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Appeal No. 2016AP1688

SUPREME COURT OF WISCONSIN

CLEAN WISCONSIN, INC.,
LYNDA COCHART, AMY COCHART,
ROGER DEJARDIN, SANDRA
WINNEMUELLER and CHAD COCHART,
Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,
Respondent-Appellant,

KINNARD FARMS, INC.,
Intervenor-Co-Appellant,

WISCONSIN LEGISLATURE,
Intervenor.

On Certification by Wisconsin Court of Appeals, District II,
Appeal No. 2016AP1688
On Appeal from Dane County Circuit Court, Hon. John W.
Markson, Presiding, Case No. 15-cv-2633

BRIEF OF NON-PARTIES FOOD & WATER WATCH, FAMILY FARM DEFENDERS, AND SUSTAIN RURAL WISCONSIN NETWORK AS *AMICI CURIAE*

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INTEREST OF *AMICI CURIAE*

Food & Water Watch, Family Farm Defenders, and Sustain Rural Wisconsin Network (collectively, "*Amici*") are nonprofit organizations with strong interests in protecting the environment, family farmers, farm workers, and local communities from harms caused by concentrated animal feeding operations ("CAFOs"). Ensuring that Wisconsin's administrative agencies have the ability to fulfill their missions and the vital roles assigned to them by the Legislature through numerous environmental and public health statutes is of critical importance to *Amici* and their membership.

INTRODUCTION

Amici file this brief to show that Wis. Stat. § 227.10(2m) and 227.11(2)(a) ("Act 21") cannot be interpreted to eviscerate the Department of Natural Resources' ("DNR") ability to competently implement the responsibilities assigned it by the Legislature. The statutes that authorize DNR to issue permits with necessary conditions explicitly articulate DNR's duties within defined areas of regulation to accomplish particular legislative goals. *See* Wis. Stat. § 283.31(3). Such

administrative action is not just permissible under Act 21; it is critical to protecting the public health and welfare and fostering a strong and sustainable economy.

Agencies' authority to do what DNR has done here is supported by the text the Legislature enacted, long-standing necessities of government, canons of statutory construction, and other state court interpretations of analogous administrative authority. This Court's holding in *Lake Beulah* was and remains correct, and should be upheld.

ARGUMENT

Kinnard Farms' and the Wisconsin Legislature's (collectively "Intervenors") position in this case would dramatically expand the effect of Act 21 beyond reason and what the text actually says. Intervenors' extreme position is incompatible with long-standing and ongoing reliance on agencies to carry out critical regulatory tasks in the real world. Act 21 did not wholesale eliminate the discretion necessary for agencies to implement enabling statutes according to their expertise and the facts at hand.

Wis. Stat. § 227.10(2m) states that,

> [n]o agency may implement or enforce any … condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule.

But Intervenors' interpretation would have this Court rewrite the statute such that no agency may enforce a condition unless it is "explicitly *and specifically*" required or permitted by statute. *See* Wis. Legis. Br. 27–29; Kinnard Br. 26. This revision of the statute would render DNR and other agencies unable to apply their unique expertise under a wide variety of statutory schemes and real-world contexts, despite the legislative intent and necessity to empower agencies with the tools to implement statutory mandates under dynamic and often complex factual circumstances. This Court should reject this rewriting of Act 21, and uphold DNR's authority to do exactly what the Legislature has asked of it—apply its particular expertise to condition licenses to ensure permittees' compliance with the law.

A. Act 21's Text and the Wisconsin Administrative Procedure Act Contradict Intervenors' Arguments

Foundational rules of statutory construction prohibit Intervenors' reading of § 227.10(2m). First, this provision does not require agency authority to be "specifically" outlined in

detail by the agency's enabling statute. Second, interpreting Act 21 as Intervenors propose would contradict the definitional section of the Wisconsin Administrative Procedure Act ("APA").

1. The Legislature did not require "specific" grants of authority in § 227.10(2m)

Whereas the Legislature considered "specific" statutory provisions in one part of Act 21, it did not predicate administrative authority on specificity in § 227.10(2m). This Court must heed the text the Legislature actually passed, and give independent meaning to different words used in the same act. *Pawlowski v. Am. Family Mut. Ins. Co.*, 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67 ("When the legislature chooses to use two different words, we generally consider each separately and presume that different words have different meanings."). The Legislature used "explicit" and "specific" for different purposes throughout Act 21.

When enumerating certain limitations on an agency's rulemaking authority in Act 21, the Legislature stated:

> A statutory provision containing a *specific* standard, requirement, or threshold does not confer on the agency

> the authority to promulgate, enforce, or administer a rule that … is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

Wis. Stat. § 227.11(2)(a)(3) (emphasis added). In contrast, Act 21's limitation on an agency's implementation or enforcement of a standard, requirement, or threshold in a license conspicuously omits specificity, only requiring that such conditions be "explicitly" required or permitted. Wis. Stat. § 227.10(2m). The Court must give effect to this use of different terms within the same legislative enactment. *Pawlowski*, 2009 WI 105, ¶ 22; *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 454 (2002) (refusing to find that "different language in the two subsections has the same meaning in each").

Even within § 227.11, the Legislature uses "explicit" in subdivisions (2)(a)(1) & (2), but then changes to "specific" in subdivision (2)(a)(3). The context of these provisions clarifies the Legislature's different uses of the two terms: "explicit" refers to unambiguous grants of authority, and "specific" denotes detailed enumeration. *See State ex rel. Kalal v. Cir. Ct. Dane Cnty. (In re Criminal Complaint)*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 ("statutory language is

interpreted in the context in which it is used; not in isolation but as part of a whole"); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (Thomson/West, 2012) ("the judicial interpreter [must] consider the entire text, in view of its structure and of the physical and logical relation of its many parts"). In other words, an "explicit" grant of authority can be general under Act 21, so long as it is expressed unambiguously.[1]

The unavoidable textualist outcome is that when agency authorities to implement and enforce standards, requirements, or thresholds are unambiguously provided by statute, they need not be specifically enumerated in the statute. In other words, explicit was used as a contrast with its antonym "implied."[2]

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[1] The Wisconsin Attorney General reached the same conclusion, which is entitled to persuasive value. OAG-04-20, ¶ 2 (Oct. 27, 2020) (plain language of Act 21 "does not alter explicit grants of rulemaking authority, regardless of whether the rulemaking provision in which the authority is granted could be characterized as broad or 'general'"); *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 126, 327 Wis. 2d 572, 786 N.W.2d 177 (holding that AG opinions carry persuasive value).

[2] *Implied*, Black's Law Dictionary (11th ed. 2019) ("[n]ot directly or clearly expressed; communicated only vaguely or indirectly").

Explicit authority to do what is "necessary" to meet the agency's Legislatively assigned mandates is enough.

2. An overly restrictive interpretation of § 227.10(2m) conflicts with the APA

Act 21 does not exist in a vacuum. Section 227.10(2m) is applicable to "any license." The APA defines a "license" as "any part of an agency permit, certificate, approval, registration, charter or similar form of permission required by law …." Wis. Stat. § 227.01(5). But it *excludes* from this definition instances where issuance is merely a "ministerial" act. *Id.* Thus, issuing a "license" is a non-ministerial agency action, where an agency applies its discretion and expertise. Intervenors' interpretation of Act 21, on the other hand, contradicts the APA by limiting agencies to a cut-and-paste exercise based on specifically enumerated options provided by the Legislature. In essence, Intervenors' reading of Act 21 would only allow an agency to issue "ministerial licenses"—an oxymoron under the APA.

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B. Administrative Agencies Require Discretion to Apply Law to Specific Circumstances

In addition to the plain text of the law, over a century of practice and experience counsel that agencies have appropriate discretion to implement their statutory mandates in light of particular facts and circumstances. *See Koschkee v. Taylor*, 2019 WI 76, ¶ 17, 387 Wis. 2d 552, 929 N.W.2d 600 ("We have long recognized that 'the delegation of the power to make rules and effectively administer a given policy is a necessary ingredient of an efficiently functioning government.'") (quoting *Gilbert v. Med. Examining Bd.*, 119 Wis. 2d 168, 184, 349 N.W.2d 68 (1984)); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (for problems "so specialized and varying in nature … the agency must retain power to deal with the problems on a case-to-case basis"). The ability of executive agencies to implement the law as called upon by a legislature is a "necessity of government" long understood and accepted. *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) ("It is wisdom and humility alike that this Court has always upheld such 'necessities of government.'") (quoting *Mistretta v.*

United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)). This is exactly what the Legislature intended and expected when it passed countless laws, including the Wisconsin Pollutant Discharge Elimination System ("WPDES") at issue here, that establish a framework and desired outcomes and then rely on an agency to "fill up the details," a practice this Court recently endorsed. *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 106, 391 Wis. 2d 497, 942 N.W.2d 900 ("as long as [the Legislature] makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details'") (quoting *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting)).

The Legislature has long relied on agencies to "fill up the details," exactly as DNR has done here, and this Court has long upheld such an arrangement. *E.g.*, *State ex rel. Buell v. Frear*, 146 Wis. 291, 306–07, 131 N.W. 832 (1911) ("the power to make appropriate rules and regulations for the purpose of carrying the provisions of the statute into effect is properly conferred on the [agency] and restricts them to

making and enforcing such rules as are appropriate to obtain an effective execution of the law").

The WPDES program is a quintessential example of why the Legislature's conferral of authority to effectively execute the law is necessary and appropriate. The Legislature tasked DNR with issuing WPDES permits, but also mandated that DNR condition such permits so that they comply with state and federal law, including evolving water protection standards. Wis. Stat. § 283.31(3)–(5). It would be infeasible for the Legislature to spell out in exacting detail every possible present and future limitation or allowance available to DNR when implementing this law to address complex and potentially novel circumstances. And the alternative—requiring the Legislature itself to issue every discharge permit through legislative act—is equally infeasible and would become an extraordinary burden on all involved.[3] Even if such legislative

[3] The sheer number of WPDES permits makes this clear: over 300 for CAFOs, approximately 300 for other industrial sources, and over 600 for municipalities. *See CAFO Permittees*, https://dnr.wi.gov/topic/AgBusiness/data/CAFO/cafo_all.asp; *Current WPDES Wastewater Permit Holders*, https://dnr.wi.gov/topic/wastewater/PermitLists.html.

drafting was hypothetically possible, legislators are typically not experts in the critical areas of regulation handled by Wisconsin agencies. Requiring such exacting and copious legislative drafting in highly technical areas would result in ineffective, unnecessarily strict, or otherwise ill-fitting requirements for individual permittees, as well as permitting backlogs that would impose insurmountable obstacles to the regulated community.

Despite necessity and long-standing practice, Intervenors' revision of Act 21 would render agencies helpless to execute the law as the Legislature intended, undermining the Legislature's own prerogative to ensure the effective implementation of statutory programs. In the present context, Wisconsin would become unable to comply with the federal Clean Water Act ("CWA"), under which Wisconsin is currently delegated the authority to issue WPDES permits, because DNR would be prohibited from effectively tailoring permits so as to meet Congressional mandates.[4]

[4] The CWA requires that for a state to be delegated permitting authority, it must have "adequate authority to carry out" and enforce standards no

Therefore, stripping DNR of authority to effectively implement the WPDES program would force the agency to choose between two absurd options: 1) issue permits that openly violate federal law (and risk losing all state permitting authority to federal regulators); or 2) refrain from issuing any permits at all, leaving the regulated community unable to function without exposure to civil and even criminal liability, Wis. Stat. § 283.91. *See State ex rel. Kalal*, 2004 WI 58, ¶ 46 (statutory language to be interpreted "to avoid absurd or unreasonable results"). There is no indication that the Legislature intended such an absurd result.

C. Act 21 Does Not Repeal by Implication Countless Other Provisions of Wisconsin Law

This Court's long-standing precedent holds that "[r]epeals by implication are not favored." *State v. Dairyland Power Coop.*, 52 Wis. 2d 45, 51, 187 N.W.2d 878 (1971). No repeal by implication exists unless the earlier statute "is so manifestly inconsistent and repugnant to the later act that they

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less stringent than those required under federal law. 33 U.S.C. §§ 1342(b), 1370. The regulatory authority that a sweeping interpretation of Act 21 would eliminate is a prerequisite to continued delegation.

cannot reasonably stand together … or when the intent of the legislature to repeal by implication clearly appears." *Id.* (citations omitted). This rule is "'particularly applicable' where the statute claimed to have been repealed is one of long-standing and frequent use." *Id.*

Act 21 contains no express repeal, and legislative intent to bulldoze through countless statutory provisions does not "clearly appear." As explained above, when properly interpreted, Act 21 is in harmony with the Legislature's broad but explicit grants of agency authority to effectuate its policy goals, as was done in the WPDES permitting statute. And § 283.31(3), calling on DNR to condition permits as necessary to protect Wisconsin's waters, is undeniably of "long-standing and frequent use," making the rule expressed in *Dairyland Power Coop.* "particular applic[able]."

Contrary to Intervenors' position, which functionally repeals an untold swath of statutory texts by rendering them meaningless, Act 21 limits agency authority inferred solely from a mission statement or statement of purpose. Act 21 clarifies the function of precatory statutory text—it simply

does not operate as a wholesale repeal by implication of substantive responsibilities imposed by the Legislature.

D. Other State Courts Have Rejected an Extreme Limitation on Agency Authority

Legislation akin to Act 21 is very rare, but at least one state with similar limitations on agency authority has rejected Intervenors' extreme interpretation. Florida's Administrative Procedure Act ("Florida APA") defines "rulemaking authority" as "statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any … 'rule.'" Fla. Stat. § 120.52(17). Florida's agencies may not exercise authority on the grounds that "it is reasonably related to the purpose of the enabling legislation …, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy." Fla. Stat. § 120.52(8); § 120.536(1).

Florida law does not draw the same distinction between "explicit" and "specific" that Wisconsin law does because of a very different legislative history; in Florida both terms convey that agency authority can be general so long as it is granted

unambiguously. *See SW Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 599 (Fla. 1st Dist. Ct. App. 2000) ("the term 'specific' was not used … as a synonym for the term 'detailed.'"); *Fla. Elections Comm'n v. Blair*, 52 So. 3d 9, 13 (Fla. 1st Dist. Ct. App. 2010) (because of context and legislative history, "[t]he words 'explicit' and 'specific' are interchangeable"). Unlike Wisconsin, where the Legislature used "explicit" and "specific" in distinct ways within the same legislative enactment, in Florida the two terms were used a decade apart, and "explicit" merely codified existing case law. *Blair*, 52 So. 3d at 12–13. Therefore, in Florida, both terms comport with the clear meaning of "explicit" under Act 21.

Yet, Florida courts do not interpret these amendments to the Florida APA to render countless statutory provisions meaningless. Instead, it is not necessary "for the statute[] to delineate every aspect" of how an agency may implement the law. *United Fac. of Fla. v. Fla. State Bd. of Educ.*, 157 So. 3d 514, 517–18 (Fla. 1st Dist. Ct. App. 2015).

In *United Faculty*, the Board of Education's standards for faculty contracts were challenged as an invalid exercise of

authority under the Florida APA, much as DNR's authority is challenged here. *Id.* at 516. The Court disagreed, recognizing that the legislature had explicitly empowered the Board to establish "minimum standards" and "conditions of employment as the [Board] deems necessary and proper." *Id.* at 517. While the enabling statutes were not "affirmative directives" to the agency, "they clearly indicate that the Legislature intended that the Board adopt rules" for employment contracts that address "conditions of employment" generally. *Id.*

Under this correct interpretation, authority explicitly granted to DNR includes the ability to establish "conditions" in the form of "effluent limitations" and "[a]ny more stringent limitations … necessary" based on real-world circumstances and applicable water protection standards. *See* Wis. Stat. § 283.31(3). There is no illogical requirement that granular administrative decision-making authority be granted as a detailed list of itemized options.

A similar holding is appropriate here. Florida's courts have held just what this Court reasoned in *Lake Beulah*

Management District v. DNR: "the fact that [a statute contains] broad standards does not make them non-existent ones." 2011 WI 54, ¶ 43, 335 Wis. 2d 47, 799 N.W.2d 73. Instead, this Court held that DNR was explicitly delegated "broad authority" to "manage, protect, and maintain waters of the state," and an absence of detailed specificity in the enabling statute did not strip DNR of its authority to do its job. *Id.* at ¶ 39. This Court also agreed with the parties in *Lake Beulah* that "Act 21 does not affect our analysis." *Id.* at n.31. *Lake Beulah* was correctly decided, remains true to statutory text and long-standing practice, and avoids the absurd results brought about by Intervenors' extreme interpretation of Act 21.

CONCLUSION

For the foregoing reasons, *Amici* respectfully ask the Court to uphold DNR's authority to competently do its job, and unambiguously adopt the holding of *Lake Beulah*.

Dated this 24th day of March, 2021.

Respectfully submitted,

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CERTIFICATES

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. This brief contains 13 point font size for body text and 11 point font size for footnotes and quotations. The length of this brief is 18 pages and 2,981 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2021, this Brief of Non-Parties Food & Water Watch, Family Farm Defenders, and Sustain Rural Wisconsin Network as *Amici Curiae* was sent via U.S. Mail to:

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