered is not unlimited. DNR has the discretion to exclude proposed control alternatives that “redefine the design of the source.” *Id.*; *Arizona*, 17 E.A.D. at 328; *Sierra Club v. EPA*, 499 F.3d 653, 655 (7th Cir. 2007). A control option redefines the source when it would change elements inherent to the proposed facility’s “purpose or objective,” or alter the project’s basic design. *In re Sierra Pac. Indus.*, 16 E.A.D. 1, 48-50 (EAB 2013) (rejecting solar when combustion of biomass fuel was “inherent aspect” of project’s purpose); *In re Prairie State Generating Co.*, 13 E.A.D. 1, 21-27 (EAB 2006) *aff’d* 499 F.3d 653 (excluding low-sulfur coal

where locally-sourced coal was design element inherent to project's purpose); *In re Elm Road Generating Station* ("Elm Road"), Case No. IH-04-03, at 10-14 (Wis. Div. Hrg. App. Feb. 3, 2005) (excluding alternative production process that altered physical design elements).

A proposed alternative also redefines the source when the change would interfere with one of the project's purposes. *In re La Paloma Energy Ctr.*, LLC, 16 E.A.D. 267, 288-92 (EAB 2014). The relevant purposes are those identified in the application; DNR may not question or redefine the stated purpose(s) of the project. *See Prairie State*, 13 E.A.D at 22.

Permit Application and Review Process. The permit process begins with an application. Wis. Stat. § 285.61. DNR analyzes the effects of the project and makes a preliminary determination of the approvability of the permit. § 285.61(3). DNR also gives notice and an opportunity for public comment and for a public hearing. § 285.61(5). The public comment period is 30 days, and then DNR must act on the application within 60 days. §§ 285.61(6), (8)(b). If the application meets the other criteria under Section 285.63, DNR may issue the permit, after it considers public comments and the project's environmental impacts. *See* § 285.61(8)(a).

C. Applicants' Construction Permit

The Application. Applicants submitted their application on April 26, 2021. R.44:18, AR00387, S-App.14. It included an Air Quality Modeling Analysis (R.58:11-60:7, AR00606-33, S-App.19-46), which used data from regional air monitors for background values for air contaminants. R.58:17, AR00612, S-App.25; R.252:6, AR03452, A-App.0141. The Project did not exceed air quality standards.

Applicants explained in the application that the purpose and need for the Project was to support their Generation Reshaping Plan:

[T]his substantial shift to renewable generation significantly changes the production curve and makes it more difficult to provide continuous energy production and the reliability customers require. This Project provides the capacity, base load, and peaking generation WEC will need at the lowest cost, and provides additional benefits such as ramping, dynamic voltage control, system inertia, and frequency response necessary for electric system stability.

R.67:3, AR00731, S-App.50.

The application also included a detailed Control Technology Review that identified BACT on a pollutant-by-pollutant basis. Applicants determined that the use of an oxidation catalyst for carbon monoxide, pipeline quality natural gas for particulate matter and sulfur dioxide, and selective catalytic reduction for nitrogen oxides, constituted BACT for the Project. R.72:7-76:4, AR00817-68.

Applicants' BACT analysis addressed whether energy storage, including batteries, should be included as a control technology. *Id.* Applicants determined that energy storage should be excluded because the supplementation or replacement of the RICE units with energy storage "would fundamentally redefine the source," by altering a basic design element and disrupting a purpose of the Project. R.72:2-72:4, AR00812-14, S-App.61-63. In so doing, Applicants reviewed permits for similar projects and found that in each case the U.S. EPA (and its Environmental Appeals Board, or "EAB") upheld permitting authorities' decisions to exclude energy storage as a control alternative

because storage would redefine the source. R.72:2-8, AR00812-18, S-App.61-67.

DNR's Review. On December 9, 2021, DNR issued a draft permit and Preliminary Determination. R.76:9-84:9, AR00873-969. Reviewing the analysis in the permit application, DNR conducted its own five-step review and made a BACT determination, which is set forth in the Preliminary Determination. *See id.*

In step 1 of DNR's BACT analysis, DNR identified control alternatives that reduced emissions without redefining the source of the Project. R.99:6-10, AR01171-75, A-App.0174-78. DNR took a "hard look" at control alternatives and excluded options that would frustrate the Project's purpose, goal, objectives, or basic design as defined by Applicants. *Id.* DNR determined those design elements that were inherent to the project's purpose and basic design, and those that could be altered without changing those inherent elements. *Id.* DNR also reviewed technical documents and permits from other states and was unable to find any instance in which a permitting authority included added battery storage in step 1 of BACT for a RICE project. *Id.*

DNR concluded that supplementing the RICE units with batteries would alter the Project's basic design and interfere with its fundamental purposes, including by introducing electric *storage* units to a proposed project containing only electric *generating* units. R.99:11, AR01176, A-App.0179. DNR found that batteries were a new element that would alter the Project's basic design. *Id.*

DNR conducted separate BACT analyses and determinations for each pollutant. R.99:8, AR01173, A-App.0176. The Permit requires that the RICE generators be fired only with clean-burning natural gas,

and that they be equipped with an integrated selective catalytic reduction system and oxidation catalyst. R.87:7, AR01004. DNR also required that three existing combustion turbines and a natural gas fired boiler located at the Weston Generating Station be decommissioned within 180 days of startup of the RICE units. R.45:2, AR00391, S-App.15; R.393:8, AR01074.

DNR provided the required notice and made the draft permit and Preliminary Determination available for public comment.

Petitioner's Comments. Petitioner, and six other parties, submitted written comments to DNR before a public hearing held on February 2, 2022. R.84:11, AR00971, S-App.70; R.85:11, AR00985, A-App.0097. Included within ten pages of comments, Petitioner commented that DNR should have promulgated the Background Guidance memorandum as a rule. R.85:4-5, AR00978-79, S-App.77-78. Petitioner also made voluminous comments on DNR's BACT analysis. R.84:12-13, AR00972-73, S-App.71-72. Petitioner offered a laundry list of different energy storage technologies and configurations that it said DNR should have included in its BACT analysis. Besides batteries, Petitioner also proposed compressed air energy storage, pumped hydro, and flywheels. Petitioner advocated for complete replacement, partial replacement, or supplementation of the RICE generators with energy storage. *Id.* Supplementing the RICE units with batteries was thus only one of twelve combinations of energy storage as BACT proposed by Petitioner. *Id.* Petitioner also proposed pairing the energy storage with thermal generating units or renewable energy. *Id.*

Petitioner included no specifics and omitted key information from its proposal. It did not present any designs to show how batteries could

be included without changing the Project's basic design. *See id.* It did not address how or when the batteries would charge or dispatch, or the physical space that would be needed to accommodate for the installation of batteries to the Project. *See id.*

DNR Response to Comments and Final Permit. On March 10, 2022, DNR responded to all comments and issued the Final Permit. As to Petitioner's comments, DNR stated:

The proposal to replace one or more of the RICE Units with energy storage units or to add energy storage units to the RICE Units constitutes a redefinition of the source because it alters the facility's basic design. The department does not agree with the commenters' claim that the cleaner production processes aspect of BACT can be read so broadly as to include consideration of an energy storage unit to replace an energy generation unit or to supplement energy generation units. Such changes as part of BACT would go beyond what DNR or EPA has previously determined to be a cleaner process and certainly represent a far more substantial change "than would be necessary whenever a plant switched from a dirtier to a cleaner fuel."

R.86:1, AR00988, A-App.0100.

DNR reviewed which specific design elements were inherent to the Project. DNR addressed all twelve of Petitioner's proposals in a greater level of detail than Petitioner provided in its comments.

R.85:13-86:2, AR00987-89, A-App.0099-101. DNR determined that adding batteries to the RICE would fundamentally change the Project's design and purpose by adding a new basic design element. R.99:11, AR01176, A-App.0179. DNR also determined that "none of these energy storage technologies are adequate to meet all the purposes of

the proposed facility.” R.86:2, AR00989, A-App.0101. DNR concluded that Petitioner’s proposals would alter the Project’s purpose from energy generation to one for storage. R.99:11, AR01176, A-App.0179. DNR therefore excluded paired battery storage from step 1 of the BACT analysis. R.99:8, AR01173, A-App.0176.

DNR’s evaluation of Petitioner’s comments was hampered by the absence of any meaningful detail. As DNR’s permit engineer noted, “[t]he department attempted to assess the battery pairing proposals made by Petitioner as emissions control strategies but was frustrated by the vagueness of the proposals.” R.99:9, AR01174, A-App.0177. He added “Sierra Club only briefly mentioned supplementing the existing RICE units and it offered no details explaining this concept.” R.99:12, AR01177, A-App.0180. Petitioner also provided no basis on which DNR via permitting could require Applicants to alter dispatch of the RICE generators, an assumption underlying Petitioners’ energy storage proposals. R.99:8-10, AR01173-75, A-App.0176-78.

Given the lack of specifics provided by Petitioner, DNR looked to how other permitting authorities addressed proposals to add batteries in the BACT analysis. *Id.* Ultimately, DNR determined that adding energy storage was not adequate to meet all the purposes of the proposed facility. R.85:13-86:2, AR00987-89, A-App.0099-101.

Chapter 227 Contested Case. On March 10, 2022, Petitioner filed its petition with DNR challenging the Permit on three grounds. R.34:6-35:3, AR00200-10, S-App.1-11. Two of those are relevant here: (1) whether DNR was required to adopt the background air pollution concentrations that it relied on to issue the Permit through rulemaking; and (2) whether DNR erroneously excluded the addition of

battery storage to the RICE units in the BACT analysis as “redefining the source.” R.35:4-6, AR00211-13.

The parties filed cross-motions for summary judgment, all of which included affidavits and exhibits, including documents not included in DNR’s permitting files. *See, e.g.*, R.207.2-232:4, AR02814-03191. On March 15, 2023, the ALJ granted summary judgment on the first issue, holding that the background concentrations used by DNR to model air impacts did not need to be enacted through rulemaking. R.38:5-6, AR00230-31, A-App.0047-48. The ALJ found that disputed facts required an evidentiary hearing on the BACT issue (R.38:6-8, AR00231-33, A-App.0048-50), which the ALJ held on May 25, 2023.

At the hearing, the ALJ considered documentary evidence and took testimony from five witnesses¹ on whether Petitioner’s proposals to add battery storage would redefine the design of the source. DNR’s witness testified regarding DNR’s process. He stated:

[T]he department made its evaluation by taking a “hard look” at the Project to discern which design elements were inherent to the Project, by reviewing BACT analyses conducted in other states for similar projects, and by evaluating the merits of the paired storage options proposed by Sierra Club to the extent that the very general proposals provided in the comments made such an evaluation possible.

¹ These were: Ronald Binzley, DNR’s Advanced Air Management Engineer who reviewed and approved the permit; Jody Arendt, Director of Planning for WEC; Scott Johnson, Asset Manager for RICE at WPSC; Gregory Eirschele, the Permit Application author; and Petitioner’s expert Michael Goggin. R.99.3-14, AR01168-79, A-App.0171-82; R.152:12-156:2, AR02014-87, S-App.84-148; R.97:5-98:16, AR01137-65, A-App.0142-70.

R.99:8, AR01173, A-App.0176. Based on this review, DNR concluded that “[i]f the seven proposed RICE units are supplemented by battery storage this would also fundamentally change the Project’s design and purpose by adding a new basic design element to the project that in no way serves the business purposes of the [A]pplicants ...” R.99:11, AR01176, A-App.0179.

Witnesses testified that Applicants identified the ability of the RICE to provide generation as one of the Project’s purposes. The Permit Application states that the Project “provides the capacity, base load, and peaking **generation**,” as well as “dispatchable electric **generating** capacity.” R.67:3-4, AR00731-32, S-App.50-51 (emphasis added). As DNR’s witness stated: “The purpose of the Project is to generate energy, not to provide energy storage.” R.99:11, AR01176, A-App.0179.

The testimony further showed that Petitioner’s proposal would redefine the source because it would interfere with this purpose because batteries store, but do not generate, electricity. R.386:2:13-17, AR05500, S-App.190; R.99:11, AR01176, A-App.0179; R.383:12:4-14, AR05432, S-App.178. “Generators” require their own fuel source, and as Petitioner’s witness testified, batteries have none. R.382:23:4-5, AR05419, S-App.172.

A central issue at the hearing was whether the addition of batteries would interfere with the “essential reliability service” of providing inertia to the grid. R.67:3, AR00731, S-App.50. Inertia is a kinetic property that “is the stored mechanical energy that keeps turbines rotating even after shutting down, and it is essential to grid stability.” R.392:7, AR05631, A-App.0039. As Applicants’ witness

explained, “[t]he inertia of an operating generator helps stabilize frequency on the transmission system during significant transient disturbances.” R.155:19:1-2, AR02083, S-App.144. Inertia also provides reliability and “damping”—a reduction in frequency decline which otherwise can lead to grid outages and blackouts. R.148:11, AR01961. It is thus an “essential reliability service” that is necessary to provide safety and stability to the grid. R.100:12, AR01198; R.155:19:1-3, AR02083, S-App.144; R.107:5-6, AR01303-04.

Applicants’ witness also testified that because Applicants and other utilities are adding so many batteries and green sources to the grid, the need for system reliability is higher now than ever before and will only continue to grow. R.386:25:10-19, AR05523, S-App.199; R.100:12, AR01198. Thus, even relatively small amounts of inertia can be critical to ensure reliability. *See, e.g., id.*; R.148:11, AR01961 (“As traditional resources are replaced with [green] resources, system inertia and thus damping is reduced, making the risk of frequency swings higher (and thus are referred to as ‘weak grids’...).”). Petitioner’s witness conceded that batteries cannot provide inertia. R.97:13:17, AR01145, A-App.0150.

On August 31, 2023, the ALJ issued a written decision finding that Petitioner failed to carry its burden on the BACT issue. R.392:4, AR05628, A-App.0036. She found that DNR correctly determined that adding batteries to the RICE units would redefine the Project’s source because it would alter the facility’s basic design and purpose by introducing a different kind of units—electric *storage* units—to a proposed *generation* facility, and because it would interfere with the essential reliability purpose of providing inertia on the grid. R.392:2-7,

AR05626-31, A-App.0034-39. The ALJ found that Petitioner's proposals were "vague" and failed to address whether the space required to add 26 MW of batteries would require a fundamental redesign of the Project. *Id.*

Based upon these findings, the ALJ concluded that reliable and credible evidence supported DNR's exclusion of batteries from the BACT analysis as redefining the source, and that Petitioner failed to meet its burden to show otherwise. *Id.*

Procedural History and Disposition in the Circuit Court

On September 11, 2023, Petitioner filed its Petition in Dane County Circuit Court. In a Decision dated March 13, 2024 (R.416, A-App.0003), Judge Remington upheld the ALJ's denial of Petitioner's challenges. The circuit court ruled that the background guidance document was not an unpromulgated rule. *Id.* at 22-23. The circuit court held that the guidance document does not have the force of law because it merely provides the data to perform the modeling required by Wis. Admin. Code § NR 405.10. *Id.* The circuit court also held that it does not "implement, interpret, or make specific legislation enforced or administered," but instead only instructs DNR staff to base their modeling on federal regulations. *Id.*

The circuit court then held that the ALJ correctly concluded that DNR did not err in excluding battery supplementation from BACT. *Id.* at 26-29. The circuit court found that substantial evidence supported the ALJ's decision that adding batteries to the RICE units would redefine the Project's source by interfering with its business purposes and altering its basic design. *Id.*

STANDARD OF REVIEW

This Court reviews DNR's decision as rendered by the ALJ. *Sierra Club v. DNR*, 2010 WI App 89, ¶ 20, 327 Wis.2d 706, 787 N.W.2d 855. This Court considers questions of law *de novo*. See Wis. Stat. § 227.57(11). The burden “in a ch. 227 review proceeding is on the party seeking to overturn the agency action, not on the agency to justify its action.” *City of La Crosse v. DNR*, 120 Wis.2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984).

Because Petitioner's BACT challenge was resolved after an evidentiary hearing, the Court must affirm the ALJ's factual determinations if they rest on substantial evidence. Wis. Stat. § 227.57(6). This requires only that there be enough evidence in the record as a whole for a finding to be reasonable. *Kitten v. DWD*, 2002 WI 54, ¶ 5, 252 Wis.2d 561, 644 N.W.2d 649. The Court may not upset factual findings unless a reasonable person, reviewing all evidence in the record, could not have reached the decision the agency did. *Hamilton v. Dep't of Indus., Labor & Human Relations*, 94 Wis.2d 611, 618, 288 N.W.2d 857 (1980). The substantial evidence test does not involve the court “weighing the evidence to determine whether a burden of proof is met or whether a view is supported by a preponderance of the evidence.” *WMC v. PSC*, 94 Wis.2d 314, 321-22, 287 N.W.2d 844 (Ct. App. 1979).

The Court shall affirm the agency's action unless it finds grounds to set aside, modify, remand, or order agency action. Wis. Stat. § 227.57(2). If the Court determines that an ALJ's decision suffers from legal error and the correct interpretation of the law does not “compel[] a particular action,” it should remand the case to DNR for

“further action” in accordance with that interpretation. Wis. Stat. § 227.57(5); see *Clean Wisconsin v. DNR*, 2021 WI 72, ¶ 9, 398 Wis.2d 433, 961 N.W.2d 611.

ARGUMENT

I. THE ALJ AND CIRCUIT COURT CORRECTLY CONCLUDED THAT THE BACKGROUND GUIDANCE DID NOT NEED TO BE PROMULGATED VIA RULEMAKING PROCEDURES.

Petitioner challenges DNR’s use of the 2021 Background Guidance document, asserting that DNR needed to promulgate it via Chapter 227’s rulemaking procedures. Petitioner does not challenge the substantive results of the air pollution modeling DNR performed to assess impacts on ambient air quality standards. It does not contend that the data were inaccurate, that DNR’s modeling incorrectly showed compliance with air quality standards, or that DNR was not permitted to use the monitors that generated the data. Petitioner’s challenge is purely procedural.

It is also without merit. The Background Guidance² is just that—a guidance document, not a rule. The Background Guidance does not meet the elements of a rule. Consequently, the Court should reject Petitioner’s challenge to the Background Guidance.

A. The Background Guidance Is a Guidance Document, Not a Rule.

Chapter 227 distinguishes between a rule, on the one hand, and a guidance document, on the other. Wis. Stat. §§ 227.01(13), 227.01(3m). As the circuit court recognized, “[g]uidance documents are not rules.”

² Petitioner calls the Background Guidance the “Background Pollution Policy.” (Br. 21.) Petitioner’s characterization appears nowhere in the document.

Serv. Emps. Int’l Union, Loc. 1 v. Vos, 2020 WI 67, ¶ 101, 393 Wis.2d 38, 946 N.W.2d 35. Rules functionally create new regulatory law that construes ambiguities or fills gaps in statutes. *See Tavern League of Wisconsin, Inc. v. Palm*, 2021 WI 33, ¶ 25, 396 Wis.2d 434, 957 N.W.2d 261. In contrast, guidance documents “are ‘communications about the law,’ not the law itself.” R.416:21, A-App.0023 (quoting *Vos*, 2020 WI 67, ¶ 102).

The Background Guidance classifies itself as a guidance document. R.252:2, AR03448, A-App.0137 (“This document is intended solely as guidance....”). This is critical because agency intent is necessary to determine whether an agency sought to engage in rulemaking, or, as here, simply publish a guidance document. *See Midwest Renewable Energy Ass’n v. PSC (“MREA”)*, 2024 WI App 34, ¶ 71, 412 Wis.2d 698, 8 N.W.3d 848.

The Background Guidance squarely fits the statutory definition of a guidance document. A guidance document is “any formal or official document or communication issued by an agency” that: (1) “[e]xplains the agency’s implementation of a statute or rule enforced or administered by the agency”; or (2) “[p]rovides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency....” Wis. Stat. § 227.01(3m)(a). The Background Guidance fits both definitions, because it merely explains how DNR implements requirements imposed and authority given to it by existing federal and state regulations, and it gives internal agency guidance about how DNR selects background concentration values.

For major sources, NR 405.10(1) requires DNR to model maximum emissions from a proposed project in accordance with the

requirements of EPA's Guideline on Air Quality Models (Revised) in Appendix W of 40 CFR part 51 ("Appendix W"). *See also* NR 484.04(11), Table 2. Therefore, by prior, duly-promulgated rules, DNR has incorporated the federal regulation's policies, practices, and procedures for modeling air impacts.

Appendix W is part of a complex federal rule that runs to hundreds of pages. It specifies in intricate detail how agencies are to perform air pollution modeling, authorizing the use of a model called AERMOD and providing detailed guidance on how agencies should select various inputs used in the model, such as whether the proposed source is urban or rural. Appendix W, § 7.2.1.1(a). It also authorizes permitting authorities to use data from regional monitors, a computer model, or monitors near the proposed source to establish background concentrations in modeling. *See id.* § 8.3.2.b, f.

Viewed in this regulatory context, the Background Guidance is a guidance document, not a rule. The Background Guidance does not establish regulatory law for modeling air pollution effects. It merely explains how DNR implements modeling in conformance with existing federal and state regulations. The Background Guidance explains how DNR selects data that it is required to utilize. It provides advice regarding how to input those data into AERMOD. DNR explains that it will input data from three-year averages from relevant regional monitors and uses the monitor data that corresponds with the urban or rural nature of the source. R.252:2-6, AR03448-52, A-App.0137-41. The Background Guidance thus "simply explain[s] statutes and rules" that are already on the books. *Vos*, 2020 WI 67, ¶ 102; *see* Wis. Stat. § 227.01(3m)(a)(1). It is therefore guidance about a rule, not a rule.

B. The Background Guidance Fails Multiple Elements of a “Rule.”

The Background Guidance also does not meet the elements of a rule. This brief will focus on the two elements discussed by the circuit court: (1) the Background Guidance does not have the force of law; and (2) it does not implement, interpret, or make specific legislation that DNR enforces or administers. R.416:23, A-App.0025.

1. The Background Guidance does not have the force of law.

An agency action has the force of law when it “could affect one’s legal interests....” *Palm*, 2021 WI 33, ¶ 22. In cases where Wisconsin courts have found that an action has the force of law, there was a direct legal consequence that followed from an obligation or prohibition established by the agency. This includes situations where “criminal or civil sanctions can result from a violation; licensure can be denied; or the interest of individuals in a class can be legally affected through enforcement of the agency action.” *MREA*, 2024 WI App 34, ¶ 71 (cleaned up). The common thread to these cases is that the agency action was *outcome-determinative* as to an individual’s legal interests.

The circuit court correctly determined that the Guidance Document does not have the force of law. R.416:23, A-App.0025. The Guidance Document merely explains how DNR implements existing regulations. R.252:2, AR03448, A-App.0137. It does not itself purport to impose any enforceable rights or obligations, or otherwise have any direct legal effects. Most critically, it does not determine the grant or denial of a permit, unlike the agency actions held to be rules in the cases Petitioner cites. As explained by Kristin Hart—DNR’s Chief of the Air Permits and Stationary Source Modeling Section—a

background concentration is “*never* used to deny a permit.” R.356:6:¶4, AR04937, S-App.149 (emphasis added). Indeed, the background concentrations are simply one set of data among many others that are inputted into the model.³

Further, applicants are not required to use the Background Guidance’s values. R.250:10-11, AR03428-29, A-App.0116-17. Instead, permit applicants can use background concentration data from monitors located in the vicinity of the project. R.250:11:¶13, AR03429, A-App.0117.⁴

Petitioner says DNR “points” to the Background Guidance and insinuates that it has a direct impact on whether a permit issues. (Br. at 26-27 (guidance document “defines a critical input to DNR’s decision to grant or deny a permit”).) Petitioner misstates the record; nowhere in the document (R.82:10, AR00946, A-App.0083) does DNR say it uses background concentrations to make a permit decision or that they are

³ Per Appendix W, there are numerous inputs besides background concentrations. Appendix W, §§ 8.1, 8.2.1.b, 8.4.1; *see* R.250:10:¶7, AR03428, A-App.0116.

⁴ Petitioner claims DNR applies the Background Guidance concentrations in all air modeling (Opening Appellant Brief of Petitioner-Appellant (“Br.”) at 16 (citing R.250:11, AR03429, A-App.0117)) and while it is “theoretically possible” for an applicant to submit its own data, it is “cost prohibitive.” *Id.* 24 (citing R.250:10-11, AR03428-29, A-App.0116-17). Petitioner misrepresents the record by cherry picking language. DNR has not made these statements. DNR has stated applicants always have the option of using data from source-specific monitors. R.250:11:¶13, AR03429, A-App.0117. Petitioner also misleadingly quotes a 2008 background guidance document to claim DNR will not consider “alternative regional background concentrations.” (Br. 16, 26.) The 2021 Background Guidance does not include that language. R.252:2-6, AR03448-52, A-App.0137-41.

critical inputs for permitting decisions. Petitioner's assertions are not supported in the record and are incorrect as a matter of law, as the ALJ determined on summary judgment. R.38:6, AR00231, A-App.0048 (background concentrations "do not have the force of law because they alone were not the deciding factor in whether to grant or deny the permit.").

This is consistent with how DNR itself views and treats the Background Guidance, which is critical to determining whether it has the force of law. The touchstone of the requirement is agency intent, specifically whether the agency has spoken with an "official voice *intended* to have the effect of law." *E.g.*, *MREA*, 2024 WI App 34, ¶ 71 (emphasis added); *Cholvin v. DHFS*, 2008 WI App 127, ¶ 29, 313 Wis.2d 749, 758 N.W.2d 118; *Cnty. of Dane v. Winsand*, 2004 WI App 86, ¶ 11, 271 Wis.2d 786, 679 N.W.2d 885. DNR's intent is that the Background Guidance not have the force of law:

This document is intended solely as guidance and does not contain any mandatory requirements except where requirements found in statute or administrative rule are referenced. This guidance does not establish or affect legal rights or obligations and is not finally determinative of any of the issues addressed. This guidance does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decisions made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts.

R.252:2, AR03448, A-App.0137; *Winsand*, 2004 WI App 86, ¶ 11 (materials developed by an agency as a reference aid for its staff are not a rule when they are not intended to have the effect of law).

Petitioner selectively quotes cases to try to dilute the test to the point that virtually any agency action would have the force of law. (Br. 25-27.) Unlike this case, however, where the Background Guidance has no definitive effect on permit applications, in each of Petitioner's cases there was a tangible, often serious, consequence as a result of the agency action.

For instance, in *Cholvin*, the Court found that an express instruction in an agency document dictated applicants' eligibility for Medicaid benefits. 2008 WI App 127, ¶ 29. Similarly, in *WEPCOC v. DNR* 93 Wis.2d 222, 235, 287 N.W.2d 113 (1980), effluent limits inserted into wastewater permits had the force of law because they were enforceable by civil or criminal prosecution. *Id.* In *Lamar Cent. Outdoor, LLC v. DHA*, 2019 WI 109, ¶¶ 5, 40, 89 Wis.2d 486, 936 N.W.2d 573, the agency interposed its interpretation of a statute to deny a permit application. *Id.* ¶ 5. In contrast to *Cholvin*, *WEPCO*, and *Lamar*,⁵ the values in the Background Guidance do not determine eligibility for a permit or give rise to enforcement.

In Petitioner's other cases, the challenged agency actions likewise directly and by themselves affected legal rights and obligations. In

⁵ Petitioner also cites *WEC* and *Lamar* for the proposition that an agency action has the effect of law "where an agency points to its policy as the justification for a decision it makes." (Br. 25-26.) Those cases are irrelevant here because DNR has never pointed to the Background Guidance or relied on it as the agency's "operative justification" (in the words of the court in *Lamar*, 2019 WI 109, ¶ 40), to make a permitting decision.

Schoolway Transp. Co. v. DMV, 72 Wis.2d 223, 236-37, 240 N.W.2d 403 (1976), and *Frankenthal v. Wis. Real Est. Brokers' Bd.*, 3 Wis.2d 249, 257, 9 N.W.2d 825, the agency denied a license to the plaintiff based solely on its interpretation of the governing statute. In *WMC v. DNR*, 2024 WI App 18, ¶ 31, 411 Wis.2d 462, 5 N.W.3d 903, the challenged decision directly affected the legal liability plaintiff faced. And in *State ex rel. Clifton v. Young*, 133 Wis.2d 193, 200, 394 N.W.2d 769 (Ct. App. 1986), the unpromulgated policy set forth the criteria for determining whether mandatory release parole violators were eligible for good time credit.

In sum, the Background Guidance lacks the force of law because its concentration values do not dictate the outcomes of permitting decisions.

2. The Background Guidance concentrations do not implement, interpret, or make specific legislation enforced or administered by DNR.

The circuit court also correctly held that the Background Guidance does not “implement, interpret, or make specific legislation” that DNR enforces or administers. R.416:23, A-App.0025. Rather, it merely “instructs *DNR staff* to base their air modeling on existing federal regulations” in Appendix W. *Id.*

Petitioner’s argument that the Background Guidance is a rule also ignores the fundamental distinction between a *statute* and a *rule*. The fifth element of a “rule” makes clear that an agency action is a rule only when the agency implements or interprets the former (“legislation”) and not the latter. This difference is dispositive because cases concluding this element was met did so in the context of a statute. *See, e.g., Palm*, 2021 WI 33, ¶ 33 (Wis. Stat. § 252.02(3));

Citizens for Sensible Zoning, Inc. v. DNR, 90 Wis.2d 804, 816, 280 N.W.2d 702 (1979) (Wis. Stat. § 87.30); *MREA*, 2024 WI App 34, ¶¶ 74-76 (various statutes in Chapter 196).

Here, the Background Guidance does not implement or interpret a *statute*, but instead communicates guidance about the application of *regulations* (Appendix W, as incorporated by NR 405.10(1) and NR 484.04(11), Table 2). This would be a different case if DNR were attempting to construct an air-modeling regime based solely on Wis. Stat. § 285.63(3)(b) in the absence of explicit rules authorizing it. Here, in contrast, DNR explained an existing regulation, rather than construing or fleshing out a statute.

C. Wis. Stat. § 227.10(1) Does Not Impose a Separate Requirement for Rulemaking.

Petitioner contends that, pursuant to Wis. Stat. § 227.10(1), all agency statements of “general policy” are subject to rulemaking, regardless whether they meet the elements of a rule. (Br. 28-29.) The Court should reject this argument for two reasons. Petitioner forfeited it. And it is based on a fundamental misunderstanding of Chapter 227.

1. Petitioner failed to make this argument below.

Petitioner never presented this argument to the ALJ or the circuit court and thus forfeited it. *See Goranson v. DILHR*, 94 Wis.2d 537, 545, 289 N.W.2d 270 (1980). Petitioner merely mentioned Section 227.10(1) in one brief to the ALJ (*see* R.196:4, AR02671),⁶ and in a reply brief to the circuit court (R.408:7,15), but in neither instance did it

⁶ Petitioner’s opposition and reply briefs to the ALJ do not cite this provision at all. *See* R.351:5-352:17, AR04849-78; R.358:9-360:5, AR04976-05008.

develop the argument. That is textbook forfeiture. *See Wascher v. ABC Ins. Co.*, 2022 WI App 10, ¶ 63, 401 Wis.2d 94, 972 N.W.2d 162.

Petitioner cannot justify saving this novel argument until two years into this litigation.

2. Wis. Stat. § 227.10(1) Is Not an Independent Trigger for Chapter 227’s Rulemaking Requirements.

The argument also fails on the merits. Wis. Stat. §§ 227.01(13) and 227.10(1) do not impose independent rulemaking requirements. Instead, they function in tandem, with the former defining what qualifies as a rule and the latter conveying what procedures agencies must follow to give a rule legal effect.

Section 227.01(13) is definitional, detailing the elements of a “rule,” but imposing no procedural duties itself. Those duties are instead found in Section 227.10(1), which sets forth what an agency must do—promulgation and adoption—to give a rule the force of law. If an agency action does not meet the definition of a “rule,” then there is no role for Section 227.10(1) to play. *See* Wis. Stat. § 227.01(13) (“Rule’ means a regulation, standard, *statement of policy*, or general order . . .”) (emphasis added). It is nonsensical to contend the Legislature enacted a detailed, multi-element definition of “rule,” only to have the procedural requirements applicable to a rule triggered by just one of those elements. Because the Background Guidance is not a “rule,” Section 227.10 does not apply.⁷

⁷ *Schoolway* does not support Petitioner’s argument (Br. 29), because it did not hold that a “general policy” is independently subject to rulemaking procedures.

D. Petitioner Seeks an Improper Remedy.

Even if this Court were to somehow sustain Petitioner's challenge, the Court should reject Petitioner's requested remedy.

Petitioner improperly seeks to require DNR to perform modeling "based on source specific background pollution...." (Br. 30.) As an initial matter, Petitioner never requested this remedy from either the ALJ or the circuit court and cannot do so for the first time on appeal. *See Goranson*, 94 Wis.2d at 545.

Petitioner's attempt to constrain DNR's discretion to select modeling inputs is also unlawful. Under Appendix W, it is within DNR's sole discretion to choose what monitoring sources to use. Appendix W unquestionably allows DNR to rely on regional monitors⁸ or computer data in lieu of source-specific monitors. The Court cannot impinge on that discretion. *See, e.g., Sch. Dist. No. 3 v. Callahan*, 237 Wis. 560, 577, 297 N.W. 407 (1941).

Petitioner's requested remedy would also unnecessarily impose an extended shutdown of the RICE generators. There currently are no source-specific monitors at Weston. Commissioning such monitors and obtaining data could take over a year. *See* Appendix W, § 8.4.2.e. If Applicants could not operate the RICE Units in the meantime, it would leave a 128 MW hole in the grid.

If the Court finds that the Background Guidance should have been promulgated as a rule, the appropriate remedy would be remand

⁸ Many EAB decisions uphold a permitting agency's power to rely on regional monitors for background concentration data, rather than site-specific monitors. *See, e.g., In re Ripley Heating Plant*, 14 E.A.D. 283, 326-28 (EAB 2009).

to DNR to conduct air modeling in any manner permitted by Appendix W, in DNR's discretion.

II. THE ALJ DID NOT ERR BY EXCLUDING BATTERIES FROM THE BACT ANALYSIS ON THE GROUND THAT THEY WOULD REDEFINE THE DESIGN OF THE SOURCE.

A. The ALJ's Determinations That Adding Batteries Would Change the Project's Fundamental Design and Basic Purposes—Determinations Not Challenged on Appeal by Petitioner—Provide a Sufficient and Independent Basis To Uphold the ALJ's Decision.

The ALJ agreed with DNR staff that adding batteries would “redefine the design of the source” because it would change the Project's fundamental design by adding a different kind of unit (energy storage) to a project for only generation units. R.392:6, AR05630, A-App.0038. The ALJ further agreed with DNR staff that incorporating batteries would alter the basic purpose of the Project because it would change the purpose from generation only to also providing energy storage. *Id.*

Petitioner does not challenge these bases for the ALJ's decision, but focuses only on the ALJ's separate finding that batteries would interfere with the RICE unit's ability to supply inertia and that Petitioner failed to address impacts on space limitations (discussed below). Petitioner therefore abandoned its challenge to these independent bases for the ALJ's decision. *See Gister v. Am. Fam. Mut. Ins.*, 2012 WI 86, ¶ 37 n.19, 342 Wis.2d 496, 818 N.W.2d 880; *Fouts v. Breezy Point Condo. Ass'n*, 2014 WI App 77, ¶ 21, 355 Wis.2d 487, 851 N.W.2d 845.

If the Court is inclined to consider this issue on the merits, it should still affirm. The ALJ's determinations are factual findings that are entitled to deference. *Kitten*, 2002 WI 54, ¶ 5. The evidence supported the ALJ's findings that adding batteries to the RICE would alter the basic design⁹ and purpose of the Project by shifting it from one to provide generation to one that would provide both generation and storage. R.86:1, AR00988, A-App.0100; *see also* R.391:3-4, AR05611-12. Batteries are unable to generate electricity; they are a storage device. R.386:2:13-18, AR05500, S-App.190; R.99:11, AR01176, A-App.0179; R.383:12:4-14, AR05432, S-App.178. The ALJ resolved the disputed testimony in DNR's favor.

The distinction between generation and storage underscores the fundamental problem with Petitioner's BACT challenge: it is a stealth challenge to the mix of generation and storage assets in Applicants' portfolio in the guise of an air permit process. Applicants already have, and continue to build, a lot of battery storage. R.67:3, AR00731, S-App.50; R.99:21, AR01186, S-App.80. Petitioner argues they should have more. *See* R.98:10:6-8, AR 01159, A-App.0164; R.381:17:10-19:13, AR05388-90, S-App.167-69; R.155:8:7-14, AR02072, S-App.137. But that is an argument about what kind of facility the Project should be.

⁹ Petitioner misstates the standard for when a control technology redefines the source as being only when it "precludes the applicant's fundamental purpose." (Br. 13.) As the ALJ found, a proposed control alternative, which contemplates a technology to be applied to a project to reduce the emissions of the project as designed, redefines the source when it would either *interfere* with a project's purpose or alter a basic design element of the project. R.392:5, AR05629, A-App.0037; *Sierra Pac. Indus.*, 16 E.A.D. at 48-50; *Prairie State*, 13 E.A.D. at 21-27; *Elm Road* at 10-14.

That is not an appropriate use of BACT, which is only about emissions controls. Reviewing and approving the appropriate balance of generation versus storage is within the PSCW's province, not DNR's. The PSCW process for the Project involved extensive review of Project need and cost, and it included participation by the public, including Petitioner. *See* R.110:9-113:20, AR01360-01424. Because approval of the Project and decisions about what the Project should look like occur in the PSCW proceeding, BACT review necessarily excludes purported "emissions controls" that redefine the Project. The ALJ properly declined to accept Petitioner's invitation to litigate through BACT how much battery storage Applicants should build and maintain, and where that storage should be located. To respect the regulatory scheme the Legislature established, this Court should respect DNR's correct decision to stay in its lane and avoid straying into questions about what Project should be built in the first place.

Because the ALJ's findings are a separate and independent basis sufficient to support the ALJ's ruling, the Court should affirm the ALJ's decision to exclude batteries from the BACT analysis. *See, e.g., Stoughton Trailers, Inc. v. LIRC*, 2007 WI 105, ¶ 5 n.3, 303 Wis.2d 514, 735 N.W.2d 477; *Haase-Hardie v. DNR*, 2014 WI App 103, ¶ 2 n.1, 357 Wis.2d 442, 855 N.W.2d 443; R.416:8, A-App.0010.

B. The ALJ Was Entitled To Rely Upon Batteries' Interference with Inertia and the Project's Required Physical Space To Find That Batteries Would "Redefine the Source."

As a separate basis for her ruling excluding batteries from the BACT analysis, the ALJ found that adding batteries to the RICE units would interfere with the Project's ability to provide the "essential reliability service" of inertia, which was one of the Project's main

purposes, and that Petitioner failed to show that batteries could be incorporated without altering the basic footprint of the facility. R.392:7, AR05631, A-App.0039; R.67:3, AR00731, S-App.50. As such, she found that batteries would redefine the source on these bases, as well. *Id.* These findings should be affirmed.

1. Substantial evidence supported the ALJ's factual finding that adding batteries would interfere with supplying system inertia.

Petitioner argues that the ALJ relied on an “incorrect” fact—that adding batteries would interfere with the RICE generators’ ability to supply inertia. (Br. 33.) Petitioner argues that the ALJ was mistaken because she assumed that the operation of the batteries would reduce the RICE units’ use.¹⁰ (*Id.*) This argument fails because it has been forfeited and because the ALJ’s finding was supported by substantial evidence.

First, Petitioner never presented it to the ALJ. Petitioner argued that, while batteries cannot supply inertia, batteries can provide “fast frequency response” which it claimed is similar to inertia. R.389:9, AR05582.¹¹ But Petitioner never argued that adding batteries would

¹⁰ “All witnesses” did not agree that adding batteries would reduce emissions. (Br. 32.) There was plenty of evidence they would not. R.388:8:17-24, AR05558. The ALJ did not need to reach that question.

¹¹ Petitioner half-heartedly makes this argument in a footnote. (Br. 34 n.13.) But the ALJ found otherwise because “inertia and frequency stabilization are separate reliability tools, and while both . . . are used to keep the grid safe and reliable, they are not interchangeable.” R.392:7, AR05631, A-App.0039; *see also* R.387:3:10-23, AR05527, S-App.203.

not inhibit inertia. The argument is forfeited. *Wascher*, 2022 WI App 10, ¶ 63.

Second, Petitioner's argument, which attacks the ALJ's factual finding, is foreclosed by the standard of review. This Court must affirm the ALJ's factual determinations if they are supported by substantial evidence. Wis. Stat. § 227.57(6); *Hamilton*, 94 Wis.2d at 617.

There was evidence on which the ALJ could reasonably find that adding batteries would interfere with the units' providing inertia.¹² The evidence showed that batteries cannot provide inertia. R.387:18:18-20, AR05542, S-App.212; R.97:13:17, AR01145, A-App.150. The evidence therefore also showed that adding batteries to the RICE would reduce the amount of available inertia on the grid. R.380:15:9-13, AR05361, S-App.155; R.386:23:22-24:14, AR 05521-22, S-App.197-98; R.387:2:15-4:3, AR05526-28, S-App.202-04; R.387:18:11-20, AR05542, S-App.212. Petitioner asserts that the RICE would operate only four hours a day and startup in thirty minutes, but the engines startup in 5-8 minutes and may operate continuously for 86% of the year. (Br. 31); R.387:9:21-22, AR05533, S-App.209; R.386:15:14-16:5, AR05513-14. Operating as Petitioner proposes would replace a significant portion of RICE generation with battery dispatch, decreasing inertia. *See id.*; R.381:2:16-18, AR05373, S-App.161; R.387:4:4-5:15, AR05528-29, S-App.204-05; R.155:7:2-5, AR02071, S-App.136. The ALJ's factual finding is more than adequately supported by the evidence.

¹² Petitioner says "witnesses agreed" that adding batteries would not preclude some Project purposes. (Br. 32.) That is the wrong standard. *Arizona*, 17 E.A.D. at 336, 341 ("interfere" with purpose). Batteries would interfere. R.391:4-7, AR05612-15.

Substantial evidence also supported her specific finding that adding batteries would reduce the amount of time the units would operate. Petitioner proposed that the batteries could be charged by excess renewable energy on the grid rather than the RICE units. R.98:10:6-8, AR 01159, A-App.0164; R.381:17:10-19:13, AR05388-90, S-App.167-69. But this would eliminate needed power-generation capacity at the site, preventing necessary inertia for the grid. R.386:19:14-22, AR 05517, S-App.193; R.380:14:7-15:23, AR05360-61, S-App.154-55; R.381:2:16-18, AR05373, S-App.161; R.387:4:4-5:15, AR05528-29, S-App.204-05; R.155:8:7-9, AR02072, S-App.137.

The testimony showed that the inertia the RICE units provide is essential to prevent grid disruptions.¹³ *See, e.g.*, R.386:25:13-19, AR05523, S-App.199; R.148:11, AR01961. Petitioner's proposal therefore would leave the grid more susceptible to disruptions, outages, and blackouts. R.387:4:6-5:1, AR05528-29, S-App.204-05. While Petitioner introduced opposing testimony, the ALJ resolved these factual issues against it. It is not the Court's role to second-guess the ALJ's findings. Wis. Stat. § 227.57(6).

2. The ALJ did not err by relying upon the impacts to system inertia and project footprint to support the conclusion that adding batteries would redefine the design of the source.

Petitioner also contends that the ALJ could not expand upon the rationales provided by DNR in its response to Petitioner's comments. This argument is based upon a misapplication of Chapter 227.

¹³ Petitioner acknowledged that inertia is a project purpose in its public comments. R.84:13, AR00973, S-App.72.

- a. **Here, the ALJ acts as the final decision-maker for DNR—not as a judicial court sitting in review of the agency—and therefore it is not constrained to the rationales articulated in DNR’s response to comments.**

Petitioner’s argument that an ALJ is “analogous” to a reviewing judicial court is based on cases that arise in a different context and reflects a fundamental misunderstanding of the ALJ’s role. An ALJ in a contested case reviewing a DNR decision is nothing like a judicial court. Rather, the ALJ is the final decision-maker for DNR. Under Wis. Stat. § 227.43(1)(b), contested cases may be heard by the DNR Secretary or an ALJ. Wisconsin Stat. § 227.46(3)(a), in turn, provides that “an agency may by rule . . . direct that the hearing examiner’s decision be the final decision of the agency.” DNR made that election in Wis. Admin. Code § NR 2.155(1), specifying that the ALJ’s decision in a contested case “shall be the final decision of [DNR].” This Court has thus recognized—in cases between Petitioner and DNR no less—that an ALJ acts as the final decision-making authority for DNR regarding the issuance of the permit, stepping into the shoes of the Secretary. *See Sierra Club*, 2010 WI App 89, ¶ 20.¹⁴

Consequently, ALJs in a contested case hearing are not constrained in the ways that reviewing courts are. Nor could they be. An ALJ conducts a *de novo* evidentiary hearing on the issues presented in the contested case under Wis. Stat. § 227.44, where she may hear

¹⁴ Further, because DNR did not petition for judicial review of the ALJ’s decision, DNR “adopt[ed] the ALJ’s decision as its own pursuant to Wis. Stat. § 227.46(3)(a), and Wis. Admin. Code. § NR 2.155(1).” *Id.*

live testimony and consider evidence submitted by the parties. *Id.* The “[e]vidence submitted at the time of hearing need not be limited to matters set forth in pleadings, petitions or applications.” Wis. Admin. Code § NR 2.14. The ALJ is entitled to consider any evidence reasonably probative of the issues. Wis. Stat. § 227.45(1); *see Sierra Club*, 2010 WI App 89, ¶ 20.

Because the ALJ is the ultimate decision-maker for the agency, it is not limited to the justifications expressly stated in DNR’s response to comments. *See Sea View Ests. Beach Club, Inc. v. DNR*, 223 Wis.2d 138, 162, 588 N.W.2d 667 (Ct. App. 1998) (“because the DNR adopted the ALJ’s decision, we give deference to the findings of the ALJ, not to the preliminary findings and recommendation of the DNR.”). This Court has recognized that an ALJ’s decision may rely on a different basis than that originally identified by an agency. *E.g., Easterling v. LIRC*, 2017 WI App 18, 374 Wis.2d 312, 893 N.W.2d 265 (treating as operative decision LIRC decision relying on different basis than DWD).

In contrast, circuit courts and appellate courts reviewing an ALJ’s ruling pursuant to Wis. Stat. § 227.52 generally are limited to the record created before the agency (including before the ALJ). Wis. Stat. § 227.57(1), (6) (court defers to factual findings of the ALJ). And reviewing judicial courts review the rationales employed by the agency (including, in the case of DNR, the ALJ’s decision). *West v. DOC*, 230 Wis.2d 71, 75 n.2, 601 N.W.2d 307 (Ct. App. 1999).

Petitioner cites *Stas v. Milwaukee Cnty.*, 75 Wis.2d 465, 474, 249 N.W.2d 764 (1977), for the proposition that ALJs in contested cases are limited to reviewing the “grounds invoked by the agency.” (Br. 35.)

But that case involved a *circuit court's* review of an agency's decision to terminate an employee. *Stas*, 75 Wis.2d at 466.

Petitioner suggests that *Village of Thiensville v. DNR*, 130 Wis.2d 276, 283, 386 N.W.2d 519 (Ct. App. 1986), lends support to its argument (Br. 34-35). It does not. There, DNR modified a portion of a pollutant discharge permit under which Thiensville operated its sewage treatment plant. Thiensville challenged the compliance dates in a contested case under Wis. Stat. § 147.20 (now § 283.63), *but it also used that contested case to challenge portions of the permit that had not been modified by DNR*. *Id.* at 278-281. This Court upheld the ALJ's rejection of Thiensville's attempt to bring into the contested case portions of the permit that had not been before DNR (and as to which the time for review had long since passed). *Id.* at 280-82. *Thiensville* does not mean, as Petitioner contends, that an ALJ cannot consider additional reasons for upholding a permit. Its holding is that a petitioner cannot, in a contested case, expand the review to *portions of a permit* that were not addressed by DNR staff. *Id.* at 281.

To the extent that the court in *Thiensville* suggested that a hearing examiner from the Department of Hearings and Appeals is distinct from DNR, this Court later limited that case's application to the specific facts of that case and clarified that the ALJ's decision is the final decision of DNR. *Andersen v. DNR*, 2010 WI App 64, ¶ 21 n.10, 324 Wis.2d 828, 783 N.W.2d 877, *rev'd on other grounds*, 2011 WI 19.

Unlike in *Thiensville*, the question before the ALJ here was precisely the same as the one before DNR: the exclusion of batteries as a redefinition of the source.

Neither do *Meteor Timber, LLC v. Wisconsin Div. of Hearings & Appeals*, 2022 WI App 5, ¶¶ 46,49,63-64, 400 Wis. 2d 451, 969 N.W.2d 746, and *Kohler Co. v. DNR*, 2024 WI App 2, ¶¶ 73-74, 78-79, 410 Wis.2d 433, 3 N.W.3d 172, stand for the proposition that the ALJ cannot expand on reasons for upholding a permit. The court in each case held that under the specific statute at issue, DNR was required to have from the applicant statutorily-enumerated information when it issued the permit to fill wetlands. In *Meteor Timber*, the permit itself included conditions stating that DNR lacked many required items—in direct contravention of the statute.¹⁵ In *Kohler*, DNR emails showed that the applicant likewise had not submitted required information, but DNR issued the permit anyway. In neither case did the court “refuse to consider post hoc evidence and rationales offered during the contested case process,” as Petitioner contends. (Br. 35.)

Petitioner’s position is also at odds with its own litigation strategy. At the contested case, Petitioner submitted evidence that post-dated the issuance of the permit and introduced additional rationales for rejecting the permit. *See, e.g.*, R.98:1-16 nn.10, 21, 23, 25, 27-28, AR01150-65, A-App.0155-70. Petitioner’s case to the ALJ went well beyond its original comments. *Id.*

Petitioner’s proposed rule (that an ALJ cannot consider additional bases for upholding a permit on a contested case) would lead

¹⁵ Petitioner selectively quotes *Meteor Timber* as saying that allowing additional information at the contested case would “eviscerate the statutory process” (Br. 35.) What the court actually said is that it would eviscerate the process to issue a permit *that itself contained permit conditions stating that applicant had not yet submitted, but could provide later, information that DNR had to have before it could issue the permit.* *Meteor Timber*, 2022 WI App 5, ¶ 64.

to absurd results. Petitioner's rule would require DNR to conduct an extensive investigation into every *potential* BACT alternative proposed in comments. Petitioner itself proposed a dozen different combinations of energy storage configurations, including novel and wholly untried storage technologies (flywheels and compressed air). If DNR had to give all potential reasons, and gather all necessary evidence, in response to every comment, it would effectively require a contested case hearing on every alternative proposed in comments, no matter how far-fetched. That would grind the permit process to a halt.

While that may be Petitioner's goal, that is not what is required. *See In re FutureGen Indus. All., Inc.*, 16 E.A.D. 717, 754 (EAB 2015) (a "response to a comment need only be commensurate with the comprehensiveness of the comment itself."); *Prairie State*, 13 E.A.D. at 33 ("permit issuer does not have an independent duty to investigate alternatives raised in public comments" so long as "all significant comments were considered"). The ALJ held that Petitioner's comments about adding batteries were too vague and non-specific to warrant a detailed refutation of every permutation proffered by Petitioner. *See* R.392:6, AR05630, A-App.0038; R.381:4:19-5:18, AR 05375-76, S-App.163-64. Courts do not require agencies like DNR to painstakingly describe every reason why each alternative is being rejected.

b. The ALJ did not exceed the scope of the issue of the Contested Case.

Petitioner next argues that the ALJ, by considering batteries' impact on inertia and space limitations of the Project, exceeded the scope of the issue upon which review was granted by DNR. (Br. 36-37.) Petitioner's argument is contrary to the plain statement of the issue, which was: "whether the Department erroneously excluded the

addition of battery storage to the RICE units in the BACT analysis as ‘redefining the source.’” R.35:4, AR00211, S-App.12. That statement does not confine the ALJ to DNR’s response to comments. Petitioner attempts to inject its desired limitation into the issue by asserting that the ALJ was limited to considering the reasons DNR gave (Br. 36), but Petitioner cites no authority for that proposition, and there is none. Petitioner’s position on the scope of the issue on review is just a reframing of its argument that the ALJ sits in the same position as a reviewing judicial court. (*See supra*, Sec. II.B.2.a.) That reframing does not save the argument.

c. The ALJ did not undermine the statutory permitting procedures.

Petitioner next asserts that the ALJ violated the statutory public comment procedures under Wis. Stat. § 285.61 by considering batteries’ impacts on inertia and Project footprint. (Br. 37-38.) That argument, too, is baseless.

Nothing in the public comment procedures prohibits an ALJ in a contested case from expanding upon DNR’s bases for excluding a BACT alternative. Petitioner cites no authority containing that prohibition, and there is none.

DNR unquestionably followed the public comment procedures set forth in Wis. Stat. § 285.61. It prepared the requisite “analysis regarding the effect of the proposed construction . . . on ambient air quality and a preliminary determination on the approvability of the construction permit application” *Id.* § 285.61(3); R.76:9-84:9, AR00873-969. It then distributed the analysis and preliminary determination, *id.* § 285.61(4), and gave notice of the opportunity to comment, *id.* § 285.61(5) (R.76:7-8, AR00871-72). It received public

comments, including from Petitioner, *id.* § 285.61(6) (R.84:11-85:6, AR00971-80, S-App.70-79), and held a public hearing, *id.* § 285.61(7). It then approved the permit application after considering all comments, including those of Petitioner, *id.* § 285.61(8) (R.85:11-87:5, AR00985-1002, A-App.97-114).

Petitioner's charge that the ALJ evaded public participation in the permit process by "substitut[ing]" different reasons than DNR staff gave in their response to comments is groundless. The ALJ did not "substitute" a new rationale. She affirmed DNR's basis for finding that batteries would alter the design of the Project and interfere with its business purposes, and then expanded upon the reasons that batteries would interfere with Project purposes. This is consistent with the statutes, regulations, and case law. And it is difficult to see how Petitioner or the public could have been harmed thereby. Petitioner took its objections all the way through a contested case hearing, and the hearing was open to the public. Nothing was done in secret.

d. The process employed by the ALJ was not unfair to Petitioner.

The ALJ's reliance on inertia and space limitations was not "fundamentally unfair" to Petitioner. (Br. 38.) It also had notice and the opportunity to respond to Applicants' and DNR's testimony regarding inertia and the Project's footprint. And Petitioner did respond. Its expert offered testimony on inertia, admitting that batteries could not supply it, but arguing that it could supply an ostensibly sufficient alternative source of frequency stabilization. R.380:12:5-13, AR05358, S-App.152. In light of this testimony, it is hard to believe that additional discovery or time for response could have been "fairer" to Petitioner.

e. The ALJ did not invoke an “automatic off-ramp” in sustaining the exclusion of batteries from the BACT analysis.

Petitioner argues that the ALJ’s reliance on inertia creates an “automatic off-ramp for energy storage,” citing *Arizona*, 17 E.A.D. at 347. There, the EPA rejected battery storage because it would redefine the source. *Id.* at 323. The EAB upheld the EPA’s decision, noting that:

Sierra Club’s proposed alternatives would interfere with the project’s inherent design elements, including the ability to start and stop quickly several times a day, which are needed to provide fast, flexible, and sustained capacity to meet fluctuating power demands and mitigate grid instability caused by the increasing integration of renewable energy into the electrical system served by the Ocotillo plant.

Id.

Petitioner argues that case was based on “site specific factors,” but this case is no different. (Br. 38-39.) The evidence showed that DNR took the requisite “hard look” at Petitioner’s proposal and determined that the increase in batteries being installed on the grid has made the need for inertia higher than ever before. R.99:6-10, AR01171-75, A-App.0174-78. The Project was designed to address that need. R.386:25:10-19, AR 05523, S-App.199; R.387:9:9-20, AR 05533, S-App.209; R.67:3-4, AR00731-32, S-App.50-51. Thus, because the need for essential reliability services like inertia was a fact-specific purpose for the Project, the ALJ’s decision does not create an “automatic off-ramp” for battery storage.

* * *

Even if the Court remands for further modeling or review by DNR, the Permit should remain in place during that work. This would

be an “appropriate” remedy that preserves “the interests of ... the public” in avoiding disruptions to electric distribution during further proceedings. Wis. Stat. § 227.57(9). This Court has done just that in earlier litigation *for this very facility* based on a prior challenge from Petitioner. *Sierra Club*, 2010 WI App 89, ¶ 66 (reopening, but not vacating, permit upon concluding DNR erred in granting it).

Remand without vacatur falls within the Court’s broad remedial authority in Chapter 227 actions, *see* Wis. Stat. § 227.57(9), and it is a customary remedy for agency error that looks to two factors: (1) “the likelihood that deficiencies in an order can be redressed on remand, even if the agency reaches the same result”; and (2) “the disruptive consequences of vacatur.” *Healthy Gulf v. FERC*, 107 F.4th 1033, 1047 (D.C. Cir. 2024) (cleaned up). Both factors support keeping the Permit in place.

Any purported deficiency can readily be redressed on remand. As noted, DNR has the authority to rely on existing regional monitoring data and can do so on remand without going through rulemaking procedures. *See* Appendix W, § 8.3.2(b). DNR also can also readily revisit its BACT analysis.

Second, as noted above, vacating the Permit would needlessly inflict severe but preventable harms—i.e., potential rolling blackouts. *See Healthy Gulf*, 107 F.4th at 1047-48 (declining to vacate order authorizing construction of natural gas facility, despite agency errors, because vacation would “needlessly disrupt” commercial operations and construction plans).

If the Court remands, it should leave the Permit in place during remand proceedings.

CONCLUSION

The Court should affirm the decision in its entirety.

Dated: September 13, 2024

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 10,986 words.

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