Appeal Nos. 2016AP1688
2016AP2502

Cir. Ct. No. 2015CV2633

WISCONSIN COURT OF APPEALS
DISTRICT II

NO. 2016AP1688

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.

NO. 2016AP2502

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.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Pursuant to WIS. STAT. RULE 809.61, these appeals are certified to the Wisconsin Supreme Court for its review and determination.

ISSUES

We are certifying these cases as companions to our certification in case No. 2018AP59.[1] The court's decision in case No. 2018AP59, defining the impact of 2011 Wis. Act 21 (Act 21) on the regulatory permit approval process, answering the question of who is trustee of the state's waters, and determining whether ***Lake Beulah Management District v. DNR***, 2011 WI 54, ¶39, 335 Wis. 2d 47, 799 N.W.2d 73, is still controlling law in Wisconsin, will affect the issues in this action. ***Lake Beulah*** holds that "[g]eneral standards are common in environmental statutes" and the fact that they are "broad standards does not make them non-existent ones." ***Id.***, ¶43. As these cases also addresses environmental statutes, i.e., the DNR's regulatory permit approval process under the Wisconsin

[1] ***Clean Wisconsin, Inc. v. DNR***, No. 2018AP59, unpublished certification (WI App Jan. 16, 2019).

Pollution Discharge Elimination System (WPDES),[2] we believe the court's answers to the above questions serve as the foundation to addressing the issues in this action.

The State argues that Act 21 is a deliberate "far-reaching" decision on the part of the legislature to shift policy-making decisions away from state agencies and back to the legislature even though the "consequences" of this shift "will, in some cases, eliminate arguably laudable policy choices of an agency." The State submits that under Act 21 the DNR may not impose any conditions on a permit request that are not explicitly set forth by rule or statute, and, therefore, as pertinent to these cases, the DNR has no authority as part of its environmental review to require a large dairy farm to monitor "off-site groundwater" nor impose limits on the number of cows a dairy farm may have.

Clean Wisconsin, Inc. counters that no far-reaching changes have occurred as a result of Act 21 as ***Lake Beulah*** held that pursuant to WIS. STAT. ch. 281 and the public trust doctrine, the legislature "explicitly provided" the DNR with the "broad authority and a general duty … to manage, protect, and maintain waters of the state." ***Lake Beulah***, 335 Wis. 2d 47, ¶39. Clean Wisconsin agrees, however, that if the court adopts any of the State's arguments, Act 21 would have effects "far beyond the current dispute."

[2] These appeals also involve two procedural issues that are not germane to the substantive issue of Act 21's impact upon the regulatory permit approval process in Wisconsin: whether the DNR could "reconsider" its decision to deny WIS. ADMIN. CODE § NR 2.20 (Oct. 2018) review and whether the circuit court properly exercised its discretion in awarding costs and fees.

We agree with the State and Clean Wisconsin that the court's determination regarding the scope and breadth of Act 21 will have implications far beyond the permitting process for high capacity wells and pollution discharge elimination systems and will touch every state agency within Wisconsin. While the State submits that ***Lake Beulah*** does not control, we cannot make that conclusion as ***Lake Beulah*** has not been overruled and we cannot dismiss any statement therein as "dictum." *See* ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682. We request that the Wisconsin Supreme Court accept certification so as to address the regulatory permit review process in Wisconsin in light of Act 21.

BACKGROUND

In these appeals, Kinnard Farms, Inc. sought approval from the DNR to expand its dairy farm operation by adding a second site and over 3000 dairy cows. Given the size of the operation, Kinnard was required by statute to submit a WPDES permit application.[3] WIS. STAT. §§ 283.31(4)(b), 283.37. Kinnard received approval and a WPDES permit from the DNR in August 2012. After the permit issued, the five named petitioners in sought administrative review through a petition for a contested case hearing. *See* WIS. STAT. § 283.63. The primary

[3] For a detailed discussion of the interaction between the Clean Water Act, 33 U.S.C. § 1251(a), and the WPDES permit process, see ***Andersen v. DNR***, 2011 WI 19, ¶¶33-40, 332 Wis. 2d 41, 796 N.W.2d 1.

Kinnard's proposed site is a "point source" under the WPDES permit process as it is a "concentrated animal feeding operation" (CAFO) pursuant to WIS. STAT. § 283.01(12)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. Wisconsin law defines a CAFO as "an animal feeding operation" with "1,000 animal units or more at any time" that "stores manure or process wastewater in a below or at grade level storage structure or land applies manure or process wastewater." WIS. ADMIN. CODE § NR 243.03(12).

claims in the petition were that the permit failed to "require monitoring to evaluate impacts to groundwater and determine compliance with permit conditions" and failed to set a "maximum number of animal units." The DNR granted the petition and referred the matter to the Division of Hearings and Appeals. *See* WIS. STAT. §§ 227.43(1)(b), 283.63. Kinnard moved for summary judgment arguing that the DNR lacked explicit authority to impose an animal-unit maximum, citing Act 21 (WIS. STAT. § 227.10(2m)). The Administrative Law Judge (ALJ) denied the motion, concluding that disputed issues of fact remained.

After a five-day evidentiary hearing, the ALJ issued its findings of fact and conclusions of law on October 29, 2014. The ALJ found from the facts that there was "a crisis with respect to groundwater quality in the area," resulting in "proliferation of contaminated wells" and "a massive regulatory failure to protect groundwater in the Town of Lincoln." Accordingly, the ALJ determined that "a ground water monitoring plan is essential given that the area is 'susceptible to groundwater contamination.'" The ALJ further opined that the "permit is unreasonable because it does not specify the number of animal units allowed at the facility." The ALJ determined that "it is essential that the [DNR] utilize its clear regulatory authority … to ensure that Kinnard Farms meet its legal obligation under WIS. ADMIN. CODE § NR 243.14(2)(b)(3) not to contaminate well water with fecal bacteria from manure or process wastewater." The ALJ ordered that the permit be "modified to reflect a maximum number of animal units at the facility" and that the DNR must "review and approve a plan for groundwater monitoring for pollutants of concern at or near the site."

After the DNR Secretary denied review of the ALJ's decision under WIS. ADMIN. CODE § NR 2.20, Kinnard filed a petition for judicial review with the

circuit court. The circuit court determined that the ALJ's order was not final and, therefore, not subject to judicial review until the DNR imposed the conditions ordered by the ALJ. In response, the DNR began to implement the conditions but "[f]or reasons that remain obscure" also sought review from the Department of Justice (DOJ) regarding its authority to do so. The DOJ responded by letter that it believed the DNR did not have the authority to impose an animal-unit limit or off-site groundwater monitoring in the permit based on Act 21.[4] In response, the DNR Secretary reconsidered her decision denying review of the ALJ's decision and issued a decision granting the § NR 2.20 petition and reversed the portions of the ALJ's decision ordering the DNR to include groundwater monitoring and an animal-unit limit in the petition.

The five named petitioners and Clean Wisconsin sought review of the DNR's decision in the circuit court. The cases were consolidated, and the court entered an order reversing the DNR's decision and remanded the case with instructions that the DNR implement the ALJ's order as to groundwater monitoring and animal-unit limits. The circuit court determined that the DNR Secretary lacked authority to reconsider her WIS. ADMIN. CODE § NR 2.20 review denial nearly a year after it was issued. The circuit court further concluded, referencing ***Lake Beulah***, that the permit conditions were within the DNR's authority under Act 21 as there "is ample explicit authority in the statutes and rules that gives DNR the power—and the duty—to impose [the conditions] where it is deemed necessary to assure compliance with WPDES requirements." *See* WIS.

[4] Act 21 had been in effect for almost three years prior to the contested case hearing in this case, and there is no evidence in the record why the DNR did not address this issue previously.

STAT. § 283.31(3)-(5); WIS. ADMIN. CODE §§ NR 243.13, 243.14(1)(a)-(b), 243.15(3)(j)-(k). The DNR and Kinnard appealed.

After the circuit court's decision, petitioners moved for fees and costs under WIS. STAT. § 814.245. The circuit court granted the petitioners' motion, finding that the DNR "was not substantially justified in taking its position" in the case as it did not have "a reasonable basis in law and fact," but stayed the judgment pending the outcome of an appeal. *See* § 814.245(2)(e), (3). The DNR appealed the circuit court's decision to award fees and costs to the petitioners and moved this court to consolidate the two cases on appeal, which we granted.

DISCUSSION

As in our companion certification, the crux of the issue is the interplay between ***Lake Beulah*** and Act 21. ***Lake Beulah*** has not been overruled, and neither the circuit court nor the court of appeals may dismiss any statement within ***Lake Beulah*** as "dictum." *See* ***Zarder***, 324 Wis. 2d 325, ¶58. For purposes of appellate review, we must accept that Act 21 was in effect when the court issued its decision in ***Lake Beulah*** and that the court found that Act 21 did "not affect our analysis." ***Lake Beulah***, 335 Wis. 2d 47, ¶39 n.31. We will not further restate our discussion in case No. 2018AP59, but we adopt it for purposes of this certification.

CONCLUSION

As only the Wisconsin Supreme Court may amend, modify, or overrule a decision and as the questions presented have statewide concern and implication, we request that the Wisconsin Supreme Court accept certification in these cases as well as our request for certification in case No. 2018AP59.