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CLERK OF WISCONSIN
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STATE OF WISCONSIN
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DISTRICT III

Appeal No. 2021AP1187

KOHLER CO.,

Petitioner-Appellant,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent,

CLAUDIA BRICKS AND FRIENDS OF
THE BLACK RIVER FOREST,

Intervenors-Respondents.

APPEAL FROM THE FINAL ORDER OF THE
SHEBOYGAN COUNTY CIRCUIT COURT,
THE HONORABLE L. EDWARD STENGEL, PRESIDING,
SHEBOYGAN COUNTY CASE NO. 19-CV-199

**BRIEF OF CLAUDIA BRICKS AND FRIENDS
OF THE BLACK RIVER FOREST**

Christa O. Westerberg, SBN 1040530
Leslie A. Freehill, SBN 1095620
PINES BACH LLP
122 W. Washington Avenue, Ste. 900
Madison, Wisconsin 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
cwesterberg@pinesbach.com
lfreehill@pinesbach.com
Attorneys for Intervenors-Respondents

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COUNTER-STATEMENT OF ISSUES

Kohler's statement of the issues is biased and circular, assuming the truth of its own arguments. A more accurate and less argumentative phrasing of the issues is as follows:

1. Did the Administrative Law Judge ("ALJ") commit an error of law by considering secondary and other impacts to wetland functional values resulting from the proposed project under Wis. Stat. §281.36(3n)(b) and (c)?

Answered by the circuit court: No.

2. Did the ALJ erroneously exercise his discretion by reversing Kohler's wetland permit after concluding the Department lacked sufficient information to issue it, and when no party had requested that he instead modify the permit?

Answered by the circuit court: No.

3. Was the ALJ's Decision supported by substantial evidence as to the project's cumulative impacts, and the impacts to groundwater and wetlands from golf course chemicals?

Answered by the circuit court: Yes.

4. Did the ALJ impermissibly require the Department to make quantitative findings on secondary impacts to wetland functional values?

Answered by the circuit court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary in this matter because the issues presented rely on facts which are founded in substantial evidence, on supported matters of discretion, or on legal arguments which lack merit and are plainly contrary to sound legal authority. Wis. Stat. §809.22(2)(a). Furthermore, the briefs will adequately present and develop the issues, rendering oral argument of little value. Wis. Stat. §809.22(2)(b).

Publication may be warranted under Wis. Stat. §809.23(1)(a)5., as this is a case of substantial and continuing public interest.

STATEMENT OF THE CASE

Nature of the case

This is a Wisconsin Chapter 227 judicial review of an administrative law judge's decision to reverse an individual wetland permit issued by the Department of Natural Resources ("Department"). Kohler Co. ("Kohler") had sought the permit to build a golf course on a rare intact forest on the Lake Michigan shoreline, characterized by unique wetlands, uncontaminated groundwater, and a diversity of plant and animal life that rely on these specialized conditions to survive.

The Department may not issue a wetland individual permit unless it finds "the proposed project will not result in significant adverse impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences." Wis. Stat. §281.36(3n)c)3. The administrative law judge ("ALJ") found, among other things, that the Department did not have sufficient information to determine the standards had been met under these sensitive environmental conditions, and he reversed the permit.

The circuit court affirmed the ALJ in a decision that rejected Kohler's strained interpretations of the ALJ's decision and the law. Kohler now attempts to revive those strained interpretations before this Court and seeks relief it never asked the ALJ to provide. In the process, it minimizes the complex facts the ALJ methodically considered and wrongly asks the Court to re-weigh them. The ALJ's decision is supported by substantial evidence, and he did not err as a matter of law or discretion. The circuit court should be affirmed.

Statement of relevant facts

The proposed project

In 2014, Kohler announced plans to build an 18-hole golf course along Lake Michigan on 247 acres it owns in Sheboygan County and approximately 5 acres of land in Kohler-Andrae State Park. (R.138:39.) The proposed site, currently in its natural forested state, is home to rare and critically imperiled wetlands, including Great Lakes ridge and swale, floodplain forest, and interdunal wetlands. (R.15:145-46, F-App.051-052; R.56:28-33, F-App.005-010; R.85:190; R.126:1.)

The wetlands are largely groundwater fed and some interact with the uplands that surround them. For example, the Great Lakes ridge and swale wetlands are a mutually supporting system of upland (ridge) and wetland (swale) that were formed over thousands of years of lake action, and that now support rare plants and wildlife such as amphibians. (R.15:99-100, F-App.024-025; R.15:84, F-App.069; R.15:148-149, F-App.054-055; R.16:13,31-32,39-40, 17:5-6; 32:16-17; F-App.011-019.)

The overall site also hosts a variety of wildlife, including threatened and endangered species and species of special concern, and a strong diversity of resident and migratory birds. (R.85:16-120; R.85:192-193; R.130:13-17.) The intact forest provides high quality migratory bird stopover habitat, rare along the highly-developed Lake Michigan shoreline, and hosts birds that the Department lists as species of greatest conservation need. (R.15:126-132, F-App.085-091.)

The site also has highly permeable sandy soils and a shallow groundwater aquifer that is directly connected to the wetlands. (R.15:88, F-App.073; R.15:101, R.15:104-105, F-App.026, 029-039; R.85:157; R.144:36-37 at 115:22-116:6; R.85:156-160, R.85:164-165.) Currently, the groundwater is not contaminated with nitrogen or other fertilizers, which enables it to support the wetlands and their diversity of plants. (R.15:85-86.) But between the sandy

soils and high groundwater table, the property is very susceptible to groundwater contamination. (R.15:101-102, 104, F-App.026-027, 029; R.85:163-164.)

Kohler's permit application

On March 6, 2017, Kohler filed a joint federal-state individual permit application with the Department and the U.S. Army Corps of Engineers for a direct wetland fill of 3.69 acres of wetlands, acknowledging secondary (i.e., non-fill) impacts to additional wetland acreage would also occur. (R.17:27-81.)¹ Any fill greater than one acre is generally a large fill; Kohler's proposed 3.69 acres was among the highest some agency staff had ever seen. (R.15:155, F-App.061; R.150:44 at 407:1-11, F-App.056; R.167:8 at 1176:12-24.)

The project would require significant site grading and deforesting of about 50-60% of the site, including within some of the wetlands. (R.164:33 at 1060:4-22; R.15:107-108; R.77:10-82:3; R.85:176; R.85:210.) It also called for Kohler to use over five acres of land in the adjoining Kohler-Andrae State Park for its maintenance buildings and access road. (R.127:5.) Subsequent operation of the course would require applying fertilizers and pesticides. (R.17:51-52.)

The Department began evaluating the permit application pursuant to Wis. Stat. §281.36(3n).² As of October 18, 2017, the application was still not complete. (R.153:48 at 553:8-14; R.151:19 at 430:18-24.) Nevertheless, staff were directed by Department bureau directors to issue a notice of complete

¹For the Court's convenience, the Friends' appendix includes a glossary of technical terms and acronyms. (F-App.001-002.)

²Kohler overstates its position as a permit applicant, declaring the Department "must administer its regulations to accommodate a world-class, 18-hole golf course" (Kohler Br. 11), referring to the fact that the Department's review includes practicable alternatives limited to those "consistent with the overall purpose and scope of the project," Wis. Stat. §281.36(3n)(a)3. The Friends did not challenge the Department's practicable alternatives analysis but, regardless, no practicable alternatives (i.e. no versions of the golf course) may be approved if the wetland standards of Wis. Stat. §281.36(3n)(c)3. are not met. A permit is by no means a foregone conclusion for this site.

application by October 27, 2017. (R.153:35-36 at 540:14-541:9; R.153:47-48 at 552:6-553:11; R.137:18.) Kohler continued submitting additional information to the Department through November 7, 2017. (R.137:19-138:27.)

Two days later, the Department announced its intent to issue the permit with conditions but failed to confirm that its staff had received and reviewed all the additional information requested of Kohler. (R.154:1-2 at 554:23-555:2; R.154:10-13 at 563:17-566:3.) The Department's notice generated controversy, with many members of the public submitting comments against the project. (R.91:66-101:27.)

The Permit

The Department issued the permit ("Permit") on January 17, 2018, allowing Kohler to fill 3.69 acres of wetlands for its project: 0.1 acres of relic ridge and swale wetlands, 1.36 acres of ridge and swale wetlands, 2.23 acres of floodplain forest wetlands. (R.85:126, ¶3.) In the Permit, the Department found all functional values of these wetlands directly filled would be lost, and that these losses were permanent, irreversible, and of high significance. (R.85:127, ¶11.) The Department also found secondary impacts to wetlands — at least 4.79 acres—would also be permanent, irreversible, and of high significance, and would affect interdunal and other wetland types. (R.85:128, ¶13.) Lastly, the Department found significant and permanent cumulative impacts including potential for additional development of the site and further cutting of the wooded community. (*Id.* ¶14.)

Despite these findings, the Permit concluded there would be no significant adverse impacts to wetland functional values, no significant adverse impacts to water quality, or other significant adverse environmental consequences if Kohler followed permit conditions. (R.85:129, ¶25.) The conditions included erosion control measures, best management practices for nutrient and pesticide applications, compliance with state and federal

endangered species law, the purchase of 5.35 wetland mitigation credits, and a commitment of funds to a wetland trust. (R.85:122-125.)

At the same time it issued the Permit, the Department issued a final Environmental Impact Statement (“EIS”) for the Project under Wis. Stat. §1.11. While it extensively described many of the project’s environmental impacts, it was unable to describe others. For example, the EIS stated that “[i]t is unknown to what extent storm water infiltration and nutrient and pesticide applications to fairways, tees and greens (for either establishment or maintenance) would impact groundwater quality in this permeable soil and shallow water table environment.” (R.85:211 at 71.)

The contested case hearing

The Friends of the Black River Forest, a local environmental group, and Claudia Bricks (collectively, “the Friends”) petitioned for a contested case hearing under Wis. Stat. §281.36(3q). The Department certified four issues for hearing:

1. Whether the permit satisfies the standards in Wis. Stat. §§281.36(3n)(c);
2. Whether the Department had sufficient information to consider the standards in Wis. Stat. §281.36(3n)(c);
3. Whether the public had sufficient information to comment on the standards in Wis. Stat. §281.36(3n)(c); and
4. Whether the mitigation required under Wis. Stat. §281.36(3n)(d) compensates for adverse impacts to wetlands.

(R.39:49.)³ Kohler did not object to the issues certified. The Friends subsequently narrowed Issues (1) through (3) to the standards of Wis. Stat. §281.36(3n)(c)3. only. (R.39:73.)

A five-day contested case hearing was held in Sheboygan in June 2018. The parties submitted pre-filed written and live direct testimony from their witnesses and collectively submitted hundreds of exhibits. Notably, at no time

³ Issue (4), wetland mitigation, is not at issue in this appeal.

before, during, or after the hearing did Kohler ask the ALJ to modify the Permit. (*E.g.*, R.142:63-143:5; 180:42-117.)

i. The Friends' evidence.

The Friends presented testimony from four experts. Dr. John Jansen, a licensed professional hydrogeologist and geophysicist, testified that Kohler would grade over half the site, disrupting local groundwater flows to wetlands. (R.15:107-108, F-App.032-033.) Once operational, Jansen testified that nutrients and chemicals applied to the golf course are likely to infiltrate to groundwater due to the Kohler site's shallow aquifer and permeable soils. (R.85:158; R.15:101-102, F-App.026-027), adversely impacting groundwater quality. (R.144:12; R.165:18; R.166:27-28; R.166:32-33 at 91:2-7, 1091:5-16, 1147:18-1148:19, 1152:7-1153:5.) Because groundwater feeds the wetlands, any contamination that reaches groundwater will migrate to the wetlands. (R.15:116, F-App.041.) He noted missing information about the shallow groundwater aquifer and nutrient inputs. (R.15:108, 110, 119-120, F-App.033, 035, 044-045.)

Pat Trochlell, a wetland ecologist and recently retired 37-year veteran of the Department, testified to the rare and exceptional quality of the wetlands on the site, their high sensitivity to disturbance, and the presence of rare and endangered plant species and upland plant communities. (R.15:140-158, F-App.046-064.) Trochlell actually created the Wisconsin Rapid Assessment Methodology for Evaluating Wetland Functional Values ("WRAM") while a Department employee, which ranks wetlands and impacts to them. (R.132:34; R.15:144 at 5, F-App.050.) She, along with Department witness Geri Radermacher, had prepared the WRAM evaluating the Kohler site before Trochlell retired, visiting the wetlands multiple times to do so. (R.15:144-145, F-App.050-051; R.39:107; *e.g.* R.85:106-115, F-App.099-108.) In her 37 years of experience with the Department, the Kohler project would have the most

significant wetland impact of any project Trochlell had reviewed. (R.15:155, F-App.061.)

Furthermore, Trochlell testified that the ridge and swale wetlands not directly filled will be affected by secondary impacts due to grading and alteration of upland ridges, destroying the complex and destroying or degrading the floristic integrity, wildlife habitat, and groundwater process functional values of the remaining wetlands. (R.167:7-8 at 1175:10-1176:11; R.130:92-93, F-App.003-004.)

William Mueller, a UW-Milwaukee lecturer and the Director, Senior Ornithologist, and Conservation Biologist at the Western Great Lakes Bird and Bat Observatory in Port Washington, testified to the predicted impact of the proposed golf course on birds and wildlife. (R.15:121-139, F-App.080-098.) He testified that tree clearing for the golf course will significantly reduce the quality of the property's remaining habitat. (R.147:2,-34 at 224:4-225:25; R.15:133-134, F-App.092-093.) Human disturbance by foot, golf cart, and vehicular traffic on and near the golf course would further negatively impact the quality of remaining habitat on the site. (R.15:134, F-App.093.)

Lastly, Dr. Quentin Carpenter, a wetland ecologist and emeritus senior lecturer at the University of Wisconsin-Madison whose specialty is groundwater-fed wetlands, testified that the wetlands on the site will "certainly" be degraded by the alteration of the landscape and hydrologic processes, the addition of fertilizers and pesticides, and by humans and increased infrastructure on the course. (R.15:80-81,83; F-App.065-066, 068.) He described the project's effects as "a complete system makeover, which cannot be accomplished without great collateral damage." (R.15:87, F-App.072.) He testified that nothing in the Permit, including the nutrient management plan and integrated pest management plan submitted by Kohler, will prevent additional nutrients from reaching the wetlands, and the wetlands will be degraded as a result. (R.15:84, R.15:88-90, F-App.069, 073-074.)

ii. The Department's evidence.

The Department presented three witnesses, including Geri Radermacher, a water management specialist. Radermacher stated that in her 17 years with the Department, no other site had wetlands with higher functional values than the Kohler site. (R.150:43, 151:28 at 406:17-25, 439:2-11.) She testified that as late as August 2017, she and other resource managers still lacked sufficient information to determine whether standards were met. (R.151:19 at 430:18-24.) However, her work on the project ceased in mid-October 2017; she did not offer any testimony that the Project met statutory standards or about the effectiveness of permit conditions. (R.39:107-108.) In fact, she had no role in drafting the Permit. (R.151:29 at 440:1-7.)

The Department also presented testimony of Pamela Biersach, the former Director of the Bureau of Watershed Management and the Department manager who signed the Permit. She did not evaluate the Kohler wetlands personally. (R.153:39, 152:37-38 at 544:9-20, 495:18-496:5) She testified that as of October 18, 2017, the permit application was still not complete, but that nevertheless staff were directed to issue a notice of complete application by October 27. (R.153:48 at 553:8-14.) She also testified that the only limits Kohler must abide and that the Department may consider when evaluating the impacts are those listed in the Permit. (R.153:42 at 547:9-23.)

iii. Kohler's evidence.

Kohler presented five witnesses at hearing.

Dr. Stuart Cohen, an organic chemist and consultant, testified that fertilizer and pesticides applied to the golf course during operation would not adversely impact surface water or groundwater. (R.15:71.) He estimated that 2-12% of the nitrogen applied to the surface would migrate below the turfgrass root zone. (R.156:12 at 659:15-18.) He testified that he expected Kohler to apply less nitrogen to the golf course than the Permit allowed, and based his testimony on that lower, presumed amount. (R.155:19; R.157:5-6 at 620:10-

16, 700:19-701:1.) He also testified that he prepared a long version of an integrated golf course nutrient management plan (“IGCMP”) that Kohler did not submit to the Department prior to permit issuance, and that still was not complete at the time of hearing. (R.154:47-48 at 600:13-601:5.)

Jeff Quest, the engineer who prepared Kohler’s stormwater management plan, testified about his evaluation of potential impacts on surface and ground water, concluding that the project would have none. (R.15:35.) He focused solely on whether the stormwater system would capture total suspended solids, but not nutrients and chemicals, in stormwater. (R.158:40 at 784:1-22.) He conceded he provided an incorrect groundwater elevation map at the time the Department issued the Permit, and that his pre-filed testimony contained inaccurate groundwater elevations. (R.158:47-159:20 at 791:24-811:19.)

Jon Gumtow, a wetland scientist who consulted on Kohler’s permit application, testified that his company, Stantec, conducted its own WRAMs on the site’s wetlands. (R.161:42 at 927:17-20.) He conceded that Stantec’s findings largely agreed with the findings of the Department. Specifically, he confirmed that Stantec found that direct and secondary impacts to wetlands would result from road fill, construction of roads, parking lots, and infrastructure, altered wetland hydrology, increased nutrient runoff and loading, and a drawdown of the water table, and those impacts were expected be permanent and of high significance in each wetland type. (R.161:43-46 at 928:17-931:16; R.125:11-85.) In addition, Gumtow confirmed Stantec’s findings of cumulative impacts for each wetland type. (*Id.*; *see also, e.g.*, R.31:74-80, F.App.109-115) He contended that these impacts could be managed or mitigated. (R.15:42.)

Jonathon Hoekstra, Kohler’s Hospitality Construction Portfolio Manager, acknowledged that the project will require deforesting 50-60% of the site. (R.15:62, 67; R.163:32-33; R.164:33 at 1060:4-10.) He testified that

Kohler planned to construct a maintenance facility on the Kohler-Andrae State Park portion in order to store and mix fertilizers and other chemicals. (R.164:40-41 at 1067:6-1068:2.) He testified that hosting championship tournaments would involve additional infrastructure to accommodate as many as 30,000 people. (R.164:17-20 at 1044:23-1047:1.) Finally, John Sanford, a professional golf course designer, also testified that the Kohler course was designed to host major golf tournaments and draw substantial crowds. (R.157:27-28 at 722:25-723:11.)

iv. The public hearing

At the public hearing portion of the proceeding, local residents testified against the project, including the retired Kohler-Andrae State Park Superintendent of 28 years, Jim Buccholz. Buccholz testified that the five acres of the Park slated for the project were “used extensively by the public for hiking, bird and wildlife watching, photography, and many other noninvasive recreational pursuits... and w[ere] intentionally preserved as a non-development wildlife area and dune preservation area.” (R.177:18-19 at 130:10-131:24; R.16:13, F.App.011; R.16:31-32, 39-40, 17:5-6, F.App.011-017.)

Many residents confirmed that lack of sufficient information during the permitting process deprived them of the ability to learn about and effectively comment on the permit and the environmental impacts they could expect, including about which chemicals Kohler would use as pesticides, herbicides, and fungicides. (R.174:7-10 at 8:17-11:12; R.175-3-10 at 41:6-48:5; R.175:13-14 at 51:18-52:10; R.177:35-36 at 147:21-148:3.)

The ALJ Decision

On March 15, 2019, the ALJ issued a detailed, 25-page decision (“Decision”) that reversed the Permit. The second issue for hearing was dispositive, as he found “the Department did not have sufficient evidence to support its determination that the project will not result in significant adverse

impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences” when it issued the Permit. (R.184:21, App.32.)

The ALJ first reviewed the standards of Wis. Stat. §281.36(3n)(c)3. and the five factors of 281.36(3n)(b) which the Department must consider in evaluating the standards. (R.184:8, App.27.) After describing the wetlands’ “exceptionally high quality,” the ALJ described direct, secondary, and cumulative impacts. (R.184:9, App.28.) He agreed with the Department that significant adverse secondary impacts to wetlands will result from construction of the golf course, including deforestation, loss of wildlife habitat and floral diversity, and introduction of invasive species. (*Id.*) Therefore, he found, the Department’s overall finding that no significant adverse impacts would occur could not extend to secondary impacts, because it would contradict the Department’s own findings. (*Id.*)

The ALJ next turned to the application of nutrients and pesticides during golf course operations, explaining that the “critical question is the levels of chemicals and contaminants that will reach the groundwater and wells.” (R.184:10, App.29.) He reasoned that because the introduction of nutrients, pesticides, and contaminants into the groundwater would adversely impact wetland functional values, the Department would have had to know the “levels at which nutrients will be applied to the course, the identity of the pesticides that will be used by Kohler, the direction of groundwater flow, and the separation between the surface and the groundwater.” (*Id.*) Each of these, he concluded, was unknown by the Department at the time it issued the Permit. (R.184:10-11, App.29-30.) As to cumulative impacts, the ALJ accepted DNR’s testimony that cumulative impacts would occur as “a matter of best professional judgment,” and he therefore adopted the Department’s determination of cumulative impacts in his decision. (R.184:13, App.32.)

The ALJ also noted that Department resource experts still had questions and concerns about the Permit just days before it was issued, and neither Biersach nor anyone else testified that those were answered or resolved prior to issuance. (R.184:12, n.8, App.31.) For these reasons, he concluded the Department did not have sufficient information to determine whether the standards of Wis. Stat. §281.36(3n)(c) had been met, either as to the project's secondary impacts to wetland functional values during operation, or as to water quality. (R.184:16-17, App.35-36.)

The Department adopted the ALJ Decision as its own pursuant to Wis. Admin. Code §NR 2.155(1).

Procedural Status

Circuit court disposition

Kohler sought judicial review of the Decision under Wis. Stat. §227.52 (R.1), making arguments similar to those in this appeal. (R.205:2.)

The circuit court wholly affirmed the Decision in a 38-page decision that rejected Kohler's interpretations of law and description of the ALJ's decision. (R.220:1-38; App.38-75.) Said the court, "[t]he ALJ stated his concerns clearly and concisely in his decision, writing that the Department should have based its decision to issue the wetlands permit on completed, defined plans and accurate information, not promises outlined in incomplete documents from Kohler or on the basis of error laden maps." (R.220:20-21, App.57-58.)

The circuit court's decision is discussed further below.

STANDARD OF REVIEW

The standards for judicial review of an agency decision are set by Wis. Stat. §227.57. Although this Court reviews the decision of the agency and not the circuit court, it benefits from the circuit court's analysis. *MercyCare Ins. Co. v. Wis. Comm'r of Ins.*, 2010 WI 87, ¶25, 328 Wis.2d 110, 786 N.W.2d 785.

Kohler alleges two errors of law under Wis. Stat. §227.57(5). While courts no longer defer to agency interpretations of law, *Tetra-Tech EC, Inc. v. DOR*, they may afford “due weight” to an agency’s experience or specialized or technical knowledge, 2018 WI 75, ¶¶3, 84, 382 Wis.2d 496, 914 N.W.2d 21. “Due weight” means “giving respectful, appropriate consideration to the agency’s views,” which “is a matter of persuasion, not deference.” *Id.* ¶78.⁴

Second, Kohler alleges defects in the ALJ’s factfinding under Wis. Stat. §227.57(6). This section provides,

If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

The substantial evidence test presents a heavy burden for Kohler, as the Friends discuss further in Section III, *infra*.

Finally, Kohler misidentifies one of its claims as an error of law when actually, it alleges an abuse of discretion under Wis. Stat. §227.57(8), as Kohler argued in the circuit court. Section II.A., *infra*. “[T]he court shall not substitute its judgment for that of the agency on an issue of discretion.” Wis. Stat. §227.57(8).

ARGUMENT

Kohler asks this Court overturn the detailed and exhaustive Decision of the ALJ, subsequently confirmed by the circuit court in a similarly exhaustive opinion. Kohler relies on convoluted and incorrect interpretations of the law and the ALJ opinion, and an oversimplification of facts about the extraordinarily sensitive proposed golf course site.

⁴ The appropriate entity to receive “due weight” consideration here is the ALJ, not Department staff who contributed to the agency’s interim decision to grant the permit, because there is no agency decision at issue apart from the ALJ Decision. Wis. Admin. Code §NR 2.155(1).

For the reasons set forth below, the ALJ 1) correctly interpreted the law regarding secondary and non-fill wetland impacts, 2) did not abuse his discretion in reversing the Permit, 3) based his decision on substantial evidence, and 4) did not require “quantitative” determinations of secondary impacts or commit a legal error on that basis. The circuit court should be affirmed.

I. The ALJ properly considered the project’s adverse secondary and other impacts to wetland functional values under Wis. Stat. §281.36(3n)(b)3 and (c).

Kohler first argues the ALJ made an error of law by reversing the Permit on the basis of “unregulated activities” outside the boundaries of the wetlands. (Kohler Br. 17.) Kohler’s argument ignores not only plain statutory language, but the fact that these so-called “unregulated activities” will occur *within* wetland boundaries.

A. Regulatory Background.

“[W]etlands shall be preserved, protected, restored, and managed to maintain, enhance or restore their values.” Wis. Admin. Code §NR 1.95(4)(a). This policy “creates a presumption against activities which adversely affect those wetlands under department jurisdiction and control.” *Id.* §1.95(3)(a).

Hence, no person may discharge fill material into a wetland without first obtaining a wetland individual permit under Wis. Stat. ch. 281. The Department cannot issue the permit without making the following three findings, which are keyed to a “project” and not simply “direct fill”:

- (1) the *proposed project* will not result in significant adverse impact to wetland functional values,
- (2) the *proposed project* will not result in significant adverse impact to water quality, *and*
- (3) the *proposed project* will not result in other significant environmental consequences.

Wis. Stat. §281.36(3n)(c)3. (emphasis added).

“Wetland functional values” are defined by rule. They include storm and flood water storage, hydrologic functions including “the discharge of groundwater to a wetland . . . and the flow of groundwater through a wetland,” habitat for resident and transient wildlife species, and “recreational, cultural, educational, scientific and natural scenic beauty values and uses.”

Wis. Admin. Code §NR 103.03(1). Assessing wetland functional values is a scientific exercise that, as noted above, employs the WRAM. Wis. Admin. Code §NR 103.08(2).

Importantly for this case, “the department *shall consider all of the following factors* when it assesses the impacts to wetland functional values”:

1. The direct impacts of the proposed project to wetland functional values.
2. The *cumulative impacts* attributable to the proposed project that may occur to wetland functional values based on past impacts or reasonably anticipated impacts caused by similar projects in the area affected by the project.
3. *Potential secondary impacts of the proposed project to wetland functional values.*
4. The impact on functional values resulting from the mitigation that is required under sub. (3r).
5. The *net positive or negative environmental impact* of the proposed project.

Wis. Stat. §281.36(3n)(b) (emphasis added). The statute thus includes factors other than direct fill in assessing a project’s impact on wetland functional values.

This is especially true considering what “secondary impacts” are. This term is not defined by statute and must be given its “technical or special definitional meaning.” *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶45, 271 Wis.2d 633, 681 N.W.2d 110 (citation omitted). As Trochlell

testified without contradiction, “secondary impacts [to wetland functional values] are defined as those impacts which are closely linked or causally related to the activity but may occur over a longer period of time.” (R.15:149, F-App.055.)

Hence, while under Wis. Stat. §281.36(3m)(a), the requirement to obtain an individual wetland permit is triggered by plans to discharge into, i.e. directly fill, a wetland, the Legislature has directed that the Department consider more than the fill event when reviewing the permit application.

B. *The ALJ Properly Considered the Statutory Factors and Standards.*

Kohler’s arguments to this Court defeat the plain language of Chapter 281, which the ALJ meticulously applied. “[S]tatutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” *Kalal*, 271 Wis.2d 633, ¶45 (citation and internal quotation marks omitted).

In his Decision, the ALJ properly recognized that, to assess whether the Department had sufficient information to determine whether the standards in Wis. Stat. §281.36(3n)(c)3. were satisfied, he was compelled to review the evidence and findings on the project’s secondary impacts to wetland functional values as directed by Wis. Stat. §281.36(3n)(b)(3). (R.184:8-9, App.17-28.) For project *construction*, he found secondary impacts would result from activities like deforestation, grading, and conversion of land to managed turf, and that there were no provisions in the Permit to offset impacts from these activities. (R.184:9, App.28.) Hence, the Department’s Permit finding that secondary impacts would be significant “means that the standards of Wis. Stat. §281.36(3n)(c)3. have not been met.” (*Id.*)

For project *operation*, the ALJ noted testimony that secondary impacts to wetland functional values would likely result from application of fertilizers and pesticides to the golf course, which would reach wetlands through runoff and groundwater, stormwater, and irrigation. (R.184:9-10, App.28-29.) The

ALJ determined that the Department lacked accurate and sufficient information to find these operational impacts would *not* have a significant adverse effect to wetland functional values, much less water quality. (R.184:9-13, App.28-32.) On each aspect, the ALJ Decision methodically tracked the plain language and directives of Wis. Stat. §281.36(3n)(c)3.

To avoid these clear directives, Kohler now attempts to characterize the Decision as impermissibly regulating non-water- and wetland-related activities, allegedly in contravention of the statute's strict wetland- and water-related purpose. (Kohler Br. 21.) Kohler cites various provisions of Wis. Stat. ch. 281 which refer to "waters of the state," "water pollution," and "water quality" to conclude the "clear and plain focus of chapter 281 is water," not grading or deforestation or other activities. (*Id.*)

This approach elevates an oversimplified take on the statutory purpose of Wis. Stat. ch. 281 above the plain language of its text, which unambiguously directs the Department to consider not only direct but secondary and cumulative impacts to wetland functional values. Although context and purpose may be relevant to a plain-meaning interpretation of a statute, a court "is not at liberty to disregard the plain, clear words of the statute," *State v. Pratt*, 36 Wis.2d 312, 317, 153 N.W.2d 18, 20 (1967); *see also* Scalia & Gardner, *Reading Law: The Interpretation of Legal Texts* at 56 (warning "the purpose must be defined precisely, and not in a fashion that smuggles in the answer to the question before the decision-maker"). If Kohler's statutory purpose argument were true, the Legislature would have stopped at "direct impacts" in Wis. Stat. §281.36(3n)(b)1. and not identified four additional factors—but it did not.

Kohler also asserts that the ALJ could not consider activities beyond wetland borders, but this too ignores the plain language of Wis. Stat. §281.36(3n)(b). The statute directs the Department to consider direct, secondary, and cumulative impacts and environmental impacts of "the

proposed *project*”—not just of the direct wetland fill. *Id.*, §281.36(3n)(b)1.-5. Statutory language “should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect.” *State v. Martin*, 162 Wis.2d 883, 894, 470 N.W.2d 900, 904 (1991) (quoting *Donaldson v. State*, 93 Wis.2d 306, 315, 286 N.W.2d 817 (1980)). Kohler’s reading of the statute would require the Court to disregard entire words from Wis. Stat. §281.36(3n).

The circuit court saw through Kohler’s tortured divining of statutory purpose, explaining, “[i]n its argument, Kohler focuses on chapter titles and individual words and phrases, selectively citing those portions of the statutes that support its argument.” (R:220:14, App.51.) The court also rejected Kohler’s disregard of the statute’s directive to consider impacts “of the proposed project:”

Throughout this section of the statute, the legislature selected specific language to instruct the Department on how to proceed in making its determination. The legislature chose to use the term "project" when it drafted this section of the statute and ordered the Department to look at the impacts of the project on wetland functional values... The legislature did not choose to use the term "wetland fill area" or "wetland waterways" when instructing the DNR as to the scope of the factors to consider when evaluating a request for a wetland fill permit. To ignore the term "project" as referring to the greater development as Kohler suggests, runs contrary to long standing doctrine on statutory interpretation.

(R.220:14-15, App.51-52.) This ALJ correctly followed the law.

C. *Secondary Impacts Will Occur Within Wetland Boundaries and Will Otherwise Cause Wetland Destruction.*

Kohler’s framing of the Decision as considering “unregulated activities *outside* the impacted wetlands” is also misleading, ignoring that under the Permit, tree-clearing, grading, and wildlife habitat-removing activities would take place *within* the wetlands as well.

For example, tree-clearing will occur within the wetlands themselves, including the Great Lakes ridge and swale wetlands and over two acres of the

floodplain forest wetland, with significant environmental effect. (R.15:150, F-App.056.) Other activities, like grading and building on the upland ridge portions of the ridge and swale wetland complex, while technically preserving the swales portions of the wetlands, will destroy the wetland system.

Trochlell: . . . The complex is ridge and swale. It's not swale. And I mean, swales can occur anywhere. They can occur along roadside ditches. This is not a swale wetland complex. It's got to have the ridges to create the unique topography and unique microclimate and the wildlife habitat, the aquatic life habitat and all the rare species habitat that's really important for this complex.

So if you retain the wetlands without directly impacting them with fill, even if you could retain all of the wetlands and destroy the uplands or at least change them significantly by cutting down half the trees and changing all the vegetation on the ridge tops, you've really destroyed the system.

Question: And it's your opinion that that's what's going to happen in this case?

Trochlell: Yes.

(R.167:7-8 at 1175:17-1176:9; *see also* R.15:87 at 8:11-19, F-App.072; R.148:33-34 at 302:4-303:8.) The close relationship between wetlands and uplands is undoubtedly why the statute requires consideration of non-fill impacts in the first place.

Kohler claims that the ALJ's consideration of secondary impacts leads to absurd results because applicants will carry out non-fill activities, like tree-clearing, before applying for a permit. (Kohler Br. 18-19.) The circuit court discredited Kohler's absurdity scenario: "Conducting other activities, such as tree clearing or grading, is a costly endeavor. To invest in extensive site preparation prior [to] obtaining a wetland fill permit necessary to complete a development would be a reckless proposition." (R:220:16, App.53.) Even if premature site work did occur, however, this still would not change the law:

[T]he project proponents make the somewhat unique argument that the wetland is ultimately doomed—whether or not it is filled—because of its own development. . . . [T]here is no discretion for the DNR or ALJ to ignore any [regulatory requirements] because the project proponent's [activities] may or may not have diminished the functional values of the wetland.

In the Matter of the Application of McAllen 120, LLC for Water Quality Certification to Fill .37 Acres of Wetlands to Construct a Commercial Development Located in the City of Madison, Dane County, Case No.: IP-SC-08-13-69306, 2009 WL 1028288 (3/10/2009).

Ultimately, Kohler's dispute on secondary impacts is not with the Decision, but the law on which it was based. The proper forum for its dispute is the Legislature, not this Court. The ALJ did not err interpreting the statute, and the Decision should be affirmed.

II. The ALJ did not misuse his discretion in reversing the Permit, when no party had asked him to modify it and when he found the Department lacked sufficient information to issue it

Kohler now complains that after identifying the Permit's deficiencies, the ALJ erred as a matter of law by not modifying the Permit to correct them. (Kohler Br. 30.) But the ALJ was never asked to and could not provide this relief, which is also unsupported by the facts.

A. *Kohler never asked the ALJ to modify the Permit, which he could not have done anyway.*

Kohler's argument fails out of the starting blocks.

First, Kohler never asked the ALJ to modify the Permit—not even as an alternative to its argument that the Permit should be upheld in its entirety. (E.g., R.142:63-143:5 at 26-37; R.180:41-133.) It also never asked for rehearing or appealed the Decision to the Department Secretary, both options available to it. *See* Wis. Stat. §227.49; Wis. Admin. Code §NR 2.20.

Kohler waived any argument for permit modification by failing to actually make it to the ALJ. *Goranson v. DILHR*, 94 Wis.2d 537, 545–46, 289 N.W.2d 270 (1980) (applying the rule that the court “will not consider issues beyond those which were properly before the court below” equally to

“determinations made by the Department”). As one justice warned in a similar context,

[A] court should be reluctant to fault a board of adjustment for not considering a legal argument that was never made. To expect clairvoyance from a board about an unstated objection to the board's action disrespects the board, undermines its authority, encourages gamesmanship, and alters the nature of certiorari review. It also deprives an adverse party of the opportunity to address the objection and make a record before the board.

State v. Outagamie County Bd. of Adjustment, 2001 WI 78, ¶ 101, 244 Wis.2d 613, 628 N.W.2d 376 (Prosser, J., concurring).

Second, Kohler points to no source of law that allows an ALJ to modify a wetland individual permit at the contested case hearing, much less *requires* it as a matter of law. None exists. *See* Wis. Stat. §281.36(3q); Wis. Stat. §227.44 *et seq.*; Wis. Admin. Code §NR 2.13.

The circuit court recognized this omission, concluding “Kohler offers nothing, other than its opinion, that the ALJ had the authority to amend the permit into the form and with the content that he believes that should have come from the DNR in the original process.” (R.220:35; App. 72.)

That the ALJ could not fix the application’s deficiencies at hearing makes sense. Kohler must submit its permit application to the Department, which may deem it “incomplete” and require additional information. Wis. Stat. §281.36(3m)(d). Kohler’s claim that evidence provided at hearing could correct the Department’s earlier error in granting the Permit without necessary information undermines these application requirements. The circuit court recognized this, warning:

[i]nstead of [the application] being reviewed by numerous personnel and with the full weight of the resources available to the DNR, one judicial officer would issue the final permit [at hearing]... Taken to its final conclusion, Kohler’s argument results [in] the nullification of existing statutes without legislative consent and the creation of new law by the judicial fiat.

(R.220:37; App74.) The “fix it later” approach Kohler advances does not pass muster.

Third, even if the ALJ had authority to modify the permit, Kohler conceded before the circuit court that at most, the issue was one of discretion, not law. (R.205:49 (“The ALJ’s decision is outside the bounds of discretion because he did not modify the permit conditions”) and 50 (“That was an abuse of discretion.”)) Even Kohler’s words before this Court convey the same, arguing that “[the ALJ] had the power to modify” the permit to add conditions. (Kohler Br. 25.)

On matters of discretion, a court “shall not substitute its judgment for that of the agency.” Wis. Stat. §227.57(8). The ALJ Decision to reverse the Permit, rather than take any other action, was not “an unconsidered, willful or irrational choice.” *Wisconsin Pro. Police Ass’n v. PSC*, 205 Wis.2d 60, 74, 555 N.W.2d 179, 186 (Ct. App. 1996). This is especially true where Kohler never asked for permit modification from the ALJ. Appellate courts have rejected such post-hoc arguments. *Morgan Drexen, Inc. v. DFI*, 2015 WI App 27, ¶¶15-16, 361 Wis.2d 271, 862 N.W.2d 329 (upholding the agency’s remedy requiring disgorgement of profits for a consumer law violation, based, *inter alia*, on the company’s failure to contest the amount at hearing or in post-hearing briefing).

Kohler points to *Clean Wisconsin v. DNR*, to argue that the ALJ had a “statutory obligation” to modify the Permit despite the fact that no one asked him to. (Kohler Br.32.) *Clean Wisconsin* is inapposite. That case concerned a Wisconsin Pollution Discharge Elimination System (“WPDES”) permit—not a wetland permit—for a concentrated animal feeding operation. 2021 WI 71, 961 N.W.2d 346. Yet WPDES permits are governed by an entirely separate chapter of the statutes. *See* Wis. Stat. §283.31 *et seq.* Regulations governing those permits specifically authorize permit modification when directed by an ALJ after a contested case hearing. Wis. Admin. Code §NR 203.136(1)(d). Kohler points to no similar authorization here.

The Court should reject Kohler’s late-breaking claim of error.

B. The ALJ did not “disregard” evidence, and Kohler’s three “quick fixes” would not have resolved the Permit’s defects.

Even if the Court could consider Kohler’s argument, Kohler is incorrect that the ALJ “disregarded critical evidence” that would have addressed three concerns with the Permit: (1) the quantity of nitrogen to be applied, (2) the pesticides to be applied, and (3) whether Kohler would engage in groundwater monitoring. (Kohler Br. 28.)

1. The lack of information was an issue for hearing.

Kohler forgets that the main issue for hearing was “[w]hether the Department had sufficient information to consider the standards in Wis. Stat. §281.36(3n)(c).” (R.39:49.) Kohler did not move to dismiss or otherwise dispute this issue for hearing. Hence, when the ALJ found insufficient evidence upon which the Department could have issued the permit, he was not “disregarding evidence,” but merely deciding the parties’ agreed-upon issue for hearing.⁵

The ALJ also did not “exclude” evidence, as in some of the cases Kohler cites, as irrelevant or otherwise. (Kohler Br. 29.) Rather, he admitted a variety of evidence as to whether the Department’s determination to issue the permit on the information it had was correct, then decided Kohler’s evidence was controverted by more credible evidence as explained in the Decision.

Moreover, the ALJ did not find a lack of sufficient information for only the three issues Kohler flags. He had other significant concerns, including but not limited to: stormwater and irrigation water carrying chemicals, contaminants, and dissolved solids to groundwater and wetlands (R.184:10; App.29); the lack of an accurate water table map of the project site showing

⁵ The ALJ’s 25-page Decision that made 65 findings of fact is hardly comparable to the cases Kohler cites. For example, in *Plessinger v. Berryhill*, the ALJ’s deficient “reasoning” totaled two sentences, which the court found not nearly enough to be able to discern what evidence he had considered, and how. 900 F.3d 909, 917 (7th Cir. 2018).

groundwater elevations and direction of groundwater flow, needed in order to assess separation to groundwater, which even Kohler's retained engineer could not provide (R.184:10-11, App.29-30); and construction-related secondary impacts, such as deforestation, grading, and loss of wildlife habitat and floral diversity (R.184:9; App.28.) None of the three questions Kohler claims it resolved at hearing would have addressed these concerns, and so the Permit still would have failed.

2. Kohler's evidence did not resolve its three issues.

Regardless, the evidence Kohler presented at hearing would not have resolved its three issues.

First, Kohler claims a permit modification limiting nitrogen applications to "less than three pounds per one thousand square feet," as Cohen suggested at hearing, would have ensured nitrogen inputs to groundwater and wetlands would not be significant. (Kohler 26.) For example, Cohen's three-pound rate related only to the golf course's "operational phase." (R.155:16 at 617:20-24); he did not address applications during the "establishment phase," when Kohler would be permitted to apply up to 10 pounds of nitrogen per square foot while establishing turf grass, nor did it address phosphorus. (R.85:8.) As the Decision explains:

The EIS notes that the sandy soils on the site are nutrient poor. The permit allows the application of higher levels of nutrients to establish the turf for the proposed course. A larger portion of the applied nutrients, particularly phosphorus, will leach through the permeable soil into the groundwater during the period when the turf is becoming established. (Carpenter testimony, tr. 315:1-316:9).

(R.184:11, App.30)

Kohler is also incorrect that the Friends did not refute Cohen's testimony that at a rate of three pounds, nitrogen would not cause any significant adverse impacts to groundwater, surface water, or the wetlands.

(Kohler Br. 26.) The Friends address this argument in detail in Section III.C., *infra*.

The second issue Kohler claims it resolved at hearing concerned pesticides but, again, this remained far from settled. After the Permit was issued, Kohler submitted a plan to the Department noting 38 chemicals it might use on the golf course, without application rates. (R.127:84.) Department staff stated that “an analysis of the environmental risk for each pesticide should be provided” because “pesticide movement depends on a number of factors including the persistence and mobility of the pesticide.” (R.130:47,49.) By the time of the contested case hearing, however, Cohen provided a risk assessment of just seven of the pesticides—not all 38. (R.155:24, 156:30 at 625:12-17, 677:13-18.) Again, the impact of pesticides was not completely resolved at hearing.

Finally, Kohler claims that hearing testimony resolved whether groundwater monitoring could avoid adverse impacts of pesticide use. (Kohler Br. 27-28.) This, too, remained unanswered. The ALJ noted that the Department’s EIS had stated “monitoring groundwater quality for pesticide contamination and minimizing pesticide use through implementation of an [integrated pest management plan] are *potential ways* to reduce the potential negative effects of pesticide use.” (R.85:169 at 33 (emphasis added).) However, the EIS also stated “[i]t is unknown to what extent storm water infiltration and nutrient and pesticide applications to fairways, tees and greens (for either establishment or maintenance) would impact groundwater quality in this permeable soil and shallow water table environment.” (R.85:211 at 71.) Without knowing these basic facts, the ALJ could not have concluded that groundwater monitoring would be effective in addressing his concerns.

“The contested case hearing was not a second permitting hearing,” as the circuit court stated. (R.220:36, App.73.) This Court should reject Kohler’s attempts to make it so.

III. The ALJ Decision was amply supported by substantial evidence as to cumulative impacts and chemical impacts to groundwater and wetlands.

Kohler claims two of the ALJ's findings of fact, regarding (1) cumulative impacts and (2) nutrient and pesticide migration to groundwater and wetlands, were not supported by substantial evidence. (Kohler Br. 33.) Substantial evidence is an exceptionally low bar, and the ALJ Decision more than meets it.

A. *“Substantial evidence” is less than a preponderance of the evidence, and must be judged on the full record.*

On review of an administrative decision for substantial evidence to support it, the court “will not independently weigh the evidence or pass on the credibility of witnesses.” *City of Superior v. DILHR*, 84 Wis.2d 663, 666, 267 N.W.2d 637 (1978). “This standard does not permit a court to overturn an agency’s finding even if it may be against the great weight and clear preponderance of the evidence.” *Holtz & Krause, Inc. v. DNR*, 85 Wis.2d 198, 204, 270 N.W.2d 409 (1978). “The findings of an administrative agency do not even need to reflect a preponderance of the evidence as long as the agency’s conclusions are reasonable.” *Kitten v. DWD*, 2002 WI 54, ¶5, 252 Wis.2d 561, 644 N.W.2d 649.

Kohler claims this Court cannot consider the full record before the ALJ when determining whether his decision was supported by substantial evidence because a reviewing court “must judge the propriety of [an administrative] action solely by the grounds invoked by the agency.” (Kohler Br. 38-39.) Kohler is incorrect. It relies solely on a certiorari case (not a ch. 227 case) holding that a local civil service commission (not a state agency) failed to sufficiently explain its finding. (Kohler Br. 39 (quoting *Stas v. Milw. County Civ. Serv. Comm’n*, 75 Wis.2d 465, 474, 249 N.W.2d 764 (1977).) This is a defect of

discretion, not factfinding. See *Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals of City of Milwaukee*, 2005 WI 117, ¶26, 284 Wis.2d 1, 700 N.W.2d 87.

Meanwhile, Wisconsin courts have repeatedly held that “an agency’s findings of fact may be set aside only when a reasonable trier of fact could not have reached them from *all the evidence before it*, including the available inferences from that evidence.” *Milwaukee Symphony Orchestra, Inc. v. DOR*, 2010 WI 33, ¶31, 324 Wis.2d 68, 781 N.W.2d 674 (emphasis added); see also *Daly v. Nat. Res. Bd.*, 60 Wis.2d 208, 219-20, 208 N.W.2d 839 (1973) (providing substantial evidence is evaluated “in view of the entire record as submitted”) (quoting *Reinke v. Personnel Bd.*, 53 Wis.2d 123, 191 N.W.2d 833 (1971)); *Mireles v. LIRC*, 2000 WI 96, ¶36, 237 Wis.2d 69, 85, 613 N.W.2d 875, 884 (“A reviewing court has a duty to search the record to find credible evidence that supports the agency’s findings.”).

This Court should reject Kohler’s attempt to narrow the substantial evidence test.

B. *The ALJ’s finding regarding cumulative impacts was supported by the Department, the Friends’ witnesses, and even Kohler.*

When assessing a wetland permit, the Department must consider “[t]he cumulative impacts attributable to the proposed project that may occur to wetland functional values based on past impacts or reasonably anticipated impacts caused by similar projects in the area affected by the project.” Wis. Stat. §281.36(3n)(b)2. Substantial evidence supports the ALJ’s finding of adverse cumulative impacts to wetland functional values.

First, the permit record shows that cumulative impacts would occur. The WRAM prepared by Department staff identified cumulative impacts as “[a]dditional development of site (potential expansion) and further cutting of wooded community.” (*E.g.*, R.85:114, F-App.107.) It also stated these impacts

would be permanent and of high significance, findings echoed in the Permit itself. (*Id.*; R.85:128 ¶14.)

At hearing, Department manager Biersach confirmed the accuracy of the WRAM, explained that the Department's cumulative impacts conclusion was a matter of "best professional judgment" that required no specific equation, and affirmed the Department's prior work. (R.153:18 at 523:4-11.)

Further, both of the Department's staff members who prepared the WRAMs, Pat Trochlell and Geri Radermacher, testified at the hearing. Neither one contradicted or retracted her findings in the WRAM regarding cumulative impacts. In fact, Kohler's *own experts* reached the same conclusion—that cumulative impacts would occur—when conducting their own version of the WRAMs, which Kohler's expert Jon Gumtow confirmed at hearing. (R.125:11-85, 161:42-162:3 at 927:21-935:23; R.31:79-90, F-App.114-115.) The ALJ had no reason to second-guess the Department's professional judgment, and he did not, explaining that "[a]lthough the basis of the determination is unclear, the Department's finding on cumulative impacts is adopted." (R.184:4, App.23.)

In this appeal, Kohler claims no cumulative impacts could occur because expansion of the golf course was "prevented by adjacent residential, State Park, and Lake Michigan land use." (Kohler Br. 34.) But that does not mean cumulative impacts would not occur both within and near⁶ the property: as Trochlell explained, "[i]ncreased human activity at the course will likely lead to further degradation of adjacent wetlands and uplands, including sensitive areas on the state park property." (R.15:153, F-App.059.) This

⁶It is appropriate to consider off-site cumulative impacts: the statute makes clear that the relevant area is not just the project site, but potential "similar projects *in the area* affected by the project." Wis. Stat. §281.36(3n)(b)2. (emphasis added); *see also Hilton v. DNR*, 2006 WI 84, ¶¶26-27, 293 Wis.2d 1, 717 N.W.2d 166 (upholding the Department's finding of cumulative impacts relevant to entire littoral zone of Green Lake, not just the immediate site of the proposed pier).

testimony is further supported by Kohler's intention that the course host tournaments, which would necessitate bleachers, concessions, and other facilities for the thousands of volunteers and spectators, which could be set up months in advance, again increasing the likelihood of additional development and tree-clearing. (R.164:18-19 at 1045:1-1046:24.)

The circuit court noted that even though Kohler had provided *some* evidence (its own statement) that cumulative impacts due to expansion were unlikely, at best that meant “[b]oth parties presented substantial evidence of record in support of their arguments.” (R.220:24, App.61.) Where substantial evidence exists on both sides, the circuit court explained, “*it is not for this court to re-weigh the evidence or to second guess credibility determinations made by the ALJ.*” Because there is substantial evidence of record to support the decision of the ALJ, this court may not overturn his conclusions.” (R.220:24, App.61 (emphasis added); *see also* Wis. Stat. §227.57(6).)

In the end, Kohler's substantial evidence argument on cumulative impacts is simply a disagreement with the ALJ's weighing of each party's cumulative impacts evidence, and it should be rejected.

C. *Substantial evidence supported the ALJ's findings on chemical impacts to groundwater and wetlands.*

Kohler next argues that the Decision lacked substantial evidence regarding nutrient and pesticide impacts on the groundwater and wetlands, but substantial evidence indicated impacts to these resources, and Kohler's vague plans and the Permit did not provide sufficient assurance that the impacts will be insignificant.

1. Substantial evidence confirms the Department lacked sufficient information regarding chemical impact on groundwater and wetlands.

On the topic of nutrient and pesticide impacts, the ALJ found:

The Petitioners established that the Department did not have sufficient, accurate information to determine the level of nutrients and pesticides that will reach the groundwater and wetlands. The Petitioners showed that the information supplied by Kohler's experts to the Department was incomplete and/or in error at the time of the Department's determination so that the amounts of nutrients and pesticides [that] would likely reach the groundwater and wetland are unknown. Accordingly, the Department did not have a sufficient basis for its determination that the operation of the proposed golf course will not result in significant adverse impacts to wetland functional values, water quality or environmental consequences.

(R.184:16-17, App.35-36 (emphasis added).) Substantial evidence supports this finding.

Kohler's expert, Cohen, testified that 2-12% of the nitrogen applied to the golf course would migrate below the root zone. (R.156:12 at 659:15-18.) The Department concluded that excess nutrients and chemicals applied to the ground surface—like the *at least 2%* excess nitrogen Cohen predicted—were likely to infiltrate to groundwater due to the project site's shallow aquifer and highly permeable soils. (R.101:56 at 2; R.85:211 at 71.) The Friends' hydrogeologist Jansen, concurred, and opined that an even greater amount of nitrogen than Cohen's estimate was likely to infiltrate the soil. (R.143:18; R.165:17-20 at 50:7-20; 1090:16-1093:22.) The Friends' expert Dr. Carpenter testified that during turfgrass establishment, when there are no or few plants to capture nutrient applications, phosphorus applied to the surface will dissolve in water and infiltrate to groundwater. (R.148:46-47 at 315:1-316:11.)

In the Decision, the ALJ explicitly stated that the only piece of evidence put forward for the proposition that water applied to the surface would *not* carry nutrients and chemicals to the groundwater was not credible. (R.184:11, App.30 (“Cohen testified that the only way that water carrying nutrients and other chemicals could reach the groundwater is if one used a posthole digger to bypass the turf...If this testimony was intended to be taken literally, it is not credible.”)) Cohen's statement contradicted even his own testimony that some nitrate would reach groundwater.

After the point at which nutrients and pesticides enter the groundwater, both the Department and Jansen provided evidence that they will migrate to the wetlands. (R.85:211; R.146:44 at 219:5-16.). Dr. Carpenter explained that the sandy soils of the project site would not allow denitrification to occur, a soil process which normally prevents some downward-migrating nitrogen from reaching groundwater. (R.148:47-149:2 at 316:24-318:11.). Since “we only have an output to groundwater” on the site, Carpenter explained, excess nitrogen would inevitably flow to groundwater and, in turn, the wetlands. (R.149:2 at 318:12-20.)

Then, the Friends’ experts testified that the introduction of any nutrients and pesticides beyond current levels to the rare and sensitive wetlands on the Kohler site would cause significant adverse impacts to wetland functional values in the form of degraded floristic integrity, wetland hydrology and habitat values, and water quality (R.146:24-26 at 199:11-201:10; R.147:39-40 at 261:16-262:15.) For example, increased nutrients degrade wetland plant diversity, as less nutrient-tolerant species are replaced by more tolerant, non-native species like reed canary grass, which grows aggressively and effectively swamps out other species. (R.15:150, F-App.056; R.148:26; R.148:41-42 at 295:4-20, 310:1-311:14.)

Kohler attacks the testimony of Friends experts Pat Trochlell and Quentin Carpenter (Kohler Br. 39-42), but not only does this invite the Court to impermissibly reweigh the evidence and make credibility determinations, Kohler’s points are unavailing. Trochlell, a wetland ecologist, indeed testified that the Permit contained “no assurance that nutrients won’t enter the wetlands.” However, Trochlell, in combination with Carpenter, confirmed that the nutrients and chemicals migrating to wetlands *would* significantly adversely impact them. (R.146:24-26 at 199:11-201:10; R.147:39-40 at 261:16-262:15.)

Kohler attempts to discredit Carpenter by emphasizing that he did not perform “empirical,” *i.e.* on-site, tests in order to reach his conclusions. (Kohler Br. 40-41.) But Carpenter based his testimony on science-based literature, experience, site-specific documents, and related field work. (R.15:81-82.) An expert reviewing science-based literature in a given field in which he has decades of personal experience, then using that literature review and experience to “weigh known factors along with inevitable uncertainties to make a sound judgment,” is an accepted method for rendering expert opinion in Wisconsin. *Siefert v. Balink*, 2017 WI 2, ¶107, 372 Wis.2d 525, 574, 888 N.W.2d 816, 841, *reconsid. denied*, 2017 WI 32, 374 Wis.2d 163, 897 N.W.2d 54. Kohler never moved to exclude the testimony of Carpenter or Trochlell as experts or attempted to disqualify them. Their attempts to do so now are too late.

The ALJ weighed the testimony of the Friends’ witnesses against that of Kohler’s and rejected Kohler’s. “[I]t is for the agency to determine which view of the evidence it wishes to accept.” *Robertson Transp. Co. v. PSC*, 39 Wis.2d 653, 658, 159 N.W.2d 636, 638 (1968). Indeed, the circuit court correctly refused to substitute its judgment for the ALJ’s:

[a]s with the [cumulative impacts] factual dispute between the parties, both Kohler and the DNR cite substantial evidence of record in support of their arguments. Each party offers a different analysis of the testimony of the experts and the documentation offered in support of and against the issuance of the permit. Although the parties do not agree on the interpretation of the evidence, the record does contain substantial evidence that would support the conclusions reached by the ALJ... This court cannot re-interpret the evidence and reach its own conclusions...

(R.220:32, App.69.)

This Court should do the same.

2. Kohler’s testimony and evidence on best management practices was speculative and unsupported.

Kohler contends that its best management practices would have addressed groundwater contamination, but much of Kohler's testimony was premised on metrics not contained in the Permit, not before the Department when it issued the Permit, and in some cases, not even before the ALJ. (R.184:10, 13, App.29, 31.) He was right to reject it.

As noted above, Cohen testified about pesticide risks based on application rates and practices contained in his limited assessment he completed months after the Permit was issued, and that still only evaluated a fraction of the pesticides Kohler would likely use. (R.155:24, 156:30 at 625:12-17, 677:13-18.) Cohen also testified about the effects of a three pound per acre nitrogen application rate, when the actual Permit allowed Kohler to apply 6 to 10 pounds of nitrogen per 1,000 square feet during turfgrass establishment, and up to 8 pounds of nitrogen per 1,000 square feet thereafter. (R.85:124 ¶22; R.82:17.) Kohler itself had requested the larger amounts in a plan submitted during the permit process; Cohen's lower rate were supposedly itself based on a longer plan not even completed. (R.154:47-48 at 600:13-601:15.) The ALJ was correct to not rely on testimony based on incomplete and unavailable plans. *See Paulsen Lumber, Inc. v. Anderson*, 91 Wis.2d 692, 698, 283 N.W.2d 580 (1979).

Furthermore, the Department's experts testified that the limits contained in the Permit were the only limits that Kohler would have to abide by and the only limits the agency could consider when assessing impacts. (R.153:42 at 547:9-23.) Contrary to Kohler's assertion, then, the higher limits were not "hypothetical." (Kohler Br. 41.) Despite Kohler's present insistence that it has "expressly committed itself to applying far less" (Kohler Br. 42), the ALJ explained that "[t]he Department must consider the impacts based on what Kohler is allowed to do, not on a best case scenario." (R.184:11, App.30.)

Kohler provided some testimony that its adherence to generic BMPs would assure there would be no significant adverse impacts on the project site. For example, Cohen described how practices such as spoon-feeding and using slow-release fertilizers work generally, and concluded that those practices can result in “minimal, if any, leaching below the root zone.” (R. 155:1-2, 155:9-10 at 602:7-603:15, 610:21-611:7.) But he did not testify that BMPs would categorically eliminate the potential for leaching, and the Friends’ experts repeatedly refuted Kohler’s over-confidence in BMPs. (R. 149:39-40 at 355:2-356:25; R.15:83, 88, F-App.068, 073.) The Department agreed, listing in its EIS the extent of the impact that increased nutrients would have as one of the “adverse impacts that cannot be avoided,” even with the use of BMPs. (R.85:211 at 71.)

Selecting bentgrass as a BMP, another point which Kohler highlights (Kohler Br. 43), is yet another example of how BMPs provide no assurances against contamination that would overcome the ALJ’s findings. Kohler’s expert Cohen testified that “the thatch can be a barrier to pesticides that you want and fertilizers that you want to get to the root zone.” (R. 156:7-8 at 654:25-655:2.) In response, the Friends’ expert testified that the turfgrass and thatch layer remained permeable through, for instance, insect burrows and mechanical cuts made intentionally in the thatch by Kohler. (R.165:22-23 at 1095:20-1096:22.) The ALJ concluded that on the whole, the allowed practices “appear likely to increase the amount of the chemicals that will reach the groundwater.” (R.184:11, App.30.)

Substantial evidence supports the Decision.

D. *Even if Kohler were correct that the ALJ Decision lacked substantial evidence on cumulative impacts or nutrient and pesticide migration to groundwater and wetlands, the Decision must still be affirmed.*

The holes Kohler tries to poke in the ALJ's findings on cumulative impacts and nutrient and pesticide impacts to groundwater and wetlands would not be fatal to the ALJ Decision even if they were true.

Kohler does not challenge the ALJ's factual findings which provide an independent basis for the Decision outside of cumulative impacts and impacts from nutrients and pesticides. For example, the ALJ found that secondary impacts to wetland functional values from construction—such as hydrology and habitat modifications caused by deforestation and grading—were significant and adverse, and that many of these impacts would not be offset or addressed by permit conditions. (*E.g.*, R.184:16, App.35.) This finding alone supports the ALJ's decision that the “Department did not have sufficient evidence to support its determination that the project will not result in significant adverse impact to wetland functional values,” and even “mandate[s] that] the permit application must be denied.” (*Id.*)

Even if the Court agreed with Kohler's disputes on cumulative impacts or nutrients and pesticides, the Decision is still supported by substantial evidence and should be upheld.

IV. The ALJ's isolated reference to a lack of “quantitative findings” illustrated his concern that the Department lacked sufficient information when it issued the Permit—he didn't require the Department make them

Finally, Kohler strings together isolated words in the Decision to claim the ALJ required “quantitative findings” as to secondary impacts. (Kohler Br. 49.) As the circuit court marveled, this is a “very complicated argument,” and ultimately a flawed one. (R.220:20, App.57.)

The Decision states, “[t]he Department did not make any quantitative findings as to at what point the secondary adverse impacts would become significant or explain how the conditions would reduce the adverse impacts below the level of significance either in the permit itself or through

Department staff testimony at hearing.” (R.184:12, App.31.) By that point, the Decision had already discussed secondary impacts to wetlands from project *construction*, including impacts from deforestation, grading, and conversion of the native soils and vegetation to managed turf. (R.184:8, App.27.) It did not require “quantitative” findings of when secondary impacts from project construction would become “significant,” but instead accepted the judgment of the Department and Friends scientists that secondary impacts from construction would in fact be “permanent, irreversible, and of high significance.” (*Id.*; *see also* R.183:32-33, App.17-18.) Clearly, the ALJ did not hold that “quantitative findings as to secondary adverse impacts are mandatory as a matter of law” under Wis. Stat. §281.36(3n)(b) or (c)3. as Kohler claims (Kohler Br. 20), or else he would not have found that secondary impacts from construction were significant.

This becomes even more apparent in the discussion of secondary impacts from project *operation*. Before the “quantitative findings” comment, the Decision had already discussed at length the potential sources of secondary impacts to wetlands, including application of nutrients (fertilizer) and pesticides to the golf course, addition of irrigation water, and stormwater inputs. (R.184:9-12, App.28-31.) The Decision then made the common-sense observation that to understand the significance of Kohler’s planned operations on the environment, one needed to know “the levels of the various chemicals that are likely to reach the groundwater and wetlands.” (R.184:10, App.29.) This, in turn, required knowing information Kohler had not supplied to DNR at the time of permit issuance, including the identity of the chemicals, the direction of groundwater flow, the depth to groundwater, as well as the specific manner in which Kohler would be required by permit conditions to reduce inputs of these chemicals to groundwater and wetlands.

Considering the ALJ’s extensive discussion of secondary impacts prior to any mention of “quantitative findings,” the clear point of the disputed

passage was to show that the Department lacked sufficient information to determine that this was the case. In fact, the remainder of the paragraph confirms this analysis. (R.184:12, App.31.) The circuit court agreed:

The phrase “quantitative finding” is used in passing by the ALJ as part of a much larger critique of the record upon which the DNR based its findings regarding secondary adverse impacts on the wetlands area...[It] was used once in the decision, was never defined, and was never given any numerical or statistical definition. Kohler locked onto a phrase that was used in passing, then attempted to reinterpret the actual conclusions of the ALJ into one establishing a standard that does not exist under the statute or any regulation.

(R.220:19-20, App.56-57.) Kohler’s complicated effort to concoct a defect in the Decision must be rejected and the Decision affirmed.

CONCLUSION

For the reasons set forth above, this Court should affirm the circuit court.

Even if the Court finds the Decision defective under Wis. Stat. §227.57, it cannot reinstate the Permit “outright” as Kohler has asked. (Kohler Br. 52.) The Permit no longer exists as an agency decision; it has been superseded and mooted by the ALJ Decision. Wis. Admin. Code §NR 2.155(1). The Court may only set aside, modify, reverse, or remand the ALJ Decision. Wis. Stat. §227.57. There is nothing to modify since the Decision resulted in no permit, and the Court itself has no permit-granting authority under Wis. Stat. §281.36. At most, the Court could remand the Decision to the agency if it finds that Kohler has met its burden under Wis. Stat. §227.57(5), (6), or (8)—but Kohler has not.

Respectfully submitted this 22nd day of November, 2021.

PINES BACH LLP

Electronically signed by:

Christa O. Westerberg

Christa O. Westerberg, SBN 1040530

Leslie A. Freehill, SBN 1095620

122 W. Washington Avenue, Suite 900

Madison, Wisconsin 53703

Telephone: (608) 251-0101

Facsimile: (608) 251-2883

cwesterberg@pinesbach.com

lfreehill@pinesbach.com

Attorneys for Intervenors-Respondents

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,883 words.

Dated this 22nd day of November, 2021.

Electronically signed by:

Christa O. Westerberg

Christa O. Westerberg