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CLERK OF SUPREME COURT
OF WISCONSIN

VIA HAND-DELIVERY

Ms. Sheila T. Reiff
Clerk of Supreme Court
Post Office Box 1688
Madison, WI 53701-1688

Re: *Applegate-Bader Farm, LLC v. Wis. Dep't of Rev. & Richard Chandler*
Case No. 2018AP1239; District IV

Dear Ms. Reiff:

Enclosed please find ten copies of Wisconsin Department of Revenue's Response to Petition for Review in the above-referenced matter. By copy of this letter, three copies are being mailed on this date to counsel of record.

Sincerely,

A handwritten signature in blue ink, appearing to read 'A. Russomanno'.

Anthony D. Russomanno
Assistant Attorney General

ADR:jrs

Enc.

cc w/enc.: Ryan L. Woody (via U.S. mail)

STATE OF WISCONSIN
IN SUPREME COURT

FILED

MAR 13 2020

**CLERK OF SUPREME COURT
OF WISCONSIN**

Case No. 2018AP1239

APPLEGATE-BADER FARM, LLC,

Plaintiff-Respondent-Cross-Appellant,

v.

WISCONSIN DEPARTMENT OF
REVENUE AND RICHARD CHANDLER
IN HIS CAPACITY AS SECRETARY OF
THE DEPARTMENT OF REVENUE,

Defendants-Appellants-Cross-Respondents.

APPEAL FROM A FINAL ORDER OF THE CIRCUIT
COURT FOR GREEN COUNTY,
THE HONORABLE THOMAS J. VALE, PRESIDING

**WISCONSIN DEPARTMENT OF REVENUE'S
RESPONSE TO PETITION FOR REVIEW**

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INTRODUCTION

Applegate-Bader Farm, LLC (Applegate) petitions for review of a Wisconsin Environmental Policy Act (WEPA) claim directed at the definition of “agricultural use” for property tax purposes. By statute, the Department is required to define that term through a rule.

The Department has promulgated a definition for “agricultural use” land that includes classic farming uses, like cropping and animal production. At issue here is a separate portion of the definition, which covers some land that was in agricultural use but now is subject to an easement. In particular, as promulgated in 2015, the definition includes agricultural land subject to a temporary easement and certain permanent easements that allow for compatible agricultural use.

The definition does not, however, include Applegate’s land, which is subject to a permanent easement that does not allow for farming activity. And because the easement is permanent, that land can never again be used for farming. The lack of coverage for Applegate’s easement is nothing new. Under no definition of “agricultural use,” old or new, has Applegate’s land qualified as agricultural.

During the rulemaking, Applegate lobbied for a more expansive definition that would have included its permanent easement. Having failed in that effort, it then filed this lawsuit and alleged nine claims, with theories ranging from the procedural to the constitutional. The present petition concerns just one of those claims (Claim IX), where Applegate alleged a WEPA violation.

When triggered, WEPA may require an agency to undertake a detailed environmental study of a proposed action—classic examples might include significant construction or landfill approvals. Here, however, Applegate

alleged something else: that the Department was required to undertake a detailed environmental study because the coverage of easements was not expanded to include permanent ones like Applegate's. This claim was unsuccessful in the circuit court and court of appeals, both of which concluded that Applegate failed to support its claim on multiple levels. Those courts were correct, and there is no persuasive basis for this Court to grant further review.

SUPPLEMENTAL STATEMENT OF THE CASE

The following supplemental statement provides general context for Applegate's WEPA claim. Further, because Applegate presents a "statement of facts" that contains inaccuracies and argument, portions of its statement are clarified, to the extent relevant.

I. Agricultural use property tax classification and changes made by the 2015 rule.

The general rule is that land is taxed uniformly. Wis. Const. art. VIII, § 1. As an exception, the constitution directs that "agricultural land . . . as defined by law" may be taxed differently. Wis. Const. art. VIII, § 1. In turn, the property tax statutes define "[a]gricultural land" as "land, exclusive of buildings and improvements and the land necessary for their location and convenience, that is devoted primarily to agricultural use." Wis. Stat. § 70.32(2)(c)1g. The statutes then direct the Department to define "[a]gricultural use" for purposes of that classification. Wis. Stat. § 70.32(2)(c)1i.

How a parcel is classified may affect the amount of property tax paid by the landowner. Qualified "agricultural" land is assessed based on its value as farmland. Wis. Stat. § 70.32(2r). Most other real property is assessed based on fair market value. Wis. Stat. § 70.32(1). However, land like Applegate's is classified as "undeveloped." That means it is

assessed based on 50% of its fair market value. Wis. Stat. § 70.32(4).

Applegate's challenge relates to a portion of the administrative rule, Wis. Admin. Code Tax § 18.05(1), that defines "agricultural use." The primary definitions of "agricultural use," which cover crop and animal production, are not challenged. Wis. Admin. Code Tax § 18.05(1)(a)–(b). Rather, this case is solely about a provision that allows some land placed into an easement or program to retain the "agricultural use" classification.¹ That provision, Tax 18.05(1)(d), was amended through a rulemaking process that began in 2013 and became final in summer 2015.

Prior to the current rulemaking, only a limited number of easements qualified as "agricultural use"; the old rule listed them by name. Wis. Admin. Code Tax § 18.05(1)(d)–(e) (Reg. Dec. 2013, No. 696). That proved problematic. Over time, some of those programs changed or ceased to exist, meaning coverage was even less than the limited list might have suggested. (*See* R. 32:35.)² The rulemaking process that began in 2013 sought to address that problem and, more generally, standardize the criteria so that coverage did not turn on particular programs' names.

During the rulemaking, Applegate (and some others with similar landholdings) lobbied the Department to adopt broad coverage for once-agricultural land that was now subject to a permanent easement. (*E.g.*, R. 38:29–35; R. 39:7–16.) That was in Applegate's interest because it had chosen to place its land into a permanent easement held by the federal Wetlands Reserve Program. (R. 15:1; R. 39:8.)

¹ This response uses the term "easement" to refer to both "easements" and "programs" covered by the rule.

² References to Record 26–51 are to the Department's rulemaking record.

Although that program offers temporary easements, Applegate had signed up for the permanent version, and it came with no provision authorizing an agricultural use. (R. 31:25; R. 90:3 Nos. 7, 9.)

Others supported including temporary easements but opposed including permanent easements that came with no possibility of agricultural use. (*E.g.*, R. 38:35–37.) Their view was that it went too far to include land that was permanently severed from being farmed. (R. 38:35–37 (presenting the views of the Wisconsin Farm Bureau, Cranberry Growers, Potato and Vegetable Growers, Pork, and Cattlemen's Associations); *see also* R. 40:12 (similar written comments from Corn Growers).)

The final rule, first effective in July 2015, did not include land in permanent easements with no agricultural use, but it included land in temporary easements and also land subject to permanent easements that allow agricultural use (through a compatible use agreement or similar mechanism). Wis. Admin. Code Tax § 18.05(1)(d). There are dozens of programs offered by State and federal agencies that meet the new criteria, and the list is not static. (*See* R. 79:8–13.) For example, the program that Applegate entered in permanent form, the Wetlands Reserve Program, also has a temporary option that would qualify under the new rule—but it would not have qualified under the old rule. (R. 79:13.)

To further illustrate, these programs qualify either through temporary easements or permanent ones that offer compatible use permits: the Agricultural Conservation Program; Agricultural Land Easements; Conservation Reserve Program; CRP Grasslands; Conservation Stewardship Program; Emergency Watershed Protection; Environmental Quality Incentives Program; Farm and Ranch Lands Protection Program; Grazing Lands Conservation Initiative; Habitat Area Easements; National Water Quality Initiative; Soil and Water Resource Management Program;

Stream Bank Protection Program; Western Prairie Habitat Restoration Area; Wetland Reserve Easements / Wetland Reserve Program; and at least 13 other programs. (R. 79:8–13.)

Although it initially lobbied for a broader rule, at the end of the process, the Wisconsin Wetlands Association praised the environmental benefit of the final rule. For example, it issued a July 2015 press release stating that the rule “[r]educes [b]arriers to [r]estoring [w]etlands on [w]orking [f]arms” and has “created a big opportunity for wetland restoration” with its “clear and fair criteria.” (R. 78:9–10.)

II. Clarifications to Applegate’s statement of the case.

Some inaccuracies in Applegate’s statement of the case warrant clarification.

First, Applegate incorrectly asserts that there is evidence of a “direct causal nexus” between the 2015 rule amendment at issue and landowners “degrading existing wetlands.” (Pet. 9–12.) What Applegate cites does not support that assertion. Rather, it cites a 2000 report that discusses an old state of affairs where “only pasture and row crops” qualified for agricultural use, and Applegate asserts that this may have motivated some people to “opt[] to graze.” (Pet. 9–10 (citing R. 64:65–69).) This in no way supports Applegate’s assertion that the 2015 rule change has caused degradation. The report is about an old and narrower version of “agricultural use” that no longer exists. Unlike the definition discussed in that 2000 report, the current definition allows landowners to choose from many easements. The updated rule, if anything, provides increased environmental benefit.

Similarly, Applegate cites historical data (purportedly from 2010 and 2013) gathered by the Wetlands Association about potential irregularities in five counties' assessment practices. (R. 84:66–68 (explaining source of data).) But, as with the 2000 report, data *predating* the 2015 amendment does not help demonstrate the *effects* of the 2015 amendment. Further, Applegate mischaracterizes the data. At most, the data may suggest that, under the former, now-repealed version of the rule, some local assessors were misclassifying some land like Applegate's as "agricultural." (R. 29:22–23.) But this alleged misclassification says nothing about a causal nexus between degradation and Tax 18.05(1)—much less the more inclusive 2015 version of Tax 18.05(1)(d).

Second, Applegate makes assertions about meetings with "lobbyists" and "special interest carve-out[s]" that are both irrelevant and inaccurate. (Pet. 13–14.) They are irrelevant because these assertions have nothing to do with whether Applegate has a valid WEPA claim. Those statements also are inaccurate because the "agricultural use" definition contains carveouts for no one; it contains general criteria that allow many programs to qualify (and many do). And, contrary to Applegate's unsupported assertion, the new rule covers both state and federal programs. (*Compare* Pet. 14, *with* R. 79:8–13 (collecting programs that meet the criteria).)

Similarly, Applegate's assertion about lobbyists is both inaccurate and incomplete. It incorrectly states that lobbyists wrote the final rule "verbatim." (Pet. 13.) Putting aside that this is not forbidden, it also is incorrect. Rather, the final rule was a product of input first provided during the public hearing process (*e.g.*, R. 38:35–37), and it did not mirror verbatim any proposal provided by lobbyists or anyone else (*compare* R. 45:18, *with* Tax 18.05(1)(d)). Further, Applegate leaves out that, in addition, the Department contacted other stakeholders following the public hearing to get further input,

including the Wetlands Association and a representative for those with landholdings like Applegate's. (R. 44:32–36; R. 45:16, 18–32.)

III. Litigation history.

In April 2016, Applegate filed suit seeking to invalidate new Tax 18.05(1)(d). (R. 1; R. 15.) It alleged nine claims, including a claim that the rulemaking violated WEPA, Wis. Stat. § 1.11(2)(c), because the Department did not prepare an “environmental impact” statement.³ (R. 15:44–46.)

The circuit court rejected the WEPA claim, explaining that it relied on “only speculation” and “[t]here are simply not facts supporting this claim and it fails.” Put differently, “There is no evidence presented that landowners can and will remove land already enrolled [in] the federal programs because of a change in the tax rule.” (R. 96:10.)

The court of appeals then affirmed the dismissal under controlling caselaw. *Applegate-Bader Farm, LLC v. DOR*, 2020 WI App 7, ¶ 82 (“Op.”). In doing, the court observed that Applegate “concedes that its allegations of environmental harm consist entirely of indirect effects,” and that it “does not argue that § Tax 18.05(1)(d) directly affects the environment in the sense that the rule actually restricts how farmers use land enrolled in conservation easements, or that it prevents farmers from enrolling land in any particular easement program.” Op. ¶¶ 88–89.

The court also noted the speculative nature of Applegate's theory: that it “provides no support” for its apparent theory that landowners will violate the terms of their own easements or other laws. Op. ¶¶ 90–91. And, in

³ Only Claims I and IX were the subject of the present summary judgment decision and appeal, as the circuit court bifurcated summary judgment to address these claims first. In turn, only Claim IX is the subject of the present petition.

addition, Applegate's theory improperly speculated that third-party administrators of easement programs might issue more haying and grazing authorizations, regardless of their effect on the easements. Op. ¶ 92. Further, Applegate failed to come to grips with the fact that its "particular WEPA allegations are based solely on indirect environmental effects that are caused by circumstances outside the control of the Department." Op. ¶ 93.

Finding these flaws dispositive, the court of appeals did not reach the other arguments advanced by the Department. Op. ¶ 95.

REASONS THE PETITION SHOULD BE DENIED

I. Applegate's WEPA claim fails on multiple levels and so presents no grounds for further review by this Court.

As the circuit court's and court of appeals' decisions reflect, there are multiple ways to reach the same conclusion: Applegate failed to state a valid WEPA claim. The circuit court explained that Applegate's allegations amounted to speculation and raised more questions than they answered—thus failing both factually and logically. (R. 96:10.) The court of appeals focused on the fact that Applegate's allegations were, at best, about indirect effects out of the Department's control and were built on speculation. Op. ¶¶ 90–93.

And those are not the only reasons the claim would fail—Applegate also has a standing problem and its claim fails on the merits. The underdeveloped claim presents no legal issue meriting this Court's review.

A. WEPA framework and burdens.

WEPA is a procedural statute. When triggered by an agency's action, it requires an additional step, where the agency must produce a detailed analysis of its action's

environmental impact. But that requirement is triggered only by “major [agency] actions that truly affect the environment” through “significant” and “adverse” consequences. *State ex rel. Boehm v. DNR*, 174 Wis. 2d 657, 676, 497 N.W.2d 445 (1993). If that is the case, then an agency is required to prepare a “detailed statement,” which consists of a report about environmental impacts:

(2) *All agencies of the state shall:*

(c) *Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the human environment, a detailed statement, substantially following the guidelines issued by the United States council on environmental quality under P.L. 91-190, 42 USC 4331, by the responsible official on:*

1. The environmental impact of the proposed action;
2. Any adverse environmental effects which cannot be avoided should the proposal be implemented;
3. Alternatives to the proposed action;
4. The relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity;
5. Any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; and
6. Such statement shall also contain details of the beneficial aspects of the proposed project, both short term and long term, and the economic advantages and disadvantages of the proposal.

Wis. Stat. § 1.11(2)(c). The “detailed statement” is sometimes referred to as an environmental impact statement, or EIS.

Applegate has the burden to make out its WEPA claim. As a general rule, “the party challenging the validity of the . . . rules . . . has the burden of proving the invalidity of the rules.” *Wis. Realtors Ass’n. v. PSC*, 2015 WI 63, ¶ 67, 363 Wis. 2d 430, 867 N.W.2d 364. Likewise, under WEPA in particular, the challenger “bears the burden.” *Clean Wis., Inc. v. PSC*, 2005 WI 93, ¶ 190, 282 Wis. 2d 250, 700 N.W.2d 768.

That burden includes showing that WEPA review is triggered in the first place. This Court has held that allegations lacking bona fide “factual predicates” do not trigger WEPA review. *Wis.’s Envtl. Decade, Inc. v. PSC*, 105 Wis. 2d 457, 466, 313 N.W.2d 863 (Ct. App. 1981).⁴ And Applegate also must support its standing under WEPA. See *Fox v. DHSS*, 112 Wis. 2d 514, 524–26, 334 N.W.2d 532 (1983). Only if Applegate makes these threshold showings would a burden on the Department arise. In that instance, the Department would have to come forward with a “reviewable record” supporting that the agency reasonably declined to produce a detailed environmental statement under WEPA. *Wis.’s Envtl. Decade, Inc. v. DNR*, 115 Wis. 2d 381, 394, 340 N.W.2d 722 (1983); see also *Boehm*, 174 Wis. 2d at 666.

B. Applegate’s WEPA claim fails on at least three levels.

1. Applegate lacks a workable premise to trigger WEPA.

At bottom, Applegate alleges that an “agricultural use” tax classification that includes a host of conservation easements harms the environment. To support a WEPA claim, not only would that counterintuitive assertion need to be bona fide but, in addition, the alleged adverse effect would

⁴ This response cites four *Wisconsin Environmental Decade* cases decided between 1977 and 1983. To help keep them straight, the opposing party and year are provided each time.

need to be “significant[].” Wis. Stat. § 1.11(2)(c); *Boehm*, 174 Wis. 2d at 675–76 (explaining that WEPA concerns “significant” “adverse” environmental impacts). To make that initial showing, there must be bona fide “factual predicates.” *Wis.’s Envtl. Decade v. PSC*, 105 Wis. 2d at 466 (1981). And “speculative” assertions are not enough. *Id.* (citation omitted).

Applegate’s premise here does not satisfy these requirements for several reasons.

Most simply, its theory lacks logical footing. The 2015 amendment dispensed with an old program-name-based listing of qualifying easements. The old list was not only limited but also contained some programs that were outdated or defunct. Wis. Admin. Code Tax § 18.05(1)(d)–(e) (Dec. 2013). (R. 32:35.) The amendment fixed that problem with uniform criteria that do not depend on program names, and its coverage now extends to dozens of existing easements, as outlined above. (R. 79:8–13.)

Those basic facts demonstrate why Applegate is off track. It can point to no bona fide harm from this amendment. Rather, laid bare, its premise is that the new rule could have gone even further. But WEPA imposes no substantive requirements, much less a maximization requirement. *See Boehm*, 174 Wis. 2d at 665 (“WEPA is procedural in nature and does not control agency decision making.”).

To further illustrate: Applegate’s land has *never* been covered by the definition of “agricultural use”—not under the old rule listing program names and not under the new rule providing general criteria. The amendment does not change its classification or tax status. And Applegate’s WRP easement is permanent. As Applegate has explained, it cannot “develop, destroy or otherwise alter” it. (Applegate Resp. Br. 3.) This leaves no room for environmental harm.

For other property owners, Tax 18.05(1)(d) provides opportunities. For example, the new rule (unlike the old rule) would allow a landowner with qualifying land to enter into a

temporary WRP easement and meet the agricultural use classification. (R. 79:13.) Thus, if anything, the rule provides more opportunities for land to qualify and more reliability by making coverage turn on general criteria instead of outdated program names. That is why, at the end of the rulemaking process, the Wisconsin Wetlands Association correctly explained that the rule “[r]educes [b]arriers to [r]estoring [w]etlands on [w]orking [f]arms” and has “created a big opportunity for wetland restoration” with its “clear and fair criteria.” (R. 78:9–10.)

This basic disconnect is reason enough to reject the claim.

Further, the court of appeals’ decision identifies additional conceptual flaws. At bottom, Applegate’s assertions point at nothing more than speculation about indirect harms outside of the Department’s control. *See* Op. ¶¶ 90–93. That kind of speculation does not support a claim. *Wis.’s Env’tl. Decade v. PSC*, 105 Wis. 2d at 466 (1981); *see also Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 769–70 (2004) (explaining, under the federal NEPA law, that “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions . . . the agency need not consider these effects”).

First, Applegate alleged that landowners might be motivated to illegally crop and graze on their lands subject to an easement, with the goal of fooling a local assessor into applying the “agricultural use” definition. Op. ¶ 90. But as the court of appeals correctly explained, there is no basis for making this assumption, much less for using it under a WEPA analysis. Third parties, not the Department, control the easements and their enforcement. And, as a matter of law, an agency may reasonably assume “that any environmental consequences will be controlled through compliance with the applicable administrative code provisions.” *See Boehm*, 174 Wis. 2d at 676; Op. ¶ 91. That must be true: agencies

cannot be expected to engage in analyses that assume that people will act illegally.

And this speculation has nothing to do with the new rule, anyway. For example, no version of the rule, old or new, covered Applegate's permanent easements. It has no impact on Applegate's motivations.

Second, Applegate hypothesized that the new rule increases the likelihood that land might be used for grazing and haying through the issuance of compatible use permits (which, where appropriate, allow for agricultural use while land is in an easement). But, as the court of appeals observed, whether to issue those kinds of permits is up to someone else—the easement holder—and it is pure speculation to assume that the easement holder would issue such a permit where it is contrary to the easement's purpose. Op. ¶ 92. This criticism by Applegate also goes to show how far afield its premise is: the Department's task was to define "agricultural use," not to provide general environmental tax treatment.

In sum, Applegate's basic premise is unworkable: it makes no initial showing that the rule poses a bona fide environmental threat that might trigger WEPA.

2. Applegate also lacks standing for its WEPA challenge.

Although the lower courts did not need to address it, Applegate also has a standing problem. Under WEPA, standing requires a challenger to show injury, causation, and the existence of a legally protected interest. *Fox*, 112 Wis. 2d at 524–25. And the alleged harm must occur "in the area" where Applegate "resid[es]." *Fox*, 112 Wis. 2d at 531. Also, it must be that the "decision of the agency directly causes injury to the interest of the petitioner." *Id.* at 524 (citation omitted). Applegate meets none of these elements.

For example, Applegate establishes no injury. Section Tax 18.05(1)(d) does not build, dig, permit, or forbid anything. It states criteria for local assessors to use when deciding what type of property tax rate applies to a particular parcel. Landowners are free to select from the dozens of programs that fit the criteria, if they wish to put their land into an easement and also qualify for “agricultural use.”

As for Applegate, its easement lands are not adjacent to agricultural land that it owns. (R. 90:5.) Rather, Applegate maintains the land for “recreational use.” (R. 90:6.) It just asserts its land is useful to other farms. Assuming that is true, it still establishes no injury to Applegate or anyone else. Again, its land is in a permanent easement, and the rule does not change that. There is no injury and no showing that harm will occur “in the area” where Applegate “resid[es].” *Fox*, 112 Wis. 2d at 531.

Causation also is missing. The challenged action must have “a close causal connection to a change in the physical environment.” *Id.* at 529, 530 n.12. However, Applegate’s theory relies on decisions by someone else and a series of speculative events: it assumes landowners, *because of* the new tax rule, will decide not to enroll in certain permanent easements *and* will decide not to enroll in different, covered easements *and* then will do harm to the unenrolled wetlands. The theory also ignores that the rule has no effect on the motivations of current permanent easement holders like Applegate, who are bound by the terms of their permanent easements.

Applegate thus would lack standing, if a court needed to reach the issue.

3. In addition, on the merits, Applegate’s WEPA argument would fail.

Even if Applegate had met its initial burdens, its claim still would have failed. This is another issue that the courts

below did not need to reach but that would be dispositive on its own.

Applegate claims that the Department was required to prepare a formal “detailed statement” about environmental effects. But by statute, that statement is required only for actions with “significant” environmental harm. When courts review whether an agency was required to create that detailed statement, they look to the agency record to see if its decision *not* to create a statement was within the bounds of reason.

Specifically, on the merits, WEPA asks if there is a “reviewable record” that shows, under the circumstances, the agency reasonably declined to produce a “detailed statement.” *Wis.’s Env’tl. Decade, v. DNR*, 115 Wis. 2d at 394 (1983) (citation omitted). The reasonableness question is posed in light of “the agency’s functions and duties.” *Wis.’s Env’tl. Decade, v. DILHR*, 104 Wis. 2d 640, 645, 312 N.W.2d 749 (1981). No particular format is required for the agency’s record so long as it “reflects” reasonableness. *Boehm*, 174 Wis. 2d at 667. The cases likewise do not require a formal investigatory proceeding or document: “neither the nature of the information an agency may consider nor the manner in which it may be gathered are limited to the confines of a formal administrative evidentiary hearing.” *Wis.’s Env’tl. Decade v. DNR*, 115 Wis. 2d at 394 (1983) (citation omitted).

Also relevant here, a “detailed statement” is not required simply because some secondary environmental effects might occur. *Wis.’s Env’tl. Decade v. DNR*, 115 Wis. 2d at 394 (1983). Similarly, WEPA does not require agencies to consider infeasible concerns, engage in “remote and speculative analysis,” or to analyze what it cannot “accurately predict.” *Wis.’s Env’tl. Decade v. PSC*, 105 Wis. 2d at 465–66 (1981) (citation omitted).

Here, neither the record nor logic suggests that the Department acted unreasonably. There is no formal WEPA analysis in the record, but there does not need to be: the question is whether the record supports the decision not to create a formal statement. And the record here confirms that the Department certainly acted within the bounds of reason. As explained above, the most reasonable view is that the new rule is, if anything, environmentally helpful, while also serving the required statutory purpose to create an *agricultural* rule. That was the Department's relevant "function[] and dut[y]." *Wis.'s Envtl. Decade, v. DILHR*, 104 Wis. 2d at 645 (1981).

For example, the record reflects that the Department solicited and considered information from those interested in conservation easements and collected related information. The two-year process included other state agencies like DNR and DATCP, private landowners, interest groups, and nonprofits, and input about potential environmental benefits of a tax rule that included easements. (See R. 27:28–30; R. 28–32; R. 33:1–17, 25–26; R. 38:19–45; R. 39:1–19; R. 40:24; R. 45:22–27.) The Department considered that input and then gave a reasoned explanation for its ultimate approach. (R. 33:25–27, R. 47:4–17.) In its final report about the rule, the Department acknowledged the general benefits of wetlands, but explained that the tax rule concerned the agricultural use classification, not wetlands as such. (R. 47:15–16.) Nothing more is required under the cases to satisfy any arguable WEPA requirement here.

For this additional reason, the claim would fail.

II. Nothing Applegate argues shows that its WEPA claim merits this Court's review.

Applegate makes three main arguments for review, none of which raise an important or bona fide issue.

First, Applegate argues that where an action has a significant effect on the environment, indirect effects should be considered. (Pet. 17–25.) But this view does not matter here. As discussed above, Applegate failed to support a “significant” adverse effect of *any* sort attributable to the new rule. The flaws transcend a direct/indirect debate.

Further, it has been the law in Wisconsin for decades that while “indirect secondary effects may be influential in an EIS, they are not necessarily controlling in determining the threshold question of whether an EIS is to be prepared.” *Wis. ’s Env’tl. Decade v. DNR*, 115 Wis. 2d at 394 (1983). Only if there is reason to think an action will have significant adverse environmental harm, then indirect effects “may be influential in an [impact statement].” *Id.* (emphasis added). “The presence of significant indirect effects or cumulative effects only increase the need for an EIS; their presence alone does not require an EIS.” *Id.* Thus, even if Applegate had identified significant and bona fide indirect effects (which it has not done), it would only be part of an analysis, and not the whole one.

Second, Applegate argues that there is a conflict between two of this Court’s prior decisions—the *Wisconsin Environmental Decade* case from 1977 and *Wisconsin Environmental Decade* case from 1983 (which is quoted in the preceding paragraph). It also asserts that this alleged conflict matters to this case. Applegate is wrong on both counts.

There is no conflict between those decisions, much less one that matters here. Rather, the 1983 decision expressly applied and explained the 1977 decision, as this Court often does in subsequent decisions addressing the same subject matter. This Court explained it was applying “the test” in the 1977 decision, and then discussed that test for the following seven pages. *Wis. Env’tl. Decade v. DNR*, 115 Wis. 2d at 388–94 (1983). This Court then went on to clarify that, under the WEPA statute, “indirect secondary effects . . . are not

necessarily controlling in determining the threshold question of whether an EIS is to be prepared” and “their presence alone does not require an EIS.” *Id.* at 392. This is not a conflict but rather a subsequent clarification.

In fact, the 1983 case is not the only subsequent decision that contains the kinds of statements that foreclose Applegate’s claim—for example, in 1993, this Court reiterated that WEPA is only triggered by “major actions that truly affect the environment” through “significant” and “adverse” consequences. *Boehm*, 174 Wis. 2d at 665–66 (applying both the 1977 and 1983 cases, among other precedent); *Wis.’s Env’tl. Decade v. PSC*, 105 Wis. 2d at 465–66 (1981) (WEPA does not require agencies to consider infeasible concerns, engage in “remote and speculative analysis,” or to analyze what it cannot “accurately predict” (citation omitted)).

Even putting aside these subsequent decisions (for argument’s sake only), the 1977 decision does not support Applegate’s theory. For example, as the court of appeals explained, Applegate’s claims would fall short under that case because they depend on intermediaries and hypothetical violations of rules and regulations. Op. ¶ 94. In other words, consistent with the later cases, the 1977 decision recognizes that Applegate would bear the initial burden to raise “facts constituting a bona fide challenge.” *Wis.’s Env’tl. Decade, Inc. v. PSC*, 79 Wis. 2d 409, 424, 256 N.W.2d 149 (1977). And, as to direct and indirect effects, the case merely explained that “[t]here is nothing in the Act to suggest that *only* direct environmental consequences need be considered.” *Wis. Env’tl. Decade v. PSC*, 79 Wis. 2d at 428 (1977) (emphasis added). No reading of that case supports that speculative assertions like Applegate’s trigger WEPA.

Third, Applegate argues that the court of appeals was required to treat federal National Environmental Policy Act (NEPA) case law as persuasive, and that doing so would support Applegate’s argument. But the court of appeals did

not hold that NEPA caselaw can never be considered as persuasive, where appropriate; it recognized just the opposite. Op. ¶ 93 n.24.

The court of appeals discussed federal caselaw in only a limited way because it had no need to discuss it further. The core issues here are controlled by established Wisconsin law and the fact that, to a large extent, Applegate's premises fall of their own weight. There is no reason to look to potentially persuasive authority when there is no relevant gap to fill. *E.g.*, *Wilson v. Cont'l Ins. Cos.*, 87 Wis. 2d 310, 316, 274 N.W.2d 679 (1979) (resort to persuasive authority yields to Wisconsin precedent).

In any event, a resort to the federal cases does not help Applegate. The federal cases also do not recognize a viable claim based on speculation. *E.g.*, *Douglas Cty. v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995) (explaining that no environmental review is triggered where agency's action does not adversely affect the environment). Rather, what Applegate highlights is the noncontroversial proposition that an analysis may consider *both* direct and indirect effects together, where appropriate. (Pet. 28–29.) That is consistent with the discussion of Wisconsin precedent above.

Beyond that, the prevailing federal authority recognizes that an agency need not attempt to analyze things that are irrelevant to its statutory authority. For example, the Supreme Court has observed that, “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions . . . the agency need not consider these effects.” *Dep't of Transp.*, 541 U.S. at 769–70. The Department has no authority over property owners' land-use decisions. Its mandate is to define “agricultural use” for property tax classification purposes, and that is all. *See* Wis. Stat. § 70.32(2)(c)1i.

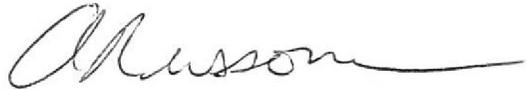
CONCLUSION

The petition for review should be denied.

Dated this 13 day of March 2020.

Respectfully submitted,

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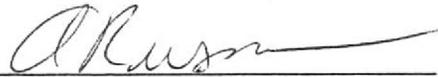
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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this response is 5480 words.

Dated this 13th day of March 2020.



ANTHONY D. RUSSOMANNO
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. §§ (RULE) 809.19(12) and 809.62(4)(b)**

I hereby certify that:

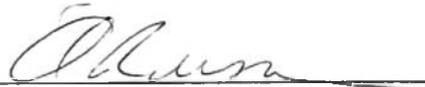
I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rule) 809.19(12) and 809.62(4)(b).

I further certify that:

This electronic petition is identical in content and format to the printed form of the petition filed as of this date.

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

Dated this 13th day of March 2020.



ANTHONY D. RUSSOMANNO
Assistant Attorney General

