

STATE OF WISCONSIN  
IN SUPREME COURT

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OF WISCONSIN

Case No. 2018AP0059

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CLEAN WISCONSIN, INC.  
and PLEASANT LAKE  
MANAGEMENT DISTRICT,

Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF  
NATURAL RESOURCES,

Respondent-Appellant,

WISCONSIN MANUFACTURERS  
& COMMERCE, DAIRY BUSINESS  
ASSOCIATION, MIDWEST FOOD  
PROCESSORS ASSOCIATION,  
WISCONSIN POTATO & VEGETABLE  
GROWERS ASSOCIATION,  
WISCONSIN CHEESE MAKERS  
ASSOCIATION, WISCONSIN FARM  
BUREAU FEDERATION, WISCONSIN  
PAPER COUNCIL AND WISCONSIN  
CORN GROWERS ASSOCIATION,

Intervenors-Co-Appellants.

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**WISCONSIN DEPARTMENT OF  
NATURAL RESOURCES' MOTION  
TO MODIFY BRIEFING SCHEDULE**

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Respondent-Appellant Wisconsin Department of  
Natural Resources (the "Department") hereby moves,

pursuant to Wis. Stat. §§ (Rule) 809.14(3)(a) and 809.82, to modify the briefing schedule in this case, with the Department briefing on the Respondents' schedule.<sup>1</sup> The Department has determined that certain positions asserted in its briefing to the lower courts are not consistent with controlling law, and intends its merits briefing in this Court to reflect that determination.

Further grounds for this motion are set forth below.

### BACKGROUND

This case involves Petitioners' challenge to the Department's 2016 decisions to issue eight approvals for high-capacity wells pursuant to Wis. Stat. § 281.34(5)(e). Petitioners argued that the Department's well approvals contravened this Court's recent decision in *Lake Beulah Mgmt. Dist. v. Dep't of Nat. Res.*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73; were improperly based on a 2016 Attorney General opinion; and ignored scientific evidence about detrimental impacts the wells would have on Wisconsin's navigable waters. (*See generally* R. 1–8.)

In October 2017, the circuit court agreed with Petitioners and held that the Department's decisions to approve the challenged wells were improper. (*See generally* R. 143.) In particular, the circuit court held that this Court's decision in *Lake Beulah* squarely controlled the Department's well approvals. The court further held that in light of the scientific evidence presented to the Department about possible detrimental impacts the wells could have on navigable waters, both *Lake Beulah* and Wisconsin's public trust doctrine dictated that the Department should have

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<sup>1</sup> Pursuant to Wis. Stat. § (Rule) 809.14(3)(a), the filing of this motion automatically tolls the briefing schedule in this case.

conducted further analysis into the possible detrimental impacts before issuing the well approvals. (R. 143:6–13.) The circuit court therefore vacated seven of the Department’s eight well approvals, remanding the eighth to the Department for further review. (See R. 143:14–15.)

On January 5, 2018, the Department filed a notice of appeal. (R. 148–55.) A group of eight agriculture and industry associations that had intervened in the case also filed a separate notice of appeal. (See R. 82; 83; 162.)

Following appellate briefing in the Wisconsin Court of Appeals, District II, that court certified the appeal to this Court. On April 9, 2019, this Court accepted certification and ordered briefing on its typical 30/20/10 schedule. (See Order, Apr. 9, 2019 (Wis. Sup. Ct.)) On April 25, 2019, the Wisconsin Legislature’s Joint Committee on Legislative Organization moved to intervene.

## DISCUSSION

The Department has determined that certain positions it asserted in its briefing to the lower courts are not consistent with controlling law. These include the Department’s previous positions regarding the public trust doctrine; the import of this Court’s decision in *Lake Beulah*; and the effect of 2011 Wis. Act 21 on the Department’s authority regarding high-capacity-well permitting. Based on these conclusions, the Department maintains that, in most meaningful respects, the judgment below should be affirmed. The Department intends its merits briefing in this Court to reflect these conclusions.

The Department recognizes that this Court accepted certification in these cases to decide important issues of statewide concern, and believes that the Court will benefit from briefing that accurately represents the position of the state agency whose decisions are at issue in this case. To do

so, the Department requests an order modifying the briefing schedule to allow the Department to file a brief on the Respondents' schedule. The Department would have no objection to granting additional time for the filing of any brief challenging the judgment below.

### CONCLUSION

For the reasons discussed, the Department requests an order modifying the briefing schedule.

Dated this 2nd day of May, 2019.

Respectfully submitted,

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