STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2024AP458

Wisconsin Dairy Alliance Inc., and Venture Dairy Cooperative,

Plaintiffs-Appellants,

v.

Wisconsin Department of Natural Resources and Wisconsin Natural Resources Board,

Defendants-Respondents,

Wisconsin Farmers Union and Clean Wisconsin,

Intervenors-Respondents.

APPEAL FROM A DECISION AND ORDER ENTERED IN THE CALUMET COUNTY CIRCUIT COURT, THE HONORABLE CAREY J. REED, PRESIDING

WISCONSIN FARMERS UNION AND CLEAN WISCONSIN'S PETITION TO BYPASS THE COURT OF APPEALS

Evan Feinauer, Staff Attorney (SBN 1106524)
Clean Wisconsin
634 West Main Street, Suite 300
Madison, WI 53703
efeinauer@cleanwisconsin.org
608.251.7020 x321

Attorney for Clean Wisconsin

Adam Voskuil, Staff Attorney (SBN 1114260)
Midwest Environmental Advocates
634 West Main Street, Suite 201
Madison, WI 53703
avoskuil@midwestadvocates.org
(608) 251-5047 x7

Attorney for Wisconsin Farmers Union

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INTRODUCTION

Intervenors-Respondents Clean Wisconsin and Wisconsin Farmers Union ("CW and WFU") petition to bypass the court of appeals pursuant to Wis. Stat. §§ 808.05 and 809.60.

Plaintiffs-Appellants Wisconsin Dairy Alliance and Venture Dairy Cooperative (collectively "WDA") seek to invalidate two longstanding administrative rules ("the Rules") the Department of Natural Resources (DNR) promulgated to control water pollution from Wisconsin's largest livestock facilities, concentrated animal feeding operations (CAFOs). The first rule, the "Duty to Apply," requires large CAFOs to obtain a Wisconsin Pollutant Discharge Elimination System (WPDES) permit. Wis. Admin. Code § NR 243.11(3)(a). The second rule defines "agricultural storm water discharge," a type of discharge that is excluded from the definition of "point source" under state law. Wis. Admin. Code § NR 243.03(2); Wis. Stat. § 283.01(12)(a). The Rules are authorized by statutes requiring DNR to protect waters of the state from harm.

For over 40 years, DNR has required large CAFOs to have a WPDES permit. DNR established this requirement because statute explicitly requires any discharge to any waters of the state by any point source be covered by a WPDES permit, and large CAFOs discharge to waters of the state when they land apply manure in fields or store manure in lagoons at or below grade. The scientific consensus for this critical fact has only grown stronger since the original CAFO rules were promulgated in 1984 and last updated in 2007. It is also a fact expressly uncontested by WDA in this case.

All the Rules do is implement the unambiguous statutory requirement that any discharge of pollutants be covered by a WPDES permit. WDA is neither challenging DNR's factual determination that large CAFOs discharge, nor alleging that it has member CAFOs that operate without discharges. (R.37:9, n.8.) Fundamentally, then, WDA is not harmed by the Rules because they require nothing of it or its members that the legislature did not already require by statute. WDA has thus failed to even present a justiciable controversy.

Despite the Rules' clear authority, uncontested factual basis, and long pedigree, WDA seeks to undermine DNR's CAFO permitting program in its entirety, calling the Rules "unnecessary regulations." (R.3:5; App.005; *see also* R.82:13.) WDA does so with a fundamentally mistaken argument that the Rules conflict with federal law, violate state law, and lack explicit statutory authority. WDA's arguments question multiple authoritative cases, advance an exceedingly narrow view of DNR's statutory authority that is out of step with this Court's precedent, and ignore the breadth of the public trust doctrine, a constitutional mandate.

The Rules are critical to limiting the pollutants large CAFOs discharge to Wisconsin waters. Without the WPDES permit process, DNR would be without means to impose environmental standards to limit those discharges. That would be a monumental and consequential break with 40 years of regulatory history. The decision in this case will thus have statewide impact for Wisconsinites who rely on safe and healthy groundwater and surface water. Concerns are especially acute for rural communities that often rely on groundwater for their drinking water, because the land application and storage of manure is a major source of nitrates, the state's most widespread (and growing) groundwater contaminant. Invalidation of the Rules would exacerbate an already serious public health problem, imperil public trust waters, result in arbitrary agency inaction on certain CAFOs and, ultimately, CAFOs that discharge yet are not covered by WPDES permits. CW and WFU joined the present case to protect their members from these harms.

This case is one the Court is likely to choose to hear regardless of how the court of appeals rules. The court of appeals is bound by precedent which controls the issues presented in this case. Only this Court can resolve the issues presented by WDA's challenge. Requiring the court of appeals to decide this case will only result in delay and unnecessary expenditure of time and resources, without developing the issues further for this Court's review. CW and WFU request this Court grant the Petition, affirm the circuit court's holding, and hold the Rules

are squarely within DNR's broad authority to protect the waters of the state.

ISSUES PRESENTED

Issue No. 1: Does WDA meet threshold justiciability requirements when they have not shown that the Rules cause any direct injury or that an injury is imminent?

Circuit Court Answer: The circuit court did not address justiciability, instead concluding that WDA's claims failed on their merits.

Court of Appeals Answer: N/A

CW and WFU's Answer: WDA has not been injured by the rules, nor can it point to any real or foreseeable scenario where it or its members are injured by the Rules. Therefore, this Court should find that WDA has not met threshold justiciability requirements.

This issue requires application of well-settled principles to the factual situation, and thus would not be an independent basis for granting the Petition. Wis. Stat. § 809.62(1r)(c)1. CW and WFU thus do not discuss this issue further in this Petition.

Issue No. 2: Are the Rules within DNR's broad grant of statutory authority to protect waters of the state from pollution?

Circuit Court Answer: Yes

Court of Appeals Answer: N/A

CW and WFU's Answer: Wisconsin's statutes grant DNR broad authority to implement a permit program that protects groundwater as well as surface water, including through the Rules.

Issue No. 3: Do the Duty to Apply and definition of "agricultural storm water discharge" violate Wis. Stat. §§ 283.11(2)(a) (the "uniformity provision") and 283.11(2)(b) (the "stringency provision") respectively?

Circuit Court's Answer: The circuit court, relying on Maple Leaf Farms v. DNR, held that the Rules do not violate state law.

Court of Appeals Answer: N/A

CW and WFU's Answer: This Court should find that challenged rules do not violate the uniformity or stringency provisions. First,

limitations of Wis. Stats. § 283.11(2)(a) and (b) are not implicated by the challenged Rules; those statutory limits address different types of regulation or altogether different regulatory programs. Second, Wisconsin's WPDES program is broader in scope than that of the federal Clean Water Act. Third, the Rules are consistent with federal requirements, in any event.

STATEMENT OF THE CASE

I. Legal and Factual Background

a. Federal Water Permitting

The federal Clean Water Act ("CWA") was originally passed by Congress with the goal of eliminating discharges to "waters of the United States"[1] by 1985, and to make those waters fishable and swimmable. *See* 33 U.S.C. § 1251(a).

The CWA authorizes the Environmental Protection Agency (EPA) to administer the National Pollutant Discharge Elimination System (NPDES), a permitting program to control the release of pollution into the waters of the state. 33 U.S.C. § 1342.

While EPA has primary authority over the NPDES program, "the Clean Water Act envisions a partnership between the states and the federal government." *Andersen v. DNR*, 2011 WI 19, ¶34, 332 Wis. 2d 41, 796 N.W.2d 1 (citations omitted); *see also Ark. v. Okla.*, 503 U.S. 91, 101 (1992). EPA may delegate its authority to a state agency so long as the state program imposes standards at least as stringent as those of the federal program. 33 U.S.C. § 1342(b). However, state programs may impose more stringent requirements, so long as they retain the minimum specified federal requirements. 40 C.F.R. §§ 122.1(a)(2), 123.25(a), 123.25(a)NOTE.

b. Wisconsin Water Permitting Program

In 1974, EPA authorized Wisconsin, via the DNR, to administer the NPDES program as part of the state's WPDES program. *See* Wis.

[1] Though "waters of the United States" has historically been subject to shifting definitions, it has never included groundwater.

Stat. § 283.001(2); *see also* Letter from Russell Train, Administrator, EPA, to Wisconsin Governor Patrick J. Lucey, DNR (Feb. 4, 1974); *Andersen*, 2011 WI 19; 33 U.S.C. § 1342(b).

The baseline requirement of the WPDES program is that the discharge of any pollutant to any waters of the state by any person is unlawful unless done under a WPDES permit issued by DNR. Wis. Stat. § 283.31(1). "Discharge of pollutant" is defined to mean "any addition of any pollutant to the waters of this state from any point source." Wis. Stat. § 283.01(5). And "point source" is specifically defined to include a concentrated animal feed operation, or CAFO. Wis. Stat. § 283.01(12)(a).[2] Put together, statute explicitly prohibits CAFOs from adding any amount of any pollutant to any waters of the state unless that discharge is covered by a WPDES permit. WPDES permits expire and must be renewed every five years, meaning DNR is constantly processing applications for new or re-issued permits. Wis. Stat. § 283.53(1).

Wisconsin's program both implements state and federal requirements for regulating discharges to surface waters and incorporates Wisconsin's groundwater protection standards into the WPDES permitting scheme. *See* Wis. Stat. §§ 283.31(1), (3)(f). This broader scope is necessary to ensure protection of all waters of the state. Wis. Stat. § 283.001(1)(a). "Waters of the state" encompass all surface water and groundwater, natural or artificial, public or private, within the state or under its jurisdiction. Wis. Stat. § 283.01(20). Wis. Stat. § 283.001(1) sets forth the policy and purpose of Wisconsin's WPDES program, recognizing that:

> Unabated pollution of the waters of this state continues to ... endanger public health; to threaten fish and aquatic life, scenic and ecological values; and to limit the domestic, municipal, recreational, industrial, agricultural and other uses of water. It is the policy of this state to

[2] "Point source" does not include "agricultural storm water discharges." Wis. Stat. § 283.01(12)(a); Wis. Admin. Code § NR 243.03(2). WDA argues DNR's definition unlawfully generates liability for CAFOs, but we understand this argument to be wholly duplicative of its arguments against the Duty to Apply itself and do not discuss it further here.

> restore and maintain the chemical, physical, and biological integrity of its waters …

The legislature granted DNR "all authority necessary to establish, administer and maintain a state pollutant discharge elimination system to effectuate the policy set forth under sub. (1)." Wis. Stat. § 283.001(2).

c. Wisconsin Water Authorities

DNR's water regulatory and permitting authority is not limited to Chapter 283 of the Wisconsin Statutes.

Chapter 281 of the Wisconsin Statutes governs a range of water resource issues. Recognizing the threat posed by present and potential water pollution, the legislature delegated DNR "necessary powers [ ] to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state." Wis. Stat. § 281.11. Chapter 281 "explicitly" requires DNR to carry out the planning, management, and regulatory programs necessary to prevent and abate water pollution. *See Clean Wisconsin v. DNR*, 2021 WI 72, ¶25, 398 Wis. 2d 433, 961 N.W.2d 611 ("*Clean Wisconsin II*").

Wisconsin Stat. Ch. 160 gives DNR "broad authority to establish, monitor, and enforce health-based groundwater standards." *Clean Wisconsin v. DNR*, 2021 WI 71, ¶30, 398 Wis. 2d 386, 961 N.W.2d 346 ("*Clean Wisconsin I*"). The legislature passed Chapter 160 in 1984 with the purpose of "minimiz[ing] the concentration of polluting substances in groundwater through the use of numerical standards in all groundwater regulatory programs." Wis. Stat. § 160.001. Chapter 160 does not create its own permitting program for discharges to groundwater but instead supplements other regulatory authority and programs, meaning regulatory agencies are required to incorporate groundwater enforcement standards and preventative action limits into those other regulatory programs. Wis. Stat. § 160.001(3). Once enforcement standards and preventative action limits have been set for a contaminant, "each regulatory agency shall review its rules and commence promulgation of any rules or amendments of its rules

necessary to ensure that the activities, practices and facilities regulated by the regulatory agency will comply with this chapter." Wis. Stat. § 160.19(1). Enforcement standards and preventative action limits have been set for both nitrates and bacteria; the contaminants discharged to groundwater by large CAFOs. Wis. Admin. Code §§ NR 140.10, 12. Accordingly, DNR is required by Chapter 160 to have rules "necessary to ensure" CAFOs comply with groundwater standards.

This explicit inclusion of groundwater in Wisconsin's program makes plain that the WPDES program "is broader and more stringent than the federal program." *Maple Leaf Farms v. DNR*, 2001 WI App 170, ¶15, 247 Wis. 2d 96, 633 N.W.2d 720. In short, DNR is required to implement the WPDES program to prevent pollution of groundwater as well as surface water. *See Id*.

d. DNR's CAFO Permitting Scheme

DNR has required large CAFOs to apply for a WPDES permit for 40 years, since the original CAFO rules were promulgated in 1984. (R.41:14-15.) Wis. Admin. Code § NR 243.11(3)(a).

DNR requires these CAFOs to hold a WPDES permit because they discharge pollutants to surface water and groundwater. CAFOs raise large numbers of animals in confinement, and a result of such high-density concentration of livestock is the aggregation of manure and wastewater. These contaminants are often stored at or below grade in lagoons that are designed to leak, (R.51:43,) and eventually spread, typically untreated, on fields. Discharges occur at the production area, from manure storage lagoons, when trucking or transporting manure, and as the manure is spread.

DNR cited its authority to require permits for a discharge to any waters of the state, including groundwater, and the numerous ways CAFOs discharge when promulgating the most recent version of Chapter NR 243 of the Wisconsin Administrative Code in 2007. DNR explained: "Wisconsin's WPDES permit program has a broader scope than the federal program." (R.47:5; App.047) (referencing groundwater). DNR also concluded:

> Under ch. 283, Stats., all discharges to waters of the state, including groundwater require a WPDES permit. The Department believes that current science supports that all manure or process wastewater storage systems leak some pollutants to groundwater and that land application of manure or process wastewater will result in a discharge of pollutants to groundwater.

(R.47:5; App.047 (emphasis added); *see also* R.48:41; App.187 (". . . all large CAFOs that land apply manure or process wastewater or that have storage structures at or below grade . . . have actual discharges to waters of the state.") (emphasis added).) The administrative record containing DNR's factual conclusions was reviewed by both EPA and the legislature prior to promulgation on July 1, 2007.

Over the last 20 years, DNR has issued and re-issued thousands of CAFO permits based on the authority granted in Chapter 283. The Department has received many thousands of comments from concerned citizens, community groups, local governments, nonprofits, and the EPA, urging it to use the WPDES permitting program to do more to address water pollution from large CAFOs in Wisconsin.[3] That well-established system is at risk of being undercut, leaving communities without a valuable and necessary tool to protect their waters.

II. Procedural Background

This case arises from a declaratory judgment action filed in Calumet County on May 26, 2023 by two CAFO interest groups that are opposed to what they describe as "unnecessary regulations." (R.3:4.; App.004) The groups brought this case on behalf of themselves and their member CAFOs, disputing DNR's authority to enforce the Rules.

Before briefing began, CW and WFU jointly filed a motion to intervene. (R.19.) Intervenors highlighted their members' longstanding interests in clean and safe drinking water, rural communities who rely on those resources, and the immediate effect a ruling in favor of WDA

[3] For proposed WPDES permits, DNR holds a notice and comment period, provides public access to information, and holds public hearings. Wis. Stat. §§ 283.39, .43, .49. If large CAFOs no longer need to obtain WPDES permits, these public engagement and transparency opportunities will be lost.

would have on their members across the state. (R.20.) No party opposed the motion, which was granted on September 12, 2023. (R.31; App.039-040)

WDA and DNR filed cross motions for summary judgment. (*See generally* R.36-37.) CW and WFU filed briefs opposing WDA's motion for summary judgment and supporting DNR's motion for summary judgment. (R.41; 85.)

On January 30, 2024, the circuit court found that the Rules were lawful and that they did not exceed DNR's statutory authority or violate the statutes regarding compliance with federal standards. (R.94:46; App.277.) In reaching that decision, the circuit court found that the arguments raised by WDA, namely the breadth of the "uniformity provision," were discussed in detail and rejected by the court of appeals in *Maple Leaf Farms*. The circuit court therefore denied WDA's motion for summary judgment and granted DNR's motion. (R.94:48; App.279; R.102; App.283-284.) The circuit court declined to reach the issue of whether WDA presented a justiciable action.

WDA filed its appeal on March 8, 2024. Briefing to the court of appeals is set to conclude on August 21, 2024.

ARGUMENT

The Court may take jurisdiction of an appeal pending in the court of appeals if it grants direct review upon a petition for bypass filed by a party. Wis. Stat. § 808.05(1). [4] The Court's Internal Operating Procedures provide guidance on when direct review is appropriate:

> A matter appropriate for bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62(1), and one the court

[4] A petition may be filed no later than 14-days following filing of respondent's brief. Wis. Stat. § 809.60(1)(a). Intervenors-Respondents and Defendants-Respondents filed response briefs on August 7, 2024, thus this petition is timely. This Court has identified a preference that petitions to bypass be filed after filing of the primary briefs in the matter. (Order Denying Petition For Bypass, *Becker v. Dane Cnty.*, No.2021AP1343 (Wis. Nov. 16, 2021). We therefore filed our response brief in the court of appeals prior to filing this petition.

> concludes it ultimately will choose to consider regardless of how the Court of Appeals might decide the issues.

Wisconsin Supreme Court Internal Operating Procedure § III.B.2.

Criteria for review include, in relevant part, whether a:

> a real and significant question of state constitutional law is presented . . . a decision by the supreme court will help develop, clarify or harmonize the law, and . . . The question presented is a novel one, the resolution of which will have statewide impact; or [] The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

Wis. Stat. §§ 809.62(1r)(a), (c).

The Court should grant the Petition to Bypass because criteria for review are met and this case is one the Court will ultimately choose to hear, regardless of how the court of appeals decides.

I. Bypass is Appropriate because the Criteria for Review are Met.

a. A ruling from the Court would help develop, clarify, or harmonize the law in several important areas.

Given the issues presented, a ruling from this Court would help develop, clarify, or harmonize the law regarding agency rulemaking authority, the interaction of federal standards with DNR rules in the context of Wisconsin's delegated Clean Water Act program, and Wisconsin's groundwater protection standards..

This appeal creates potential confusion about how to apply the Court's longstanding "elemental approach" for determining whether an agency rule is authorized by statute. *Wis. Ass'n of State Prosecutors v. Wis. Emp't Rels. Comm'n*, 2018 WI 17, ¶¶36-39, 380 Wis. 2d 1, 907 N.W.2d 425. Under this approach, "the reviewing court should identify the elements of the enabling statute and match the rule against those elements. If the rule matches the statutory elements, then the statute expressly authorizes the rule." *Id.* ¶39. If the rule conflicts with an unambiguous statute or a clear expression of legislative intent, the rule is invalid. *Id.* ¶36.

WDA's argument turns on the assertion that 2011 Wis. Act 21 fundamentally changed agency rulemaking authority by adding an "explicit authority" requirement and prohibiting agencies from relying on statutory statements of intent and general powers provisions to conduct rulemaking. Wis. Stat. §§ 227.11(2)(a)1, 2. From that framework, WDA contends that the Rules are invalid because they violate each of these limitations on rulemaking authority. (*See* WDA Br. 39, 41.)

This argument fails because the Rules do not rely on "implied" or "implicit" authority and do not impermissibly depend on intent or general powers provisions. Instead, the Rules are authorized by an explicit statutory authorization (indeed, mandate) that DNR prohibit unpermitted discharges of contaminants to waters of the state by any point source. Wis. Stat. § 283.31(1). In short, a rule requiring large CAFOs to obtain a WPDES permit because they discharge "matches" the statutory elements prohibiting unpermitted discharges.

This authorization is buttressed by other provisions in Chapters 160, 281, and 283. Indeed, this Court recently held that the legislature granted DNR broad, explicit authority in Chapter 283 to implement the WPDES permitting program to protect waters of the state from discharges caused by large CAFOs. *Clean Wisconsin I*, 2021 WI 71, ¶¶26-39; *see also Maple Leaf Farms*, 2001 WI App 170, ¶¶15, 27. Connecting this recent precedent to the current issue of DNR rulemaking authority would harmonize the law. The Rules are also authorized because they are "necessary to effectuate the purpose of the statute[,]" *i.e.*, to prevent water pollution caused by unpermitted discharges. Wis. Stat. § 227.11(2); *see supra* at 5-7 (discussing purpose of relevant statutes). Taken together, the Rules readily comply with the "elemental approach" this Court has consistently applied in challenges to agency rulemaking authority, and a ruling to that effect would be helpful in creating certainty around this critical permitting requirement.

When presented with the statutes and caselaw, WDA, by contrast, argues *Clean Wisconsin I* supports its view that DNR lacks authority for the Rules. (WDA Br. 42-44.) WDA also contends the earlier *Maple Leaf*

Farms decision is no longer controlling to the extent it conflicts with WDA's interpretation of Wis. Stats. § 227.11(2)(a)1 and 2 to eliminate the statutory basis for the Rules' authorization. (WDA Br. 41; R.94:17-18; App.248-249.) WDA also argues the Court's opinion in *Wisconsin Legislature v. Palm* invalidated *Maple Leaf Farms* in this regard. (*See* WDA Br. 41, *citing Wis. Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.)

The issues presented thus call out for clarification as to how Wis. Stats. § 227.11.(2)(a)1 and 2 do or do not limit DNR's rulemaking authority, and how these square with established precedent applying the elemental approach. Given this, a clear ruling from this Court that the legislature has conferred broad, explicit statutory authority on DNR to administer the WPDES program, including through implementing the longstanding Rules, and that Wis. Stats. § 227.11(2)(a)1 and 2 did not *sub silentio* rescind this authority and supersede precedent, would further clarify and harmonize Wisconsin law concerning agency rulemaking authority.

This appeal also raises questions over the interplay between the Clean Water Act and Wisconsin's delegated program, chiefly, when is Wisconsin limited by the federal program? Wis. Stats. § 283.11(2)(a) and (b) require certain DNR rules relating to aspects of Wisconsin's delegated CWA program to "comply with and not exceed" and "be no more stringent than" certain federal law requirements, respectively. DNR has at times called these the "uniformity" and "stringency" provisions.[5] WDA argues these provisions apply to the Rules and that the Rules fail to comply with or exceed federal law. CW, WFU, and DNR contend these provisions do not limit DNR's authority to implement the Rules because they do not apply here and, even if they did, the Rules do not exceed/are not more stringent than federal law. A ruling from this Court would thus clarify

[5] There is meaningful semantic difference between directing that a rule "comply with and not exceed" another authority and requiring that the rule be "uniform" with that authority. As such, literal uniformity is not what the provision requires by its plain text, nor is that what *Maple Leaf Farms* understood it to require.

the limits placed on DNR rulemaking under Wis. Stats. § 283.11(2)(a) and (b).

Importantly, precedent forecloses WDA's interpretation of Wis. Stat. § 283.11(2)(a), because *Maple Leaf Farms* already considered and rejected it. In *Maple Leaf Farms*, a CAFO challenged DNR's authority to draft permit conditions relating to manure spreading on fields where the manure was not initially produced. 2001 WI App 170, ¶1. The petitioner in *Maple Leaf Farms* argued Wis. Stat. § 283.11(2)(a) prohibits DNR from requiring CAFOs to meet WPDES permit conditions relating to their offsite land spreading activities, because the federal program does not cover offsite land spreading. *Id*. ¶11.

The court of appeals rejected the petitioner's interpretation of Wis. Stat. § 283.11(2)(a). The court observed that states are authorized to maintain their own permitting schemes so long as they are at least as stringent as federal law, and then noted a pair of important differences between the state and federal programs. First, Wisconsin, unlike the federal program, regulates groundwater. *Maple Leaf Farms*, 2001 WI App 170, ¶10. Second, Wisconsin law authorizes DNR to impose effluent limitations that are more stringent than federal law when necessary to meet water quality standards. *Id*. The court further held that provisions in Chapter 283, the enabling statute, confers broad authority on DNR to protect groundwater, not just surface water, and "clearly and unambiguously empowers the DNR to regulate where groundwater may be affected by the discharge of pollutants." *Id*. ¶15 (*citing* Wis. Stat. §§ 283.001(1), (2), 281.11, .12, and related statutes and regulations), *see also id*. ¶27 (*citing* Wis. Stat. § 283.31). The court further agreed with DNR's position that "this [uniformity] provision applies only where the federal program regulates the activity in question, for example, where the EPA has imposed specific discharge limits for defined categories of industrial discharges and the DNR has superimposed more stringent limits. It would not apply where the federal government has chosen not to regulate at all." *Id*. ¶16. Accordingly, the court held that DNR's broad grant of authority to protect surface water and groundwater from discharge of pollutants was not limited by Wis. Stat. § 283.11(2)(a). *Id*.

¶20; *see also*, *Clean Wisconsin I*, 2021 WI 71, ¶¶28, 32 (*citing Maple Leaf Farms* with approval).

Now, WDA challenges the Duty to Apply based on the same Wis. Stat. § 283.11(2)(a) argument that was rejected in *Maple Leaf Farms*: the federal program does not have a Duty to Apply rule, therefore neither can Wisconsin. (*See* R.3:8; App.008; R.37:2, 8, 15-18; R.82:39-45; WDA Br. 28-33.) As in *Maple Leaf Farms*, Wis. Stat. § 283.11(2)(a) does not limit DNR's authority because the federal government does not regulate the activity in question (here discharges to groundwater) and because the Duty to Apply is not the kind of limitation that sub. (2)(a) concerns, *e.g.*, numeric effluent limits.

WDA acknowledges that *Maple Leaf Farms* held that the uniformity provision does not apply where the federal government does not regulate the activity in question but attempts to argue its position is consistent with *Maple Leaf Farms* by construing the "activity in question" not as discharges to groundwater, but as "NPDES permitting to CAFOs" generally. (WDA Br. at 33.) Such a broad characterization of "the activity in question", however, would read both *Maple Leaf Farms's* holding and the text of Wis. Stat. § 283.11(2)(a) out of existence. It would interpret the scope of "the activity in question" at such a high level of generality that it would always be an "activity" that the federal program regulates and thus the uniformity provision would always apply. It is simply not consistent with *Maple Leaf Farms*, which did not construe the "activity in question" as "NPDES permitting for CAFOs" but as "the land application of manure on off-site croplands," a much narrower "activity." 2001 WI App. 170, ¶¶4, 16. WDA elsewhere seeks to evade this point by arguing the Rules do not even concern discharges to groundwater because they do not contain the word "groundwater." (R.94:12; App.243.) But of course, the Duty to Apply covers large CAFOs that discharge to "waters of the state" which is defined to include groundwater, and those permits include conditions to ensure groundwater standards are met. Wis. Stat. § 283.31(3)(f). Because this attempt to avoid conflict with precedent undermines the holding and rationale of that decision, this argument should be understood for what it really is, a request that the

case be modified, set aside, or otherwise not given force. A ruling from this Court that *Maple Leaf Farms* remains good law on the proper interpretation of Wis. Stat. § 283.11(2)(a) would thus clarify this issue.

Regarding the "stringency provision" in Wis. Stat. § 283.11(2)(b), WDA makes the novel argument that this provision applies to the definition of "agricultural storm water discharges." It does not. As more fully explained in briefing, this provision applies to "storm water discharges," an entirely different regulatory program, found under Wis. Stat. § 283.33. (*See* WDA Br. 19-25; CW and WFU Br. 40-41.) This fundamental error by WDA introduces confusion into Wisconsin's CWA program, and a ruling from this Court providing a correct interpretation of the provision would clarify the law.

A ruling would also help harmonize the authority and obligations imposed by Wisconsin's groundwater law, Chapter 160, on agencies like DNR, with the Department's authority and obligation to implement the WPDES program under Chapter 283. WDA's arguments ask that Wisconsin's groundwater law be functionally ignored or treated as inoperative by precluding DNR from using the legislatively-prescribed method—issuance of WPDES permits—for carrying out legislatively-prescribed requirements—that large CAFOs not discharge to groundwater without a permit and those discharges cannot cause exceedances of groundwater quality standards. That is contrary to the plain text of both Wisconsin's groundwater law and the legislature's choice to incorporate groundwater protections into the WPDES program. *See supra* 6-7. A ruling from this Court would thus clarify important questions of how Wisconsin groundwater law authorizes DNR to act when presented with discharges to groundwater.

b. This case presents novel questions, the resolution of which will have significant impacts across the state.

This case concerns regulatory requirements that have been on the books for 40 years, applied countless times to CAFOs across the state, and treated as valid and enforceable in this Court as recently as three years ago. *See, generally, Clean Wisconsin I*, 2021 WI 71. The Rules themselves are thus the opposite of novel. Yet, no court has previously

resolved a direct challenge to DNR's authority to promulgate or enforce the Rules or argued that these Rules violate the "uniformity" or "stringency" provisions. This case therefore presents novel questions. Wis. Stat. § 809.62(1r)(c).

Resolution of this case will have statewide impact. It will affect the Department's permitting program, CAFOs, and the citizens of this state who rely on clean water for drinking, fishing, swimming, and myriad other uses. If the approximately 335 large CAFOs spread throughout the state no longer need to obtain WPDES permits and meet the environmental standards these permits contain, that is a change of massive significance to the people of this state. CW and WFU discuss these impacts further below. *See infra*, Argument Section II.b.

c. The question presented is legal in nature and likely to recur without a ruling from the Court.

This appeal presents questions of law. Whether an agency rule is authorized by statute is a question of law. *Wis. Ass'n of State Prosecutors*, 2018 WI 17, ¶31. And whether the challenged Rules are invalid because they run afoul of Wis. Stats. § 283.11(2)(a) and (b) is also a question of law because it presents questions of statutory interpretation. *Id.*

The procedural posture of this appeal further demonstrates there are no disputes of fact. All parties agree the case is fit for resolution by summary judgment, there are no disputes of material fact. Moreover, WDA has been explicit that it is not challenging the factual basis for DNR's rulemaking at issue in this case, that large CAFOs that land apply or store manure at or below grade discharge to waters of the state. (R.37:9, n.8)

The questions of law presented by this case are also likely to recur. In fact, they already have. While a Wisconsin court has never resolved a legal challenge to the Duty to Apply, this is not the first time a challenge to that rule has been filed. A claim challenging the validity of the Duty to Apply rule was raised in a 2017 action by a different dairy industry group. *Dairy Business Association, Inc. v. DNR*, No. 17-CV-1014 (Wis. Cir. Ct. Brown Cty.). That challenge resulted in a settlement and

voluntary dismissal of the claim that the Duty to Apply is unauthorized. (See R.49:21-27.) (The relevant provisions of the settlement are recital D and agreement term 4.b.) More fundamentally, the number and size of CAFOs is only growing in Wisconsin, as are concerns about their impacts to water quality. It is thus reasonable to believe legal challenges to how DNR implements the WPDES permitting program for this class of discharger are likely to continue, if not increase in the coming years.

d. This appeal presents the real and significant question of whether an interpretation of statute that precludes DNR from protecting public trust waters from harm caused by CAFOs is consistent with the constitutional public trust doctrine.

CW and WFU, as well as DNR, argued in both the circuit court and in our appellate briefs that WDA's interpretations of statute and requested relief were inconsistent with Wisconsin's public trust doctrine. (R.41:36-37, R.51:50-51; *see also* CW and WFU Br. 30-31, DNR Br. 46-46.) The public trust doctrine requires the state to hold in trust and safeguard the state's navigable waters for the use and enjoyment of all Wisconsin residents. Wis. Const. Art. XI, § 1; *Clean Wisconsin II*, 2021 WI 72, ¶12. The legislature delegated some of the state's responsibility for administering the trust to DNR. *Id*. ¶13. DNR has the affirmative duty and authority under the public trust doctrine to act when presented with concrete, scientific evidence of harm to public trust waters. *Id*. ¶¶17-19.

We reiterate here that DNR has found concrete, scientific evidence that large CAFOs discharge contaminants to waters of the state when they land apply manure or store manure at or below grade, and that WDA does not contest this evidence. As CW and WFU articulated in support of their motion to intervene before the circuit court, some of Wisconsin's navigable surface waters are degraded due to nutrient loading caused, in part, by large CAFOs. (R.20:11.) This has reduced if not eliminated the ability of Wisconsin's residents to exercise their public trust rights in those waters, *e.g.*, fishing, boating, swimming, scenic enjoyment, etc. (R.26, 27; App.017-038.)

An interpretation of the relevant statutes that prevents DNR from requiring known dischargers to comply with WPDES permits designed to limit the impact to surface water quality caused by those discharges creates a constitutional problem because it would leave DNR without the legal authority to safeguard public trust waters from significant adverse impacts when presented with concrete, scientific evidence of harm, the precise authority (and duty) this Court recently reaffirmed DNR in *Clean Wisconsin II*.

This constitutional problem also exists, in part, because of a choice the Wisconsin legislature made regarding how to implement Wisconsin's groundwater law. Chapter 160 does not create a freestanding permitting program, but instead directs DNR to enforce groundwater standards through WPDES permits. *See supra* 6-7. If the Duty to Apply were invalidated, it is unclear how DNR would protect groundwaters from contamination caused by these large CAFOs, *i.e,* prevent exceedances of state groundwater quality standards.

This generates a public trust problem because surface waters gain and lose water to groundwater; basic hydrology tells us these systems are interconnected. *County of Maui v. Hawaii Wildlife Fund*, 1040 S. Ct. 1462, 1470 (2020) ("Virtually all water, polluted or not, eventually makes its way to navigable water. This is just as true for groundwater."). Thus, contamination of Wisconsin's groundwaters inexorably results in contamination of Wisconsin's trust waters. Invalidation of the Duty to Apply would prevent DNR from acting to protect public trust waters from harm caused by groundwater contamination, because DNR would no longer have the authority to compel large CAFOs to meet groundwater quality standards in enforceable WPDES permits.

An interpretation of statute that would divest DNR of authority to exercise its delegated role as trustee of Wisconsin's public trust waters was precisely what the Court found impermissible in *Clean Wisconsin II*. Yet, that is what WDA advances here.

WDA has so far responded to these arguments by asserting they are undeveloped and declining to respond to them. (R.82:48.) But the constitutional argument is not undeveloped simply because it is not our

primary argument. Indeed, we present this as an alternative basis for rejecting WDA's position precisely because the constitutional issue is one a court could—and perhaps should—avoid by ruling against WDA on purely statutory grounds. *See Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶51, 376 Wis. 2d 147, 897 N.W.2d 384; *Baird v. La Follette,* 72 Wis. 2d 1, 5, 239 N.W.2d 536, 538 (1976) ("Where there is serious doubt of constitutionality, we must look to see whether there is a construction of the statute which is reasonably possible which will avoid the constitutional question."). This does not mean, however, that the case does not present a real and significant question of constitutional law as contemplated by the criteria for review; it merely means that it also presents other, potentially narrower grounds for rejecting WDA's challenge to the Rules. It also elides the reality that constitutional context can be an important source of statutory meaning. *See Clean Wisconsin II,* 2021 WI 72, ¶18 (reaffirming that interpreting statutes to force DNR to make permitting decisions it knew would cause harm to waters of the state was an "absurd result" that could not be attributed to the legislature) (quoting *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, ¶¶28, 42, 335 Wis. 2d 47, 799 N.W.2d 73).

II. Bypass is Appropriate because this Court will Ultimately Choose to Decide the Case Regardless of how the Court of Appeals Rules.

a. Only this Court can resolve the legal questions presented because *Maple Leaf Farms* and *Clean Wisconsin I* control the issues.

Only this Court can resolve the legal questions presented because granting WDA's requested relief requires that binding precedent be modified, overruled, or not given force, which a court of appeals cannot do.

As already described above, *Maple Leaf Farms* controls many of the central questions presented in this case. And this holding was cited with approval by this Court in 2021. *Clean Wisconsin I,* 2021 WI 71*,* ¶¶28, 32. Further, *Clean Wisconsin I* itself held that DNR has broad, explicit statutory authority to implement the WPDES permitting program as

applied to CAFOs, a holding fundamentally at odds with WDA's assertion that DNR lacks authority to require CAFOs to obtain WPDES at all. *Id*. ¶40.

The court of appeals can neither modify nor overrule precedent. "[O]nly the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals." *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246, 256 (1997). In the event the court of appeals disagrees with precedent, it may only "signal its disfavor to litigants, lawyers and this court by certifying the appeal to this court, explaining that it believes a prior case was wrongly decided. Alternatively, the court of appeals may decide the appeal, adhering to a prior case but stating its belief that the prior case was wrongly decided." *Id. at* 190. *See also, Maple Grove Country Club Inc. v. Maple Grove Estates Sanitary Dist.,* 2019 WI 43, ¶23, 386 Wis. 2d 425, 926 N.W.2d 184 (observing court of appeals application of *Cook* rule). Here, the role of precedent would compel the court of appeals to recognize *Maple Leaf Farms* and either affirm the lower court's ruling, or affirm it while noting that it is bound by *Maple Leaf Farms* and "signal[ing] its disfavor." Given this, the court of appeals' review of the matter cannot add anything to the case's development that would aid this Court's inevitable, ultimate resolution of the questions presented.

This is something the circuit court understood, stating at the hearing on the cross motions for summary judgment that WDA's requested remedy was not consistent with *Maple Leaf Farms* and thus "beyond the authority of the circuit court." (R.94:50; App.281.) The same conclusion would present itself to the court of appeals in considering this matter.

Further, just as the court of appeals cannot modify or overrule precedent, it also cannot treat anything in precedent as mere "dictum" and not part of a holding to be applied in subsequent cases. *Zarder v. Humana Ins*., 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682. The court of appeals thus is not free to ignore or set aside language from a precedential case like *Maple Leaf Farms* as inessential to its holding or otherwise no longer part of the precedential value of the decision.

WDA argues the circuit court was wrong to conclude it was bound by *Maple Leaf Farms*, and that it should have instead found that the case was superseded by 2011 Wis. Act 21. (R.82:29; WDA Br. 41.) When presented with this argument, the circuit court reasonably asked for any case law or legislative action invalidating *Maple Leaf Farms,* and WDA acknowledged that it did not have an authority that directly invalidated the case, instead relying again on its position that *Wis. Legislature v. Palm sub silentio* overruled *Maple Leaf Farms*. (R.94:17-18; App.248-249.) Just as the circuit court was unpersuaded by this argument, the court of appeals would be left to direct the question of whether and to what extent *Maple Leaf Farms* remains good law to this Court.

b. Compelling, statewide interests at stake in this case means the Court would ultimately hear the case regardless of how the court of appeals decides.

Even setting aside the unique ability of this Court to address Wisconsin precedent, the interests at stake in this matter would compel Supreme Court review.

The potential, perhaps likely, outcome of invalidating the Rules would be large CAFOs attempting to opt out of permits and placing the onus on DNR to establish via particularized, affirmative evidence that each of the state's approximately 335 CAFOs are discharging to waters of the state as a precursor to requiring a permit. It would shift a burden onto DNR it would struggle to meet, not based on the (uncontested) facts, but rather resource and staffing constraints that would limit DNR's ability to gather those facts for each of the state's approximately 335 large CAFOs. The result would thus be expensive litigation, agency inaction on certain CAFOs, and ultimately, discharging operations without permits, the precise outcome that statute prohibits. Wis. Stat. § 283.31(1).

WDA's request that CAFOS no longer be required to have a WPDES permit despite the significant, growing, and uncontested evidence that CAFOs contaminate the waters of the state. (R.41:3-10.) And despite the significant harm that shielding these dischargers from having to comply with permit standards would have on the people and

waters of this state, WDA suggests invalidating the Rules would change very little. (R.37:2) WDA's claim is premised on the notion that, because the statute prohibits unpermitted discharges, *if* a CAFO discharges, then it would need a permit anyway. But WDA has continually declined to either challenge the factual determination that all large CAFOs that land apply or store manure at or below grade discharge or allege that it has member CAFOs that do not discharge. What this amounts to is an acknowledgement that these CAFOs discharge, coupled with an argument that—even though everyone who discharges must have a permit—large CAFOs should not be required to have permits. It is thus hard to avoid the conclusion that the outcome described above, wherein CAFOs avoid WPDES permitting requirements despite discharging, is the purpose of the requested remedy. So, the Court should not be persuaded by this effort to downplay the enormity of the relief WDA seeks. Such a result would be catastrophic for Wisconsin's waters and the people who rely on them for drinking water, fishing, recreation, and other uses.

Many Wisconsin communities already face water contamination issues caused by CAFOs and thus have a strong interest in adequate CAFO regulation. CAFOs discharge to both surface waters and groundwater from their production sites and land spreading fields; CAFO WPDES permits are intended to address the numerous contaminant pathways to water in a single document. CW and WFU extensively outlined how production area management, [6] manure storage, [7] manure transfer, [8] and manure application [9] all lead to discharges of contaminants, namely nitrogen, phosphorus, and pathogens, to Wisconsin's water resources. As CAFOs have proliferated in the state, Wisconsin communities have been forced to deal with the

[6] (R.41.4 (*citing Clean Wisconsin I*, 2021 WI 71, ¶19).)
[7] (R.41:5 (*See* EPA, Risk Assessment Evaluation for Concentrated Animal Feeding Operations (May 2004)).)
[8] (R.41:5-6 (*See Eric T. Ronk & Kevin A. Erb,* A Preliminary Analysis of 300 Manure Incidents in Wisconsin (2010)).)
[9] (R.41:5 (*Clean Wisconsin I*, 2021 WI 71, ¶19; *Mark Borchardt et al.*, Sources and Risk Factors for Nitrate and Microbial Contamination of Private Household Wells in the Fractured Dolomite Aquifer of Northeastern Wisconsin (2021)).)

water quality impacts, and those communities have a particular interest in ensuring CAFO must continue to hold WPDES permits.

In Wisconsin, approximately 2/3 of the state population relies on groundwater as their drinking water source.[10] In rural areas, almost all households rely on private wells for their drinking water; there are over 800,000 private wells in the state.

Unlike public water systems, testing, maintenance, remediation, or closure of a private well is often the responsibility of a homeowner, regardless of the source of contamination.[11] Wisconsinites reliant on groundwater for drinking water—largely our state's rural residents—therefore have an especially strong interest in a strong WPDES program for CAFOs. They are responsible for the health and safety of their wells and have relied on DNR's authority requiring CAFOs to hold WPDES permits to track land use, identify potential sources of contamination, comment on permit terms, and challenge permit terms or the issuance of permits.

For example, residents of Northeast Wisconsin have dealt with significant groundwater contamination caused by CAFOs over the last two decades. *See* DNR, Groundwater Collaboration Workgroup Final Report (June 2016); DNR, Final Report of the Northeast Wisconsin Karst Task Force (Feb. 9, 2007). In October 2012, Kewaunee County residents petitioned for administrative review of a CAFO WPDES permit, seeking more protective conditions to safeguard their water. In 2021, this Court affirmed DNR's authority to include those conditions in *Clean Wisconsin I*. In central Wisconsin, Portage County residents have been advocating for groundwater monitoring at CAFO land spreading fields for over seven years. Those residents have pushed for private well monitoring, had the county install groundwater monitoring wells, and challenged the CAFO's permit, calling for monitoring provisions in CAFO WPDES permits.

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[10] Wis. Dep't of Health Servs., Water: Drinking Water, https://dnr.wisconsin.gov/topic/DrinkingWater.

[11] Wis. Dep't of Nat. Resources, Wells, https://dnr.wisconsin.gov/topic/Wells.

Advocating for improvements to WPDES permits would be impossible if CAFOs are no longer required to have them. Further delay in conclusively denying WDA's requested relief burdens DNR's implementation of the WPDES program and citizen advocacy in the interim. DNR is constantly processing WPDES permits for CAFOS for issuance or renewal, and both DNR and affected citizens rely on that process to manage water pollution from CAFOs. The possibility that CAFOs may no longer need WPDES permits creates uncertainty that unsettles planned allocations of time and resources. In short, it is hard for the public to advocate for stronger permits when those same permits may not apply because of this lawsuit. This presents a need to "hasten the ultimate appellate decision." Wisconsin Supreme Court Internal Operating Procedure § III.B.2.

Nonetheless, local advocacy and activism are not anomalies, communities from around Wisconsin actively organize and engage on CAFO permitting issues to protect their water resources. A ruling invalidating DNR's authority would almost immediately put their water at additional risk of contamination and undercut years of advocacy.

CONCLUSION

CW and WFU respectfully ask the Court to grant the Petition, avoid unnecessary intermediate appellate review, and conclusively find the Rules are authorized by and consistent with state statute.

Dated this 21st day of August, 2024.

Respectfully submitted,

Electronically Signed by Evan Feinauer

Evan Feinauer, Staff Attorney
(SBN 1106524)
Clean Wisconsin
634 West Main Street, Suite 300

Madison, WI 53703
efeinauer@cleanwisconsin.org
608.251.7020 x321

Attorney for Clean Wisconsin

Adam Voskuil, Staff Attorney
(SBN 1114260)
Midwest Environmental Advocates
634 West Main Street, Suite 201
Madison, WI 53703
avoskuil@midwestadvocates.org
(608) 251-5047 x7

Attorney for Wisconsin Farmers Union

FORM AND LENGTH CERTIFICATION

I hereby certify this Petition conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (8)(bm), and (8)(g). Although this is a Petition to Bypass, not a Petition for Review, this Petition conforms to the rules in Wis. Stat. § 809.62(2) for a petition for review produced with a proportional serif font. The length of this response is 7,995 words. The word count above is inclusive of all words in the Introduction, Issues Presented, Statement of the Case, Argument, and Conclusion sections, including the text of all such sections' headings and footnotes.

CERTIFICATE OF EFILE/SERVICE

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

Dated this 21st day of August, 2024.

Electronically Signed by Evan Feinauer

Evan Feinauer, Staff Attorney (SBN 1106524)
Clean Wisconsin
634 West Main Street, Suite 300
Madison, WI 53703
efeinauer@cleanwisconsin.org
608.251.7020 x321