Case No. 2018-AP-1239

In the Supreme Court State of Wisconsin

APPLEGATE-BADER FARM, LLC,

Plaintiff-Appellant-Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE and RICHARD CHANDLER,

Defendants-Respondents.

On Appeal from the Circuit Court for Green County,
Case No. 2016-CV-000048.
The Honorable **Thomas J. Vale**, Presiding Judge.

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS DISTRICT IV

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PETITION FOR REVIEW

Applegate-Bader Farm, LLC, (Plaintiff-Appellant) hereby petitions the Supreme Court of the State of Wisconsin, pursuant to Wisconsin Statute section 808.10 and Wisconsin Statute section 809.62 to review the decision of the Court of Appeals, District IV, in Applegate-Bader Farm, LLC v. Wisconsin Department of Revenue and Richard Chandler, case no. 2018AP1239, filed on January 30, 2020.

ISSUES PRESENTED FOR REVIEW

The issues presented for review are:

I. Do Wisconsin state agencies need to consider indirect environmental effects when determining whether to issue an environmental impact statement ("EIS") under Wis. Stat. §1.11(2)?

The Court of Appeals explained that, regardless of the overarching logic of precedent, it was bound to answer no, under its obligation to follow a single sentence of potential overstated dictum: "The presence of significant indirect effects or cumulative effects...alone does not require an EIS." *Wisconsin's Envtl. Decade, Inc. v. Wis. Dep't of Nat. Res.*, 115 Wis. 2d 381, 394, 340 N.W.2d 722, 729 (1983) (emphasis added) ("WED (1983)"). The Court of Appeals was compelled below to ignore both relevant context from WED (1983) itself, along with pages of earlier analysis from this Court, neither addressed nor discussed in WED (1983), "reject[ing] any intimation ... that because the [relevant] environmental effects ... are 'indirect' they need not be considered under WEPA. There is nothing in the Act to suggest that only direct environmental consequences need be considered." *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Com.*, 79 Wis. 2d 409, 428, 256 N.W.2d 149, 159 (1977) (emphasis added) ("WED (1977)").

BRIEF STATEMENT OF CRITERIA FOR REVIEW

As the Court of Appeals explained: "[I]it is not clear to us why the court made such an unqualified statement regarding 'significant indirect effects' given the specific factual context of *WED (1983).*" 2018AP1239, ¶88. This Court, alone, has the ability to provide much-needed guidance on this potential conflict in its prior cases.

Relevant to the adjudication of this case and suitability for further appellate review, Wisconsin law divides real property into separate classifications for tax assessment. Agricultural land is based upon its "use value" instead of its fair market valuation. The Wisconsin Department of Revenue (the "Department") promulgated Wisconsin Administrative Code section Tax 18.05(1)(d) ("Tax 18.05(1)(d)" or the "Rule") which redefined "agricultural use" – thereby determining which land would be classified as agricultural and generally subject to less taxation.

The Wisconsin Environmental Policy Act ("WEPA"), §1.11(2) requires state agencies to issue an EIS, a "detailed statement" on the "environmental impact" of "major actions significantly affecting the quality of the human environment[.]" Wis. Stat. § 1.11(2)(c)1. "The purpose of the EIS is to enable agencies to take a hard look at the environmental consequences of a proposed action. To the extent that

relevant information is complete and available, the EIS shall evaluate reasonably foreseeable, significant effects to the human environment." *Clean Wis., Inc. v. PSC of Wis.*, 2005 WI 93, ¶¶188-189, 282 Wis. 2d 250, 375-76, 700 N.W.2d 768, 828-29 (citations, footnote, and quotation marks omitted).

In crafting Tax 18.05(1)(d), which impacts tens-of-thousands of acres of land and associated landowners, the Department failed to conduct any environmental study at all. Instead, the Department dismissed the Rule's documented effect on wetland restoration as indirect and stated it was unable to measure the impact.

As discussed *supra*, the Court of Appeals concluded, based on what it described as unclear authority from this Court, that the Department's failure was excusable. This Court should grant review for four reasons.

First, because a decision by this Court will develop, clarify, and harmonize the law, specifically the interplay between WED (1997) and WED (1983), in a way that only this Court can. The Court of Appeals determined the latter impliedly overruled the former, unexpectedly and adversely impacting landowners across the state.

Second, the issue presents a novel question of law that the Wisconsin Appellate Courts have not previously considered and the resolution of which will have a statewide impact. To Petitioner's

knowledge, no state agency has previously argued indirect environmental effects are insufficient as a matter of law to trigger the issuance of a "detailed statement" under Wis. Stat. ss 1.11(2)(c). Permitting this flawed understanding of WEPA to stand will permit all state agencies to dispense of important statutory duties out of hand.

Third, this case presents and ideal vehicle for resolution of the issue. As it comes to this Court, the case does not rest on a factual dispute, but instead turns purely on a question of law that only this Court is empowered to resolve. Indeed, the Court of Appeals expressly recognized "the defect is in the nature of the claimed effects, not because the LLC's evidentiary claims are inadequate." 2018AP1239, ¶91 n.23. "[T]he LLC's burden is merely to *allege* facts constituting a bona fide claim to trigger scrutiny of the Department's actions under WEPA, and this does not amount to a duty to *prove* its allegations." *Id.* (emphasis in original).

Last, but certainly not least, the Court of Appeals decision represents a break from the federal precedent on which the WEPA is patterned, the NEPA. *Larsen v. Munz Corp.*, 167 Wis. 2d 583, 606, 482 N.W.2d 332, 334 (1992). This represents a tectonic shift in how the courts of this state interpret the WEPA, which has consistently been to utilize federal NEPA precedent as persuasive, if not controlling. *Clean Wis.*,

Inc., 2005 WI 93, ¶¶ 188-189; *see generally WED (1977)*. If such a shift in the analytical framework surrounding the WEPA is to occur, it should be announced clearly, and by this Court.

STATEMENT OF FACTS

Petitioner Applegate-Bader Farm, LLC

Petitioner Applegate-Bader Farm, LLC ("Applegate") operates a corn, soybean, and cattle farm on approximately 11,000 acres of farmland throughout Green and Rock counties. (R.39:8; R.67:1 ¶3.) Applegate also owns 1,919.86 acres of real property located in the Town of Avon, Rock County, Wisconsin, that is enrolled in a Wetlands Reserve Easement through the Agricultural Conservation Easement Program, f/k/a Wetland Reserve Program. (R.67:1 ¶4.) In exchange for assistance in restoring the Avon property from marginal farmland to wetlands, Applegate encumbered the property with perpetual agricultural easements restricting its ability to develop, destroy or otherwise alter the nature of the land. The easement also provided environmental benefits, including relief from water pressure for neighboring farmers upstream and increases in soil and water quality, all of which impact farming productivity. (R. 67:1 ¶5; R. 67:2 ¶¶11-13.)

Agricultural Use-Value

On July 26, 1995, the Wisconsin legislature enacted the Use Value

Law through Wis. Act 27 3362h. Replacing fair market valuation with "use valuation" for agricultural lands, the Use Value Law purports to assess lands based upon their actual, current usage as opposed to the land's future potential for development or other uses. This law intends "to slow urban sprawl and allow farmers to keep their land in agricultural production without burdensome taxation," and "preserve wildlife habitat and opportunities for hunting and other outdoor recreational activities." (R.63:2; R.64:21-22.)

Wis. Stat. § 70.32(2)(a) divides all real property into eight classifications for tax purposes, one of which is agricultural. The Use Value Law does not contain a definition of "agricultural use." Instead, the legislature tasked the Department with fashioning a definition. Wis. Stat. § 70.32(2)(c)1i.

Prior Rulemaking History

The Department endeavored to define agricultural use in 1997 when it promulgated Wis. Admin. Code § Tax 18.05(1) as:

> (e) Land eligible for enrollment of land in any of the following federal agriculture programs: the conservation reserve program 1991-1995 under 7 C.F.R. 1410; the conservation reserve program 1986-1990 under 7 C.F.R. 704; the feed grain program under 7 C.F.R. 1413; the water bank program under 7 C.F.R. 752; the agricultural conservation program under 7 C.F.R. 701; or the dairy price support program under 7 C.F.R. 1430 and 282. (Cr. Register, September, 1997, No. 501.)

This initial rule attempted to classify lands enrolled in certain federal programs as agricultural notwithstanding their actual use. This definition immediately fell flat. The 1997 rule included programs that no longer existed ["water bank" and "agricultural conservation program"], may never have existed ["feed grain"] and another that was not even land-based conservation program ["dairy price support"]. Out of all the listed programs in the 1997 rule, *only* the conservation reserve program was a valid, existing agricultural conservation program.

This dud prompted the agency back to the drawing board. In 1999 the Department tried once more to define agricultural use. Its updated rule now read:

> (1) "Agricultural use" means any of the following:
> ...
> (d) Land enrolled in any of the following *federal* agriculture programs: the conservation reserve program under 7 CFR 1410; the conservation reserve program 1986-1990 under 7 CFR 704; the water bank program under 7 CFR 752; the agricultural conservation program under 7 CFR 701; or, provided that the land was in agricultural use under par. (a), (b) or (c) at the time of enrollment, the environmental quality incentives program under 7 CFR 1466 or the conservation contract program under 7 CFR 1951, Subpt. S, Exh. H.
>
> (e) Land that is subject to an easement under any of the following programs provided that the land was in agricultural use under par. (a), (b) or (c) at the time the easement was acquired: the stream bank protection program under s. 23.094, Stats.; the conservation reserve enhancement program under s. 93.70, Stats.; or the non-

> point source water pollution abatement program under s. 281.65, Stats.

Wis. Admin. Code Tax § 18.05(1) (2000) (emphasis added).

Although the updated version of the rule dispensed with several of the defunct programs, Tax §18.05(1)(d) now defined "agricultural use" as lands enrolled in *federal* agricultural conservation programs subject to *temporary* agreements, while Tax § 18.05(1)(e) defined "agricultural use" as lands in *state* programs subject to *permanent* easements. Bizarrely, the rule excluded permanent federal easements and temporary state easements for no apparent reason.

Negative Environmental Effects of the Rule

The 2000 updated rule created caused immediate problems again, in part due to its arbitrary treatment of similarly situated lands based solely on whether they were enrolled in state or federal programs of varying durations. As a result of the rule participation in permanent federal easement programs fell off a cliff. Enrollment in the Wetland Reserve Program fell from 5752 acres to 1352 acres a year over a 6-year period following implementation of Tax 18.05(1) due to the increased tax burden. (R.63:1 ¶3; R.64:16.) And for many of those landowners already enrolled in federal easement programs, they began converting and degrading existing wetlands to an active agricultural use to avoid the

punitive property taxes resulting from Tax 18.05(1). (R. 29:22-23.)

The record in this case includes first-hand reports by the DNR and assessors that landowners were damaging wetlands by pasturing cows in them to obtain agricultural classifications. (R.64.87). Joshua Ramicsh and Dan Undersander, professors in the University of Wisconsin's agronomy department, prepared a study and submitted it to the Department of Revenue which explained in detail how Tax 18.05(1) was causing property taxes on agricultural wetlands to soar – as much as **2726%**. (R.64:65-70). This dramatic increase has placed "[w]etlands and adjacent, environmentally sensitive idle, "waste" land...under...pressure." (R.64:66.) They reported that "[f]armers no longer have a tax incentive to enroll stream corridors in the WRP. Instead, it is in their interest to graze these lands to be assessed at the cheaper pasture rate." (R.64:67.) As an example, they reported that a landowner in Marathon County "has opted to graze a wooded creek bottom to save almost $2400 in taxes." (R. 64:66.) As a result, Professor Ramish testified that "[t]hese actions, of course, threaten water quality, diminish wildlife habitat, contribute to nutrient loading, and problem of hypoxia in the Gulf of Mexico, and across the board they hurt Wisconsin agriculture." (R.64:69.)

The Wisconsin Wetlands Association conducted a survey and a

study that further documented these trends. According to its survey of farmers, 44% said tax concerns "very much" influenced their decisions to implement conservation practices. (R.83.2 ¶4; R.84:109.) Within that same survey, 48% of farmers admitted to altering land use by pasturing cows in forests or marshes or by replacing fence rows, stream buffers or wetlands with crops or pasture to maximize eligibility for agricultural tax benefits. (Id.)

The WWA went as far as collecting all the tax records for Wetland Reserve acres within the State. (R.83:2 ¶4; R.84:66-68.) It then selected five counties with significant numbers of these easements and performed a comprehensive review of the actual assessments. The study's results were astonishing. Despite prohibitions on active agricultural uses:

- In Dodge County, 42.53% of Wetland Reserve Easements were being assessed agricultural.
- In Marquette County, 38% of lands enrolled in permanent Wetland Reserve Easements were assessed as agricultural.
- Manitowoc County stands out for the fact that an overwhelming 88.86% of Wetland Reserve Easements acres were assessed agricultural!
- Similar results were found for Columbia County and Jefferson County where 53.62% and 45.75%, respectively, were assessed as agricultural.

(R.29:22-23.)

The WWA tax study shows the direct causal nexus between Tax 18.05(1)'s classifications and landowner behavior, further confirming the

DNR and UW professors' observations that farmers were converting these lands for haying and grazing in order to secure use-value assessment as a result of their exclusion from Tax 18.05(1). The rule's effect on behavior is apparent and its impact on the environment is meaningful.

2013 Rulemaking

Nudged along by several lawsuits[1] in 2013 the Department announced it would be initiating new rulemaking to replace the 2000 version of Tax 18.05(1)(d) & (e). On December 9, 2013, the Department submitted a proposed rule, CR-102, to the Wisconsin Legislative Council Rules Clearinghouse. The draft rule placed federal Wetland Reserve easements on *equal* footing with the state agricultural conservation easement programs that received the benefit of Use Value assessment. The Draft Rule Order revised Tax 18.05(1)(d) and (e) relating to assessment of agricultural property, including all lands "subject to a permanent federal or state easement or enrolled in a permanent federal or state program if that land was in agricultural use under par. (a), (b), or (c) when it was entered into the easement or program." The proposed rule was estimated to affect nearly 87,000 acres of agricultural wetlands.

[1] *D & D Schmidt Farms, LLC v. DOR* (Fond du Lac County Case No. 13-CV-143), *Ryan Waldschmidt v. DOR* (Fond du Lac County Case No. 13-CV-349) and *Frank Multerer v. DOR* (Dodge County Case No. 13-CV-380.)

(R.49:26.)

Although the Rulemaking Record contains voluminous outside comments on the environment ramifications of the Department's rule, no analysis was ever conducted. The Department concedes that it only evaluated the economic impact of the proposed language, not how the rule may affect the environment in accord with WEPA. (R.85:29.) Given that the proposed rule would add to the overall acres of qualifying land, that initial oversight could certainly be forgiven.

However, on January 14, 2014 following the public hearing and comment process, the Department met privately with interested lobbyists. (R.63:9 ¶45; R.66:2.) Following that meeting the lobbyists provided Department with its replacement draft of the rule, which effectively removed all lands covered by permanent easement. (Id. at R.66:42 ¶¶8-11; R.63:8 ¶40; R.64:134-R.65:1.) After several rounds of revisions, on February 10, 2014 the Department then replaced its Draft Rule "verbatim" with what the lobbyist had dictated. (R.66:42 ¶11, R.65:1.) Two days later, a lobbyist met with the Department to offer another special interest carve-out to the rule that created a permitting requirement only for select lands enrolled in permanent easements

controlled by DATCP[2] - but not applicable to those under federal stewardship. (R.65:2.) This permitting scheme later became a blanket-authorization for those enrolled in state-programs only, [R.83:1 ¶3; R.84:32-35], which only exacerbated the environmental error by allowed unrestrained haying and grazing regardless of what is best for the land. (R.45:1-2.)

The final text of the revised Tax 18.05(1)(d) states:

> (1) "Agricultural use" means any of the following:
> [...]
> (d) Land without improvements subject to a federal or state easement or enrolled in a federal or state program if all of the following apply:
> 1. The land was in agricultural use under par. (a), (b), or (c) when it was entered into the qualifying easement or program, and
> 2. Qualifying easements and programs shall adhere to standards and practices provided under the January 31, 2014 No. 697 version of s. ATCP 50.04, 50.06, 50.71, 50.72, 50.83, 50.88, 50.91, 50.96, or 50.98. The Wisconsin Property Assessment Manual, authorized under s. 73.03 (2a), Stats., shall list the qualifying easements and programs according to the ATCP provisions, and
> 3. a. The terms of the temporary easement or program do not restrict the return of the land to agricultural use under par. (a), (b), or (c) after the easement or program is satisfactorily completed, orb. The terms of an easement, contract, compatible use agreement, or conservation plan for that specific parcel authorized an agricultural use, as defined in par. (a), (b), or (c), for that parcel in the prior year.

[2] As explained by the Department of Revenue, this permitting requirement allowed a sub-set of permanent easements (i.e., those favored by DATCP and the Farm Bureau) to obtain a compatible use authorization, which **"[t]hey don't need to exercise"** in order to obtain Use Value assessment. (R.63:9 ¶45; R.66:10-11.)

Wis. Admin. Code Tax § 18.05(1).

Despite modifying the proposed rule from one of greater inclusion to one of exclusion, none of the Department's rulemaking documents were updated. The new rule wholly eliminated eligible programs like the State's Streambank Protection Program and the Non-point Source Water Pollution Abatement Program without study, much less comment. It also eliminated all the Wetland Reserve Program lands that had been included in the proposed rule without any even the slightest contemplation of the environment impacts – much less a study. (R.85:29.) Confronted by the Wisconsin Wetlands Association over its lack of any environmental consideration, the Department dismissed the concerns stating:

> This rule does not deal specifically with wetland restoration or conservation, and to the extent that this is an indirect effect of the rule change, the department is unable to measure the impact.[3]

(R.46:4-5)

STATEMENT OF THE CASE

On April 1, 2016, Applegate filed suit against the Department and

[3] Measuring these effects is not cumbersome or expensive. The record reflects that DATCP annually measures the environmental effects of its agricultural easements. (R.43:5.)

Secretary Richard Chandler challenging the validity of Wis. Admin. Code Tax § 18.05(1)(d) on several procedural and substantive grounds. (R.1.) The Green County Circuit Court effectively bifurcated the matter and requested briefing on the procedural rulemaking and WEPA claims first. The parties filed cross motions for summary judgment on March 2, 2018. (R.68; R.74.) The Circuit Court issued its Memorandum Decision on Motion for Summary Judgment on June 5, 2018. (R.96.) The Circuit Court granted Petitioner's motion for summary judgment finding that the Department made meaningful and measurable changes to the proposed rule that were not properly disclosed to the public. (R.96.) The Circuit Court would have required the Department to revise its state of scope and economic impact analysis and hold a new public hearing. By contrast, the Circuit Court granted the Department's motion for summary judgment on the WEPA claim.

The Department filed its Notice of Appeal on June 28, 2018, and Applegate filed its Notice of Cross-Appeal on July 9, 2018. (R.99; R.103.) On January 30, 2020, the Wisconsin Court of Appeals, Division IV, reversed the decision of the Circuit Court on the procedural rulemaking claims and affirmed the dismissal of the WEPA claim. 2018AP1239, ¶¶95-97.

ARGUMENT

Applegate asks this Court to resolve the conflict identified by the Court of Appeals between two prior precedents, WED (1977) and WED (1983). Specifically, this Court is asked to review and decide whether indirect environmental effects can be legally sufficient to require the publication of an EIS, an issue that the 1977 case addresses at length and an issue with the 1983 case addresses, at best, briefly and tangentially.

I. The WEPA Obliges State Agencies to Consider All Environmental Impacts, Including Indirect Ones, Where, as Here, a Proposed Action has a Significant Effect on the Environment.

Specifically, under Wis. Stat. § 1.11,

> (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.
> (d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any agency which has jurisdiction or special expertise with respect to any environmental impact involved. ...

Wis. Stat. § 1.11. The purposes of the WEPA are to "declare a policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; and to enrich the understanding of the important ecological systems and natural resources." Chapter 274, Laws of 1971 § 1(1).

WEPA's plain language compels the inclusion of indirect environmental effects in state agencies' considerations. Specifically, Wis. Stat. § 1.11(2)(c) requires an environmental impact statement "for legislation and other major actions *significantly affecting* the quality of the human environment." (emphasis added). Further, an environmental impact statement must describe "[t]he environmental impact of the proposed action[.]" Wis. Stat. § 1.11(2)(c)1. WEPA does not distinguish

between categories of effect. Rather, WEPA applies flexibly, concerned with environmental all effects that "significantly [affect] the quality of the human environment." Wis. Stat. § 1.11(2)(c). This conclusion is bolstered by the policies set forth in Chapter 274, Laws of 1971 § 1, which explains that State agencies can hardly be said to be "us[ing] all practicable means and measures" "to promote efforts which will prevent or eliminate damage to the environment" and "to enrich the understanding of the important ecological systems and natural resources[]" by dismissing environmental impact as indirect. Chapter 274, Laws of 1971 § 1(1)-(2). This Court first clarified its firm stance on indirect impacts in 1977.

> Both the *Guidelines for the Implementation of WEPA* and the *CEQ Guidelines* prepared for federal agencies under NEPA indicate that both direct and indirect effects must be considered. WEPA was intended to require cognizance of environmental consequences "to the fullest extent possible."

WED (1983), 115 Wis. 2d at 392 (quoting *WED (1977)*, 79 Wis. 2d at 428-30).

Agencies within Wisconsin have, without issue, incorporated the need to consider indirect environmental effects into their policymaking. For instance, the Wisconsin Department of Safety and Professional Services promulgated Chapter SPS 301 – Environmental Analysis and Review Procedures for Department Action. In Wis. Admin. Code SPS §

301.04(7), "impact" is defined to mean "a reasonable and foreseeable effect relative to the human environment, including ecological, aesthetic, historic, cultural, economic, social or health effects." Similarly, Wis. Admin. Code SPS § 301.21(2)(b)3. and Wis. Admin. Code SPS § 301.22(3)(b)3. require description of "possible environmental impacts" of the agencies' actions in its environmental assessments and environmental impact statements, respectively. Instead of excluding indirect environmental effects, these rules reasonably exclude from consideration unforeseeable environmental effects not indirect environmental effects.

The DNR has promulgated a relevant definition of environmental effect, which expressly includes "a direct, *indirect*, secondary, or cumulative change to the quality of the human environment." Wis. Admin. Code NR § 150.03(9) (emphasis added). The DNR also defined "secondary effects" as "reasonably foreseeable indirect effects caused by an action or project later in time or farther removed in distance, including induced changes in the pattern of land use, population density, or growth rate and related effects on the human environment." Wis. Admin. Code NR § 150.03(24).

A. WED (1977)

WED (1977) concerned utility rate-making. The Wisconsin Electric

Power Company pursued an application with the Public Service Commission of Wisconsin in order to increase rates to consumers. *WED (1977)*, 79 Wis. 2d at 412. Plaintiff in WED (1977), Wisconsin's Environmental Decade, attended public hearings on the proposed increase and sought to have an EIS completed. *Id.* No EIS was conducted and the rate increase was approved. *Id.* at 413. The Commission argued that no EIS was required because the regulation was economic in nature rather than environmental, and no EIS was required because any impact would be indirect. *Id.*

WED (1977) went on to squarely address the consideration of indirect environmental effects: "Initially, we reject any intimation in the Commission's order, that because the environmental effects of a rate order are 'indirect' they need not be considered under WEPA. There is nothing in the Act to suggest that only direct environmental consequences need be considered." *Id.* at 428. In support, the *WED (1977)* Court cited a federal case interpreting NEPA:

> In *Citizens Organized to Defend the Environment v. Volpe*, 353 F. Supp. 520, 540 (S.D. Ohio 1972), the court stated regarding NEPA:
>
> "*A federal action 'significantly affecting the quality of the human environment' is one that has an important or meaningful effect, directly or indirectly, upon any of the many facets of man's environment.* [cite omitted] The phrase must be broadly construed to give effect to the purposes of NEPA.

> A ripple begun in one small corner of an environment may become a wave threatening the quality of the total environment. Although the thread may appear fragile, *if the actual environmental impact is significant, it must be considered*." (Emphasis supplied.)

Id. Further, the *WED (1977),* Court noted that both the Guidelines for the Implementation of WEPA and the CEQ Guidelines for federal agencies "indicate that both direct and indirect effects must be considered." *Id.* at 428-29. The WED (1977) Court found that "[a]ny construction limiting [WEPA] to direct environmental effects would be contrary to its manifest intent." *Id.* at 430.

It was not until 1983 that this Court would be called upon to reconsider the precise scope of indirect impacts that might trigger the EIS requirement.

B. WED (1983)

WED (1983) was a consolidated case that involved challenges to the Wisconsin Department of Natural Resource's decision to not prepare an environmental impact study in connection with various agency actions related to the development of a new shopping mall near the Town of Grand Chute. In *WED (1983)*, it was clear that the relevant agency, the Department of Natural Resources, had seriously considered the environmental effects of its actions. For instance, the DNR created a 23 page "Environmental Impact Assessment Screening Worksheet" and

included attached sources and documents. *WED (1983)*, 115 Wis. 2d at 396. Further, the DNR contacted 80 people outside DNR and reviewed nearly 30 research sources. *Id.* at 397. The DNR also considered "direct and indirect environmental effects[.]" *Id.* (emphasis added).

In WED (1983), this Court did not face the same question as had been presented in 1977. Rather, this Court identified that: "The real issue is whether the DNR has an obligation to do an EIS for a project when investigation, research and public hearing reveal that the project will have minor impacts on the environment, but will have possible socioeconomic impacts." *Id.* at 381 (emphasis added).[4]

This Court, in *WED (1983)*, quoted 40 C.F.R. sec. 1508.14:[5] "the 'human environment' includes the natural and physical environment and, further, that 'economic or social effects are not intended by themselves to require preparation of an environmental impact statement.'" *Id.* at 403. (emphasis altered). Immediately following this quote, the Court stated:

[4] The *WED (1983)* trial court found that the Department of Natural Resources fulfilled the requirements of *WED (1977)* because "it is clear that WEPA does not require the DNR to consider secondary socio-economic impacts in making its threshold determination not to require an EIS." *WED (1983)*, 340 N.W.2d at 730.

[5] Erroneously referenced as 40 C.F.R. § 1508.4.

> The socioeconomic injuries alleged by the parties seeking an EIS do not have a direct causal relationship to the minor changes to the physical environment found by the DNR and the alleged socioeconomic injuries do not trigger the requirement that DNR prepare an EIS. *See Metro. Edison*, 103 S. Ct. 1556, and *also, Fox v. DHSS*, 112 Wis. 2d 514, 334 N.W.2d 532 (1983). As held in Metro. Edison, it is the physical environment that the agency must study for significant effect in the threshold decision to conduct an EIS; that was done by the DNR in this case and then based on the record before it, the DNR exercised reasonable judgment not to prepare an EIS.

Id. at 404 (emphasis in original).[6] It was with that background that this Court then made the statement at the center of this appeal: "While the 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. 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.* at 394 (emphasis added).

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[6] *Fox*, in evaluating standing under WEPA, merely stated injuries to aesthetic, conservational and recreational interests "must be caused by a change in the physical environment before they would fall within the interests protect by the environmental protection act." *Fox v. Wis. Dep't of Health & Soc. Servs., 112 Wis. 2d 514, 525, 334 N.W.2d 532, 538 (1983)* (citations omitted). *Metro. Edison* was analyzing whether potential psychological health effects allegedly caused by the risk of nuclear disaster which would be caused by the operation of a nuclear powerplant are relevant under NEPA; it determined such effects are too attenuated from the operation of the plant to be "caused" by operation of the plant, and determined that the risk of an accident is not an effect on the physical environment. *Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 775-76, 103 S. Ct. 1556, 1561-62 (1983)*

Turning back to this case, the Court of Appeals recognized "it is not clear to us why the [*WED (1983)*] court made such an unqualified statement regarding "significant indirect effects" given the specific factual context of [*WED (1983)*]." *Id.*; *see also* 2018AP1239, ¶86 (the *WED (1983)* Court "did not explain its rationale in detail."). Further, the Court of Appeals noted that *WED (1983)* "does not explicitly modify or withdraw any part of" *WED (1977)*. 2018AP1239, ¶88. Although both WED (1977) and WED (1983) are each regularly cited, this case is the first to squarely address the apparent, implicit, conflict between the two.

II. The Court of Appeals was Required to Conclude that a Conflict Existed, and Could Not Consider of the Overall Logic of Either WED (1977) or WED (1983) – Logic Which Dictates a Contrary Result Here.

The Court of Appeals was unable to consider whether or not the statement in WED (1983) that "indirect effects or cumulative effects ... alone do[] not require an EIS[,]" was limited by either WED (1977), or by the preceding language in WED (1983) itself. The Court of Appeals expressly recognized this limitation and did not engage in further analysis: "[W]e cannot disregard the statement that such effects alone are insufficient." 2018AP1239, ¶86. "The court of appeals may not dismiss a statement from an opinion by our supreme court by concluding that it is dictum." *Id.* (quoting *Zarder v. Humana Ins. Co.*, 2010 WI 35,

¶58, 324 Wis. 2d 325, 350, 782 N.W.2d 682, 694) (quotation marks omitted).

In light of the clear precedent of WED (1977), that "[a]ny construction limiting [WEPA] to direct environmental effects would be contrary to its manifest intent[,]" *WED (1977)*, 79 Wis. 2d at 430, it would, at best, be unexpected for this Court to have overruled that WED (1977), in WED (1983), which cited WED (1977) for related propositions, without doing so explicitly or without clear analysis. A natural reading of WED (1983) is to consider the build-up to the indirect effects statement, which details the statutory and practical distinctions between socioeconomic effects and more traditional environmental effects, and to read WED (1983) as applying the explicit text of 40 C.F.R. § 1508.14 to the WEPA: "economic or social effects are not intended by themselves to require preparation of an environmental impact statement." *WED (1983)*, 115 Wis. 2d at 403 (quoting 40 C.F.R. § 1508.14[7]) (emphasis added). Indeed, this Court has applied WED (1983) exactly that way: "[T]he DNR did not need to consider socioeconomic impacts in determining whether to issue an EIS...." *Rock-Koshkonong Lake Dist. v. State Dep't of Nat. Res.*, 2013 WI 74, ¶43, 350 Wis. 2d 45,

[7] Erroneously referenced as 40 C.F.R. § 1508.4.

69, 833 N.W.2d 800, 812 (citing *WED (1983)*, 115 Wis. 2d at 395) (emphasis added).

While the Court of Appeals could not more robustly consider the reasoning and import of the cases as a whole, that context is critical to any analysis by this Court. See *State v. Starks*, 2013 WI 69, ¶64, 349 Wis. 2d 274, 311, 833 N.W.2d 146, 165 (criticizing the dissent for disregarding the "reasoning and import" of critical precedent). This case presents an ideal vehicle to allow this Court to engage in that analysis, as the Court of Appeals expressly recognized "the defect is in the nature of the claimed effects, not because the LLC's evidentiary claims are inadequate." 2018AP1239, ¶91 n.23.[8]

III. The Court of Appeals Decision Creates a Marked Departure from Decades of Precedent in Which This Court Has Declared NEPA Authority to be Persuasive, if not Controlling, Regarding EIS.

"The Wisconsin Environmental Policy Act (WEPA) is patterned after the National Environmental Policy Act of 1969 (NEPA), 42 USC sec. 4321, et seq." *WED (1983)*, 115 Wis. 2d at 395. "As a result, federal NEPA case law is an essential source of guidance regarding the proper implementation of WEPA, constituting highly

[8] "[T]he LLC's burden is merely to *allege* facts constituting a bona fide claim to trigger scrutiny of the Department's actions under WEPA, and this does not amount to a duty to *prove* its allegations." *Id.* (emphasis in original).

relevant persuasive authority." *Clean Wis., Inc.*, 2005 WI 93, ¶305 n.69 (in dissent) (emphasis added) (citation omitted). "The CEQ regulations promulgated to implement the NEPA are also applicable to WEPA". *Larsen*, 167 Wis. 2d at 593 (citing Wis. Stat. § 1.11(2)(c); additional citation omitted).

Consistent with federal NEPA authority, over 42-years ago, this Court instructed State agencies to consider both direct and indirect effects on the physical environment. *WED (1977)*, 79 Wis. 2d at 430 (1977) ("Any construction limiting the Act to direct environmental effects would be contrary to its manifest intent.") The Court of Appeal's decision that "'significant indirect efforts or cumulative effects' alone do not require an impact statement" creates an immediate conflict with both *WED (1977)* and is a stark departure from highly persuasive NEPA authority.

NEPA directs that federal agencies consider "any adverse environmental effects" of their "major ... actions," 42 U.S.C. § 4332(C), and the CEQ regulations, which are binding on the agencies, explain that "effects" include both "direct effects" and "indirect effects," 40 C.F.R. § 1502.16(b). Indirect effects are effects that "are caused by the action and are later in time or farther removed in distance [than direct impacts], but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). "Indirect

effects may include ... effects related to induced changes in the pattern of land use...and related effects on air and water and other natural systems, including ecosystems." *Id.* (emphasis added) "Cumulative impacts" must also be considered. 40 C.F.R. § 1502.16(e).

The touchstone for determining whether an agency must consider indirect effects is whether those effects can influence the agency's decision. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 73 (D.D.C. 2019). To constitute an indirect effect under NEPA, there must be "a reasonably close causal relationship between a change in the physical environment and the effect at issue[,]" analogous to the "familiar doctrine of proximate cause from tort law." *Metro. Edison Co.*, 460 U.S. at 774; *see also DOT. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).

The Petitioner has met its burden of demonstrating a close causal relationship between the Department of Revenue's classification of certain wetlands as 'agricultural' and the degradation of the physical environment resulting from the exclusion of certain landowners: "These actions, of course, threaten water quality, diminish wildlife habitat, contribute to nutrient loading, and problem of hypoxia in the Gulf of Mexico, and across the board they hurt Wisconsin agriculture." (R.64:69.)

The Court of Appeal's attempt to distinguish Petitioner's challenge

by pointing to the authority of other agencies to police the environmentally harmful behavior, 2018AP1239, ¶¶90-93, does not excuse the Department of Revenue from its WEPA obligations.[9] *See Sierra Club v. Fed. Energy Regulatory Comm'n,* 867 F.3d 1357, 1375 (D.C. Cir. 2017) ("[T]he existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis.") The Department does not need to control the source of the environmental impacts to recognize their existence, and craft policy in accordance with that recognized reality, particularly when it has an ability to mitigate detrimental effects.

The Court's citation to *DOT v. Pub. Citizen*, 541 U.S. 752 (2004) ("*Public Citizen*") to support its conclusion that the Department is not the "legally relevant 'cause' of the effect" was also misplaced. 2018AP1239, ¶93. *Public Citizen* involved a unique situation implicating the presidential power, and a lack of any relevant individual or agency with the authority to change the status quo. There, the Supreme Court held that the Federal Motor Carrier Safety Administration ("FMCSA") did not violate NEPA when it did not consider the environmental effects

[9] It also disregards that the record in this case shows that DATCP and the Department of Revenue collaborated to modify the applicable permits for certain State easements so that they would qualify under Department's new classification. (R.83:1 ¶3, R:84:29-35; R.63:9 ¶45, R.66:10-11.)

of Mexican motor carriers entering the United States. *Pub. Citizen*, 541 U.S. at 773.

The North American Free Trade Agreement ("NAFTA") required the United States to admit trucks from Mexico and did not provide for modification based on concerns that those trucks were unsafely regulated. *Id.* at 759–60. The President directed the FMCSA to set new safety standards and admit Mexican trucks that met those standards, as was required under NAFTA. *Id.* at 760. *Public Citizen* addressed what was required in order to effectuate that change – nothing, because the policy at issue was independently legally required, and could not be modified. *Id.* at 772–73. The case does not stand for the proposition that the FMCSA would not have needed to consider the impact of the then-implemented lower emissions standards when promulgating any subsequent policies, only that they did not need to perform an EIS before implementing a policy they were already legally required to implement, without modification.

Public Citizen is not controlling here. DATCP's and the USDA's oversight of certain easements is hardly comparable to the president's authority to enter into binding international treaties. The Wisconsin Legislature has specifically tasked the Department of Revenue in this instance with the task of defining "agricultural use". That the

Department of Revenue has elected to use its primary authority to wade into classifying wetlands, it cannot shirk its obligations on the basis that another agency may ultimately be able to police the conduct.

CONCLUSION

Unfortunately for those that care about the environment, under the decision of the Court of Appeals, state agencies would be free to avoid taking a "hard look" at indirect environmental effects of their actions, no matter how significant to the environment the indirect effects may be. This is squarely in conflict with WED (1977), which has never been expressly overruled by this Court.

Here, the record shows that the Department was not even aware which environmental programs its rule impacted. Applegate respectfully asks this Court to accept this case to clarify which environmental impacts that must be considered when determining whether to issue an EIS and correct the errant application of the Wisconsin Environmental Policy Act hesitantly endorsed by the Court of Appeals.

Dated: February 28, 2020

Respectfully submitted,

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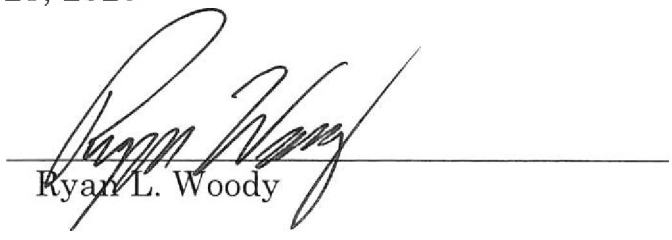
CERTIFICATION REGARDING ELECTRONIC PETITION PURSUANT TO SECTION 809.19(2)F), STATS.

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, which complies with the requirements of section 809.19(12), Stats.

I further certify that this electronic petition and appendix are identical in content and format to the printed form of the petition and appendix filed as of this date.

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

Dated: February 28, 2020

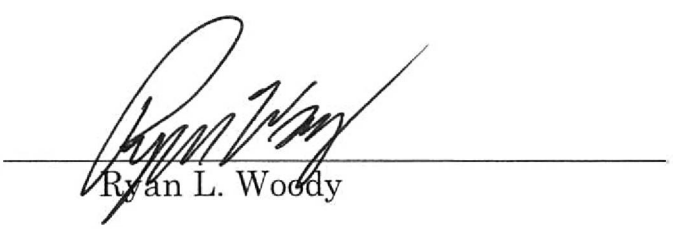


Ryan L. Woody

CERTIFICATION PURSUANT TO WIS. STAT. § 809.19(8)(d)

I hereby certify that this brief and appendix conform to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of the portions of this brief referred to in section 809.19(8)(c) is 6,730 words, calculated using the word count function of Microsoft Word.

Dated: February 28, 2020



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