STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2008AP003170

LAKE BEULAH MANAGEMENT DISTRICT

Petitioner-Appellant-Cross-Respondent, Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner-Co-Appellant-Cross-Respondent,

vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent-Respondent,

VILLAGE OF EAST TROY

.

Intervening Respondent-Respondent-Cross-Appellant-Petitioner.

BRIEF AND APPENDIX OF VILLAGE OF EAST TROY INTERVENING RESPONDENT-RESPONDENT-CROSS-APPELLANT-PETITIONER

On Appeal from an Decision of the Court of Appeals, District II
dated June 16, 2010 relating to a Final Order Entered on
In The Walworth County Circuit Court on September 20, 2008
The Honorable Robert J. Kennedy, Judge
Walworth County Circuit Court Case Nos. 06-CV-172

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STATEMENT OF ISSUES

1. **Does the legislative framework of Wis. Stat. §§ 281.34 and 281.35 define the scope of DNR's review when issuing permits for various categories of high capacity wells?**

   Answered by the Court of Appeals: No. The scope of DNR's review in connection with the issuance of a permit for a well like the one at issue in this case is not restricted by §§ 281.34 and 281.35, notwithstanding the fact that the Legislature created a detailed statutory framework and has rejected calls to expand DNR's review in connection with its permitting authority. App-15-17.

2. **Do the provisions in Wis. Stat. §§ 281.11 and 281.12 establishing DNR's general authority or the provisions of the public trust doctrine provide DNR with plenary permitting authority over high capacity wells notwithstanding the specific legislative framework in §§ 281.34 and 281.35?**

   Answered by the Court of Appeals: Yes. The general language controls over the specific statutory framework, and DNR has a duty to consider factors outside the specific language of § 281.34 whenever DNR "has evidence suggesting that waters of the state may be affected by a well" even though "there is no standard set by statute or case law" to determine when or how to evaluate such evidence. App-19-20.

3. **In a proceeding under Wis. Stat. ch. 227, are documents that the parties did not offer as part of the record in an administrative proceeding, but that were in the possession of the agency's attorney in connection with a prior related judicial proceeding, deemed to be a part of the record before the agency?**

   Answered by the Court of Appeals: Yes. When a document is sent to a DNR attorney in a related judicial proceeding, it is deemed to be in the possession of the DNR for purposes of a separate administrative proceeding, and therefore part of the administrative record. App-24.

STATEMENT OF THE CASE

Nature Of The Case

This case arises from efforts of the Village of East Troy (Village) to develop a municipal well (Well #7) to provide an adequate public drinking water supply for its residents. The Village met all of the applicable statutory standards for approval of a high capacity well and received a permit in the form of a high capacity well "approval" from the Wisconsin Department of Natural Resources (DNR) in 2003 and again in 2005 (2005 Approval).

The Village's approvals were granted under the graduated permit process for high capacity wells established by the Legislature. Wis. Stat. §§ 281.34 and 281.35 provide that wells pumping less than 100,000 gallons per day (gpd) are exempt from review; wells pumping between 100,000 gpd and 2,000,000 gpd are subject to limited review; and wells pumping over 2,000,000 gpd are subject to a full environmental review. Well #7 fell within the second category because it only has the potential to withdraw 1,440,000 gpd, and therefore it was subject to limited review. The framework for review has evolved over several decades, but since the 2003-

04 legislative session, the Legislature has repeatedly rejected attempts to broaden this permit program.

The Lake Beulah Management District (LBMD) and the Lake Beulah Protective and Improvement Association (LBPIA) (collectively the District) have sought to thwart the Village's use of Well #7. This action arises from their petition for judicial review under Wis. Stat. ch. 227 challenging the 2005 Approval. Their primary objection is that the graduated statutory framework for granting a high capacity well permit is not and should not be controlling. Instead, they argue that DNR has broad authority, and even the duty under the public trust doctrine, to require a full environmental review prior to granting a high capacity well permit whenever allegations are made that a well potentially could adversely affect surface waters. In addition to contending that DNR should consider factors *outside* the legislative framework, the District also contends that DNR erred by not considering evidence *outside* the agency record.

The circuit court upheld the 2005 Approval but the Court of Appeals reversed. App-1.[1] The primary question presented by the Court of Appeals decision is whether DNR has plenary permitting authority over high

[1] App-__ refers to the Petitioner's Appendix. The Court of Appeals decision is the first document in the Appendix.

capacity wells which it can apply in its complete discretion without regard to legislative standards.

Facts and Procedural History

The Village originally began the well siting process in 2000 and applied to DNR for an approval for Well #7 in 2003. R.18-63.[2] Well #7 was necessary to meet the deficiencies in its water supply system and to allow for future growth. R.17-42. Well #7 was 300 feet below and approximately 1,400 feet away from Lake Beulah. R. 17-75. Its maximum rated capacity was 1,000 gallons per minute or 1,440,000 gallons per day. For context, Lake Beulah has 14,279 acre-feet of water, which translates to 4.7 billion gallons of water.[3] The 1,440,000 gpd maximum capacity of Well #7 is 0.03% of that volume.

The DNR reviewed the plans and specifications for this project, granted approval on September 4, 2003, and required that construction begin within two years (2003 Approval). R.8-19 through 22; App-53. As part of the 2003 Approval, DNR concluded that Well #7 will "*avoid* any serious disruption of groundwater discharge to Lake Beulah." R.8-20. The

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[2] R.__ are citations are to the Record of the circuit court.

[3] DNR, *Lake Survey Map for Lake Beulah,* http://dnr.wi.gov/lakes/maps/DNR/0766600a.pdf (last visited Dec. 5, 2010). The standard conversion is one acre-foot of water equals 325,851 gallons.

District challenged the 2003 Approval but it was upheld by both Administrative Law Judge Boldt and the Walworth County Circuit Court.[4] On a motion for reconsideration, the District submitted an affidavit of Mr. Nauta alleging that, in his opinion, Well #7 could have adverse impacts on Lake Beulah and that additional testing and modeling should be undertaken. App-5, ¶9. The Court summarily denied the motion for reconsideration. App-6, ¶10.

During that time, the need for Well #7 had become more critical. As part of the 2005 Annual Inspection, DNR advised the Village that it was not in compliance with DNR water capacity regulations. R.8-14. As a result, the Village was required to obtain a temporary variance from the regulations until Well #7 was operational. *Id.*

As the two-year term for the 2003 Approval was expiring, the Village sought a further approval for Well #7 in 2005. That application was reviewed under the new criteria created by 2003 Wis. Act 310. On September 6, 2005, DNR determined that Well #7 met all of the criteria

[4] Judge Carlson expressly rejected the notion that evidence outside of the statutory framework should be considered by DNR in granting permits, "As the Village's proposed well will not trigger the requirements of Section 281.35, the DNR is not required to consider these criteria. Furthermore, not only is the DNR not required to do so, it should not, as the criteria for approval of this type of well is clearly and unambiguously spelled out in Section 281.17 [now § 281.34]." R.22-130.

under the new statute and granted another approval. (2005 Approval). R.8-6 through 7; App-51.

The District did not seek a contested case hearing on the 2005 Approval to present additional evidence to DNR. Instead, it filed a petition for judicial review under Wis. Stat. ch. 227 nearly six months later. The Walworth County Circuit Court upheld the 2005 Approval (App-51), but the Court of Appeals reversed on June 16, 2010. App-1.

The Court of Appeals determined that notwithstanding the statutory framework for regulating high capacity wells in Wis. Stat. §§ 281.34 and 281.35, the regulatory thresholds and standards in that framework could be disregarded because DNR was given general authority to regulate waters in Wis. Stat. §§ 281.11 and 281.12. App-18, ¶28. Thus, even though Well #7 fell outside the categories of wells requiring environmental review, the Court remanded the 2005 Approval so that DNR could undertake an environmental review. App-25, ¶39.

The Court held that DNR did not have a duty to undertake a full examination of *every* well, but it was required to do so whenever "it has evidence suggesting that waters of the state may be affected by a well." App-19, ¶29. Such a review was required even though, "There is no

standard set by statute or case law" for such a review. App-20, ¶31. The Court also suggested that such a review should occur for wells below 100,000 gpd. App-15, n.9.

The Court suggested that such a review was required by the public trust doctrine, noting, "We further agree with the DNR that its public trust duty arises only when it has evidence suggesting that waters of the state may be affected by a well."[5] App-18, ¶29. However, the Court subsequently stated that the public trust is only implemented through statutory grants to the DNR:

> The public trust doctrine found in our state constitution does not have any self-executing language authorizing the DNR to do anything – the statutes do that. So the authority and duty that the conservancies claim the DNR has . . . must come from state statutes.

App-19, ¶30.

Finally, the Court of Appeals concluded that the affidavit of Mr. Nauta which was not part of the agency record, should be *deemed* to

[5] As the Court of Appeals noted, App-5, n.1., "The public trust doctrine is rooted in our state constitution and provides that the state holds title to navigable waters in trust for public purposes. WISCONSIN CONST. art. IX, § 1, states in pertinent part:

> [T]he river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor."

have been in the agency record and considered by DNR. The Court reached this conclusion based on the fact that the affidavit was in the possession of DNR's attorney in connection with a related judicial proceeding, even though the DNR did not consider the document in reaching its decision.

Summary Of Argument

The Legislature has created a detailed statutory framework for the issuance of high capacity well permits. This permit program has evolved over several decades, and the Legislature has repeatedly rejected attempts to broaden this permit program. This permit program is clear and unambiguous and the Village meets the standards for a permit under this program. The District claims that limiting review to the legislative framework is absurd, nonsensical and violates the public trust doctrine. *See* LBPIA Pet. Resp. at 4; LBMD Pet. Resp. at 2.[6] The District's arguments rest on several false assumptions.

First, there is nothing absurd about a graduated permit program for projects impacting water resources. In fact, they are commonplace for water withdrawal, wastewater discharges, and for structures in and near

[6] Pet. Resp. refers to the parties' responses to the Village's Petition for Review.

navigable waters. Indeed, if the Village had chosen to withdraw 1,440,000 gpd *directly* from Lake Beulah rather than *indirectly* from a 300-foot well that is 1,400 feet away from the Lake, the withdrawal would be completely exempt from *any* water withdrawal permitting because the surface water withdrawal threshold in Wis. Stat. §§ 30.18 and 281.35, is 2,000,000 gpd.

Second, there is nothing absurd about the limitations in a graduated permit program because DNR has also authority to address potential impacts to waters through other means. This is not a case where DNR has "no authority" to address environmental impacts from a high capacity well; it simply does not have authority to do so through a *permit* program. There are other statutory and common law remedies available to DNR and members of the public to address potential natural resource impacts regardless of whether a permit is required. These remedies can and have been utilized.

Third, there is no basis to assert that DNR has plenary permitting authority which it can apply in its complete discretion without regard to legislative standards. The Legislature has established a specific permit program for high capacity wells and consistently rejected attempts to expand that authority. Neither the public trust doctrine upon which the

District relies, nor DNR's general authority in Wis. Stat. § 281.12 upon which DNR and Court of Appeals relies, provides unlimited power to DNR. In addition, basic rules of statutory construction provide that general authority is limited by specific authority, especially where, as here, there is a direct conflict between the two.

Finally, the Court of Appeals consideration of a document that was not considered by DNR in evaluating Well #7 was improper. The agency record is not any document in the possession of DNR, but is comprised of those documents that have been properly submitted to the agency or generated by the agency in connection with a specific proceeding. Allowing such stray documents to be considered part of the record undermines the basic principles of review on the agency record.

ARGUMENT

I. DNR'S PERMIT REVIEW AUTHORITY FOR HIGH CAPACITY WELLS HAS BEEN DEFINED BY THE LEGISLATURE IN WIS. STAT. §§ 281.34 AND 281.35.

The authority of all state agencies arises from powers delegated to them by the Legislature. In the case of high capacity wells permits, the Legislature has been extremely careful in crafting a graduated permit framework. It has established regulatory thresholds and a graduated set of

standards for different categories of high capacity wells, and it has considered but rejected additional grants of authority to DNR with respect to the scope of review for granting permits. The Court of Appeals decision casts this entire set of legislative choices aside.

A. The Legislature Granted DNR Authority To Permit High Capacity Wells Through A Comprehensive And Graduated Statutory Framework In Wis. Stat. §§ 281.34 and 281.35.

The Legislature has established a three-part permitting framework in Wis. Stat. §§ 281.34 and 281.35 based on the capacity of the wells, in gallons per day and the location of the well. The statutory framework establishes the procedures *and* standards to be used for each of these three permit categories:

- **Category 1:** Wells *below 100,000 gpd* are not high capacity wells under § 281.34(1)(b) therefore do not require any DNR approval.

- **Category 2**: Wells *between 100,000 gpd and 2,000,000 gpd* require an approval in accordance with the standards under §§ 281.34(4) and (5). The general standard is whether the well will affect a public water supply.

  Sections 281.34(4) and (5) also provide that *if the well meets one of the following three additional criteria, DNR is required to undertake the environmental review process* in Wis. Stat. § 1.11:

  - Wells within 1,200 feet of "groundwater protection areas" which are defined as trout streams, outstanding and

exceptional natural resource waters

- Wells that could affect springs with a flow of 1 cubic feet per second
- Wells involving high (95%) interbasin water loss, such as a loss from the Great Lakes basin

- **Category 3:** Wells *over 2,000,000 gpd* require an approval in accordance with the standards under § 281.35(5) including a detailed review of environmental factors and public rights.

In addition to prescribing which wells are subject to environmental review, the regulatory framework establishes specific standards for each well category. The standards are summarized in the following table:

Statutory Standards for High Capacity Well Approvals

Category	Statutory Section	Statutory Standards for Approval
1. Less than 100,000 gpd		
	281.34(1)(b)	No Approval Required
2. 100,000 and 2,000,000 gpd		
• General	281.34(5)(a)	"the department may not approve the high capacity well unless it is able to include and includes in the approval **conditions . . . that will ensure that the water supply of the public utility will not be impaired**."
• Springs and Groundwater protection areas (trout streams, outstanding and exceptional resource waters)	281.34(5)(b) and (d) Added by 2003 Wis. Act 310	"1. [T]he department may not approve the high capacity well unless it is able to include and includes in the approval **conditions . . . that ensure that the high capacity well does not cause significant environmental impact."** "2. Subdivision 1 does not apply to a . . . **water supply** for a **public utility** engaged in supplying water to or for the public, if the

		department determines that there is no other reasonable alternative location for a well and is able to include and includes in the approval **conditions, ...that ensure that the environmental impact of the well is balanced by the public benefit of the well related to public health and safety."**
• High Water Loss out of the basin	281.34(5)(c) Added by 2003 Wis. Act 310	"[T]he department may not approve the high capacity well unless it is able to include and includes in the approval conditions, which may include **conditions . . . that ensure that the high capacity well does not cause significant environmental impact."**
3. More than 2,000,000 gpd		
	281.35(5)(d) Added by 1985 Act 60	**"(d)** ***Grounds for approval.*** Before approving an application, the department shall determine all of the following: **1. That no public water rights in navigable waters will be adversely affected** **. . . .** **5. That the proposed withdrawal and uses are consistent with the protection of public health, safety and welfare and will not be detrimental to the public interest.** **6. That the proposed withdrawal will not have a significant detrimental effect on the quantity and quality of the waters of the state."**

There has never been a dispute that Well #7 falls in the second permit category because the maximum capacity of Well #7 is substantially less than 2,000,000 gpd. There has never been a dispute that Well #7 is outside the specific areas that require environmental review in Category 2

because Well #7: (1) is not in groundwater protection area, i.e. within 1,200 feet of a trout stream, outstanding or exceptional resource water, (2) does not impact a spring, and (3) does not result in a 95% water loss from the basin. As a result, the general standard in Wis. Stat. § 281.34(5)(a) applies to Well #7, and DNR determined that this standard has been met when it issued the 2005 Approval.

B. The Legislative History Of Wis. Stat. §§ 281.34 And 281.35 Demonstrates Active Legislative Review And Deliberate Legislative Choices.

The statutory framework for high capacity well permits is the result of continued and deliberate legislative debate and choice. The Court of Appeals erred in casting aside the Legislature's decision about what DNR should consider prior to issuing permits for various types of wells.

Until 1985, the general standard in § 281.34(5)(a), that protected other public utility wells, was the *only* standard applicable to high capacity well permits. Numerous sources, including DNR, acknowledged that DNR's high capacity well permit authority was limited to that standard.[7]

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[7] In 1997, a DNR publication noted, "There have been a number of options considered over the past several years to address potential effects of high capacity wells on groundwater or surface water. Tom Dawson, former Wisconsin Public Intervenor, in a December 13, 1989 letter to Rep. Schneider and Sen. Helbach, **suggested statutory amendments to allow consideration of environmental effects in the high capacity well permitting process. His proposal was to make the criteria of s. 281.35(5)**

Since that time, the Legislature has twice chosen to expand DNR's permit authority for high capacity wells and has also rejected attempts to expand DNR's authority beyond the current framework.

1. 1985 Act 60 – Expansion of DNR's Permitting Authority for Withdrawals over 2,000,000 gpd.

In 1985 Wis. Act 60, the Legislature expanded DNR's authority to require environmental review before granting a permit for a high capacity well with a water loss of 2,000,000 gpd or more. This provision is now in Wis. Stat. § 281.35 and requires, among other things, that DNR evaluate seven criteria including the "public interest" and impacts on navigable

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(formerly s. 144.026(5)), Stats., applicable to all high capacity wells, not just those with a capacity greater than 2 mgd. Such legislation was not proposed." DNR, , *Status of Groundwater Quantity in Wisconsin*, 35 (Apr. 1997)(emphasis added), http://www.wnrmag.com/org/water/dwg/gw/pubs/quantity.pdf (last visited Dec. 5, 2010).

In 2000, the Wisconsin-Madison Extension Department of Urban and Regional Planning published a report which stated in part: "Under Wis. Admin. Code ch. NR 812, the WDNR may deny or modify a permit application for a proposed high capacity well or high capacity property on the basis of deleterious physical impacts *only* if the supply of water to a public utility well may be impacted." UW-Extension Urban and Regional Planning, entitled, "*Modernizing Wisconsin Groundwater Management: Reforming High Capacity Well Laws*," 18 (Aug. 2000), *http://urpl.wisc.edu/extension/reports/Reforming%20the%20High%20Capacity%20Well%20Laws%202000-1.pdf* (last visited Dec. 5, 2010).

In 2003, the Wisconsin Groundwater Coordinating Council prepared a report to the Legislature on groundwater that acknowledged, under current law, the Department "only had the authority to approve a high capacity well application if it is determined that the new well will interfere with a municipal water supply well." Wisconsin Groundwater Coordinating Council, *Report to the Legislature; Groundwater: Wisconsin's Buried Treasure*, 4-12 (2006), http://dnr.wi.gov/org/water/dwg/gcc/RTL2003.pdf (Last visited Dec. 5, 2010).

waters before granting a permit. Wis. Stat. § 281.35(5)(d).

2. 2003 Act 310 – Expansion of DNR's Permitting Authority for Wells between 100,000 and 2,000,000 gpd and Rejection of Additional Expansion.

In 2004, recognizing the limitations of the existing permitting framework, the Legislature acted again to expand DNR's high capacity well permit authority in 2003 Wis. Act 310. This time, the Legislature expanded DNR's permit authority over wells between 100,000 gpd and 2,000,000 gpd. Act 310 was in effect when DNR issued the 2005 Approval now on review.

Act 310 reflected careful legislative choices in four important respects. First, the Legislature chose to expand DNR's permitting authority by requiring environmental review in a targeted manner limited to the three specific circumstances noted above – groundwater protection areas, springs and high interbasin water loss. This was not a *carte blanche* expansion of DNR authority. This targeted expansion reflects legislative choices about how to best protect water resources balanced against the reality of limited agency resources. Even the Court of Appeals acknowledged that requiring DNR to conduct a full environmental review of all wells before granting a permit would present "an impossible and costly burden." App-18, ¶29.

Second, in expanding DNR permit authority, the Legislature did so consistent with its longstanding priority for public drinking water. The very first standard for high capacity wells was to "ensure that the water supply of [a] public utility will not be impaired" and that has remained unchanged. Where the Legislature expanded DNR's authority in Act 310, it did so with an exception for public water supply wells like Well #7. Wis. Stat. § 281.34(5)(b) provides as follows for wells in a groundwater protection area:

> 2. **Subdivision 1 does not apply to a . . . water supply for a public utility** engaged in supplying water to or for the public, if the department determines that there is no other reasonable alternative location for a well and is able to include and includes in the approval **conditions, . . . that ensure that the environmental impact of the well is balanced by the public benefit of the well related to public health and safety.** (Emphasis added.)

Identical language applies to wells impacting springs. Wis. Stat. § 281.34(5)(d).

Third, in expanding DNR's authority, the Legislature made clear that each level of review had specified standards and procedures for well approval. An applicant knows what standards apply for each category and can prepare its application accordingly. In so doing, the Legislature chose not to alter these categories on a case-by-case basis. When the Legislature wanted to provide DNR with the authority to elevate the level of review

between such categories, it has so provided and did not do so here.[8]

Finally, nothing better indicates the cautious legislative approach in Act 310 than the Legislature's creation of a Groundwater Advisory Committee for the express purpose of reporting back to the Legislature in 2007 to recommend whether additional legislative changes should be made to DNR's permitting authority.[9] 2003 Wis. Act 310, § 15. The 2007 Report to the Legislature under Act 310 evaluated various changes to the existing law, one of which was to expand DNR's authority to require an environmental review for wells affecting all surface waters. Specifically, § 2.2.4 of the 2007 Report contained the following proposed recommendation:

> Designation of Groundwater Protection Areas (GPAs) should not be restricted to Exceptional Resource Waters, Outstanding Resource Waters and Trout Streams only. Additional valued water resources, including seepage lakes, rivers, and wetlands that are not trout water or ORWs or ERWs should be considered for GPA designation by the legislature.

2007 Report at 16-17. That proposal was defeated 9-5. *Id.* No further action was taken during the 2007-08 legislative session. The Court of

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[8] For example, under Chapter 30 for some exemptions, DNR has the authority to require a permit in lieu of an exemption under specified circumstances. *See e.g.,* Wis. Stat. § 30.12(2m) . Similarly, DNR can require an individual Chapter 30 permit in lieu of a general permit under specified circumstances. Wis. Stat. § 30.206(3r).

[9] A copy of the 2007 Groundwater Advisory Committee Report to the Legislature (2007 Report) is *available at* http://dnr.wi.gov/org/water/dwg/gac/GACFinalReport1207.pdf .

Appeals decision has now adopted the change the Legislature refused to enact.

3. 2009-10 Rejection of Additional Permitting Authority.

More recently, in the 2009-2010 legislative session, a new "Groundwater Workgroup" was convened to again consider changes to the groundwater withdrawal law.[10] As part of those proceedings, DNR Water Division Administrator stated, "Additional legislation is needed *to create regulatory tools* necessary to ensure a more complete and effective approach to sustainable groundwater management."[11] Others cited "critical gaps" in the current regulatory framework including the failure of the current law to extend groundwater protection areas to lakes in Walworth County, including Lake Beulah.[12] A groundwater protection bill was introduced on March 15, 2010 as Senate Bill 620 which proposed to expand groundwater regulations, but it failed to pass.[13] The Court of Appeals

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[10] Groundwater Work Group proceedings, http//www.legis.wisconsin.gov/senate/sen16/news/Issues/GroundwaterWorkgroup.asp (last visited Dec. 5, 2010).

[11] *Id.*, Testimony of Todd Ambs, July 29, 2009.

[12] *Id.*, Testimony of Jodi Habush Sinykin, October 7, 2009; letter of Jodi Habush Sinykin, January 27, 2010.

[13] History of Senate Bill 620, http://www.legis.wisconsin.gov/2009/data/SB620hst.html (last visited Dec. 5, 2010).

decision has adopted the change the Legislature again rejected.

4. Conclusions from the Legislative History.

Three unassailable conclusions can be drawn from this legislative history. First, the scope of DNR's permitting authority for high capacity wells has been the subject of focused legislative attention for many years. This is not a case where an important policy choice has been ignored or slipped into a budget bill. This is a case where there has been focused legislative attention: two major stand-alone bills, two subsequent legislative working groups, and numerous meetings, hearings and reports. The legislative choices here were not made by accident or without extensive public involvement.

Second, none of the arguments for expanded authority would be necessary if DNR had the permitting authority the Court of Appeals claims it already has. Arguments by DNR and advocacy groups to expand DNR's authority to cover "critical gaps" and provide "necessary tools" is more than an implicit acknowledgement of the limits of DNR's current permitting authority. So too is the extensive time and effort dedicated by the Legislature to this issue through legislative work groups, hearings and reports.

Finally, the legislative choices made here were clear and unambiguous. The Legislature chose to utilize a graduated permit framework with specific thresholds and standards for each well category. And the Legislature did so in an attempt to balance all of the competing public interests at stake.

Notwithstanding this extensive legislative framework and history, the Court of Appeals decision has granted DNR plenary authority over permitting high capacity wells. It has ignored the statutory framework for permitting and granted DNR authority that the Legislature has expressly refused to grant.

C. The Legislative Limitations On High Capacity Well Permitting Do Not Leave The Resource Unprotected.

The District has repeatedly claimed that if DNR does not have the power to review environmental impacts of all wells then it is possible a permit could be issued, "even if it is undisputed that the proposed well will destroy the aquatic resources of this State." LBMD Pet. Resp. at 2. Here, the District does not have "undisputed" evidence about the impact of Well #7; *at most*, it has an affidavit of Mr. Nauta containing his opinions which place *into dispute* the conclusions reached by the DNR and the Village that

there would be no serious impacts.[14] But taking the District's argument at face value, the argument is still a red herring.

The assertion that DNR has no authority to consider adverse environmental impacts of high capacity wells with capacities to withdraw less than 2,000,000 gpd is simply not true. DNR *does* have that authority; but it is through means *other* than a permit program. If there really is an impact from a well that is not addressed through the permit program, DNR has other options to implement its delegated responsibilities. Indeed, it regularly uses those options where issues fall outside of permit requirements.

First, DNR has authority to address "infringement[s] of the public rights relating to navigable waters" pursuant to Wis. Stat. § 30.03(4)(a). This is a broad authority not limited to enforcement of permits. In *Baer v. Wisconsin Dep't of Natural Res.*, 2006 WI App 225, ¶14, 297 Wis. 2d 232, 724 N.W.2d 638, the court stated,

> As to the circumstances under which the Department may bring a statutorily authorized administrative enforcement action, the statutory language is plain and broad in its reach: "*If the department learns of a possible violation* of the statutes relating to navigable waters *or a possible infringement* of the public rights relating to navigable waters, ...

[14] The issues associated with whether this affidavit is even properly part of the agency record is discussed in Section III.

> *the department may proceed* as provided in this paragraph." Section 30.03 (4)(a). (Emphasis in original.)

In *ABKA Limited Partnership v. Wisconsin Dep't of Natural Res.,* 2002 WI 106, 255 Wis. 2d 486, 648 N.W.2d 854, this Court made it clear that a § 30.03 remedy is in addition to any other relief provided by law and it is "of no consequence that ABKA proceeded with the permit process. . . ." *Id.* ¶24.

Second, the State has enforcement authority to address nuisance conditions caused by water withdrawal, regardless of whether there is a permit. In *State v. Michels Pipeline Construction, Inc*., 63 Wis. 2d 278, 219 N.W.2d 308 (1974), the State filed a nuisance action against Michels Pipeline arising from its pumping from wells to dewater a construction site. *See also*, *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974) (state action brought to abate a nuisance from surface water runoff). The issuance of a permit has never insulated a person from liability if a nuisance has been caused. *See Costas v. City of Fond du Lac,* 24 Wis. 2d 409, 416, 129 N.W.2d 217 (1964) ("authority to install a sewer system carried no implication of authority to create or maintain a nuisance. . . .").

Third, if DNR does not bring an action, members of the public including the District have the right to bring nuisance abatement actions to

protect the public trust. *See e.g.*, *Gillen v. City of Neenah*, 219 Wis. 2d 806, 828, 580 N.W.2d 628 (1998).

In summary, DNR and the District *do* have authority to address actual impacts to public trust resources. What they do not have authority to do is to impose requirements for permits outside of those established by the legislative framework. There is no reason to abrogate the provisions of legislative permit programs in order to protect the public trust.

D. The Legislative Choices On High Capacity Well Permitting Thresholds And Standards Are Common.

The District also contends that it is absurd and nonsensical not to allow DNR to subject permit applications for wells below the legislative threshold of 2,000,000 gpd to a higher level of review than provided under the plain reading of Wis. Stat. § 281.34. It is not for the District, or even the courts, to second guess and disregard legislative choices. Even if it were, however, the legislative choices here are not unprecedented nor unreasonable.

1. The Use of a Graduated Permit Program is Commonplace.

The District's consternation that some wells are not subject to environmental review is unwarranted. Regulatory thresholds and graduated

standards are the kind of approaches used in many water permit programs administered by DNR. Regulatory thresholds establish the point below which no permit or review is required. General permits authorize activities according limited review which typically relies on specified criteria rather than a detailed case-by-case analysis. These general permits are not "rubber stamps" as the Court of Appeals claims. They provide for review, but subject to limited conditions.

Several examples are illustrative. As part of the recently enacted Great Lakes Compact, the Legislature created a three-tiered regulatory framework for water use permits for the Great Lakes basin.[15] The permit program established an exemption level at 100,000 gpd where no review was required, a general permit subject to limited review for withdrawals between 100,000 and 1,000,000 gpd, and individual permits subject to more comprehensive review for larger withdrawals. *See* Wis. Stat. §§ 281.346(4s) and (5), respectively.[16]

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[15] The Village of East Troy is not in the Great Lakes Basin. DNR, *Great Lakes Drainage Basins in Wisconsin*, http://dnr.wi.gov/org/water/greatlakes/images/glbasin_web.pdf (last visited Dec. 5, 2010).

[16] The general permit in § 281.346(4s) provides in part:

> (a) [T]he department shall include all of the following in a general permit:
> 1. Reference to the database under par (i).

Similarly, Wis. Stat. ch. 30 establishes a permit program for various activities in and near navigable waters. For many of these activities, there is a graduated permit program involving exemptions, general and individual permits. Examples of exempt activities include grading on the banks of a navigable water where the grading does not exceed 10,000 square feet, Wis. Stat. § 30.19(1g)(c); and unconnected ponds beyond 500 feet of a navigable water, Wis. Stat. § 30.19(1g)(am). Examples of general permits with limited standards for many routine activities affecting navigable waters include minor structures in navigable waters, Wis. Stat. § 30.12(3); small culverts, Wis. Stat. § 30.123 (7); and limited amounts of dredging, Wis. Stat. § 30.20(1t). These activities can proceed without full public interest review or public hearing if set standards prescribed by rule are met. For activities that do not meet the exemption or general permit standards, DNR can issue an individual permit based on full public rights and interest review.

Wastewater permits under Wis. Stat. Ch. 283 also reflect a three-tiered permit program. The fundamental threshold for wastewater permits

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2. Requirements for estimating the amount withdrawn, monitoring the withdrawal, if necessary, and reporting the results of the estimating and monitoring, as provided in rules promulgated by the department.
3. Requirements for water conservation, as provided in rules promulgated by the department under sub. (8)(d).

is that such permits are required for "point source" discharges to waters of the state, but even some point source activities are exempt from permits such as stormwater discharges from sites less than one acre. *See* Wis. Stat. § 283.33(1)(a). For many activities, Wis. Stat. § 283.35 authorizes DNR to issue general permits with prescribed standards. For example, discharges from construction pit dewatering and nonmetallic mining operations are subject to general permits with limited review.[17] Activities not exempt or subject to general permits must get an individual permit.[18]

Thus, the Legislature has often chosen to regulate the use of our waterways through graduated permit programs just as it has done here for high capacity wells. Here, the Legislature has chosen not to require environmental review in issuing permits for wells between 100,000 and 2,000,000 gpd unless certain criteria are present. To argue that such

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[17] *See* DNR, *Industrial and Municipal Wastewater General Discharge Permits,* http://www.dnr.state.wi.us/org/water/wm/ww/gpindex/gpinfo.htm (last visited Dec. 5, 2010). for a listing of these general permits and the specific standards required for each activity.

For example, the standards for discharging water from nonmetallic mining operations regulates the water quality from off-site discharges, but **does not regulate the amount of groundwater or surface water that can be pumped from the mining pit** nor the amount of water that can be discharged off-site. *See* WPDES Permit WI-0046515-05, http://www.dnr.state.wi.us/org/water/wm/ww/gpindex/46515_permit.pdf (last visited Dec. 5, 2010).

[18] A similar framework with regulatory thresholds, general and individual permits exists for non-federal wetlands under Wis. Stat. § 281.36.

regulatory thresholds and graduated permit standards are absurd is simply at odds with longstanding legislative choices.

2. Allowing Limited Review for Permits for Wells below 2,000,000 gpd is not Unreasonable.

The District and Court of Appeals also express consternation that the Legislature would limit permit review for wells withdrawing 2,000,000 gpd. Again this is a Legislative decision, but the use of a 2,000,000 gpd threshold is not an aberration.

Apart from the legislative decision to retain the 2,000,000 gpd as part of the graduated framework in Wis. Stat. § 281.34, the Legislature has used the 2,000,000 gpd as the permitting threshold for withdrawals from surface water under Wis. Stat. § 30.18 and Wis. Stat. § 281.35.[19] This means that if the Village had sought a surface water withdrawal *directly* from Lake Beulah, rather from groundwater 300 feet below and 1,400 feet away from Lake Beulah, it would not have needed a water withdrawal

[19] For example, Wis. Stat. §30.18 provides in relevant part as follows:

> **30.18 Withdrawal of water from lakes and streams.** …
> **(2) Permit required.** . . .
> (b) *Streams or lakes.* No person, except a person required to obtain an approval under s. 281.41, may withdraw water from any lake or stream in this state without an individual permit under this section if the withdrawal will result in a water loss averaging 2,000,000 gallons per day in any 30-day period above the person's authorized base level of water loss.

permit. If the Legislature can allow such withdrawals without a permit, it certainly can allow such withdrawals under a permit program with limited environmental review.

What is more, DNR has an administrative code which establishes the kind of actions that require environmental review. The granting of a high capacity well permit under Wis. Stat. § 281.17(1) [now § 281.34(5)(a)] is listed as a Type IV action. *See* NR 150.03(8)(h)1. Type IV actions include those actions which do not have significant impacts and do not therefore require *any* environmental review. Wis. Admin. Code § NR 150.03(1)-(4). DNR's determination that high capacity wells do not require environmental review, apart from what is statutorily required, reflects its judgment on the potential impact from such wells.

II. THE SPECIFIC LEGISLATIVE FRAMEWORK IN §§ 281.34 AND 281.35 IS NOT SUPERCEDED BY THE PUBLIC TRUST DOCTRINE OR THE GENERAL AUTHORITY IN WIS. STAT. §§ 281.11 AND 281.12.

Notwithstanding the specific legislative framework for high capacity well permits, the Court of Appeals claims that DNR has broad authority and that this framework can therefore be cast aside. The District argues that the public trust doctrine authorizes DNR to act outside of its statutory authority, while the DNR embraces the Court of Appeals holding that Wis.

Stat. §§ 281.11 and 281.12 provide DNR general authority that supersedes its specific authority. Neither position has merit.

A. The Public Trust Doctrine Does Not Grant DNR Plenary Authority; DNR's Authority Is Limited To That Granted By The Legislature.

The public trust doctrine requires that the state hold the navigable waters of the state in trust for the public. *Hilton v. Department of Natural Res.,* 2006 WI 84, ¶18, 293 Wis. 2d 1, 717 N.W.2d 166. However, the public trust doctrine does not alter the basic rules regarding the delegation of authority to state agencies.

DNR does not have plenary permitting authority absent specific legislative delegation of that authority. DNR, like all administrative agencies, is a creature of the state that has only those powers "which are expressly conferred or which are necessarily implied by the statutes under which it operates." *Wisconsin Citizens Concerned for Cranes & Doves v. Wisconsin Dep't of Natural Res.*, 2004 WI 40, ¶14, 270 Wis. 2d 318, 677 N.W.2d 612 (Citations omitted.). "Such statutes are generally strictly construed to preclude the exercise of power which is not expressly granted." *Browne v. Milwaukee Bd. of Sch. Dirs.*, 83 Wis. 2d 316, 333, 265 N.W.2d 559, *reh'g denied*, 83 Wis. 2d 316, 267 N.W.2d 379 (1978).

Any evaluation of an agency's *implied* powers, such as those being asserted here, begins with the presumption that "[a]dministrative powers are not freely and readily implied." *Madison Metro. Sch. Dist. v. Dep't of Pub. Instr.*, 199 Wis. 2d 1, 13, 543 N.W.2d 843 (Ct. App. 1995). "An agency's enabling statute is to be strictly construed, and we resolve any reasonable doubt pertaining to an agency's implied powers against the agency." *Wisconsin Builders Ass'n v. Wisconsin Dep't of Transp.*, 2005 WI App 160, ¶9, 285 Wis. 2d 472, 702 N.W.2d 433 (*citing Wisconsin Citizens Concerned for Cranes & Doves,* 2004 WI 40, ¶14.

The existence of a potential impact from Well #7 to a public trust resource such as Lake Beulah, does not alter the basic question of whether DNR has been delegated permitting authority.[20] This is true for several reasons.

The public trust doctrine is not self-executing. "The public trust doctrine in and of itself, does not create legal rights." *Borsellino v.*

[20] The Court need not decide whether groundwater is directly subject to the public trust doctrine to resolve the issues in this case. The Village maintains that the public trust doctrine does not apply to groundwater because the public trust doctrine applies to "navigable waters" and groundwater is not navigable even under the broadest of navigability tests and the smallest watercraft. *See DeGayner & Co. v. DNR*, 70 Wis. 2d 936, 946, 236 N.W.2d 217 (1975). However, even if groundwater *were* part of the public trust, the issue is still the extent to which the Legislature has delegated permitting authority to DNR to regulate impacts to public trust resources.

Wisconsin Dep't of Natural Res., 2000 WI App 27, ¶18, 232 Wis. 2d 430, 606 N.W.2d 255 (*citing Robinson v. Kunach*, 76 Wis. 2d 436, 452, 251 N.W.2d 449 (1977); and *State v. Deetz,* 66 Wis. 2d 1, 11-13, 224 N.W.2d 407 (1974)). The Court of Appeals correctly acknowledged, "the public trust doctrine found in our state constitution does not have any self-executing language authorizing DNR to do anything – the statutes do that." App-19.

It is the Legislature that determines how the public trust is to be administered. "The legislature has the primary authority to administer the public trust for the protection of the public's rights, and to effectuate the purposes of the trust." *Hilton,* 293 Wis. 2d 1, ¶19. *See also*, *State v. Village of Lake Delton*, 93 Wis. 2d 78, 91, 286 N.W.2d 622 (Ct. App. 1979).

Thus, to the extent that DNR implements the public trust doctrine, it does so only insofar as the Legislature has delegated it authority. *State v. Town of Linn,* 205 Wis. 2d 426, 443-44, 556 N.W.2d 394 (Ct. App. 1996) ("The legislature may *delegate* to the DNR the authority to exercise such legislative power as is necessary to 'make public regulations interpreting [its] statute[s] and directing the details of [their] execution.' This is

precisely what the Legislature has done with the public trust doctrine." (Emphasis added; citation omitted.)). *See also*, *Hilton,* 293 Wis. 2d 1, ¶20.

In this case, that delegated authority has been provided in Wis. Stat. §§ 281.34 and 281.35. The public trust doctrine does not provide additional independent authority, nor does it allow DNR to disregard the authority that the Legislature provided.

B. The DNR's General Authority In Wis. Stat. §§ 281.11 And 281.12 Does Not Grant DNR Plenary Authority; DNR's Authority Is Controlled By Wis. Stat. §§ 281.34 And 281.35.

1. Specific Authority Controls Over General Authority.

DNR now embraces the Court of Appeals holding that its general powers in Wis. Stat. §§ 281.11 and 281.12 override the thresholds, standards and procedures set forth in Wis. Stat. §§ 281.34 and 281.35. This is contrary to the well established principle of statutory construction that general authority is limited by specific authority.

In *Rusk County Citizen Action Group, Inc. v. Wisconsin Dep't of Natural Res.,* 203 Wis. 2d 1, 552 N.W.2d 110 (Ct. App. 1996), the Court directly addressed the scope of DNR's general authority under §§ 281.11 and 281.12. In *Rusk County*, a citizen group petitioned DNR to ban sulfide

mining. Like this case, the court noted that DNR had a regulatory framework to govern the issuance of mining permits and therefore, rejected the claim that the general provisions of § 144.025 [now Wis. Stat. §§ 281.11 and 281.12] could add to it:

> The Mining Act is the more specific statutory grant of authority dealing with the question of sulfide mineral mining and it was enacted eight years after § 144.025. When a specific grant of authority to an agency conflicts with a more general grant of authority, the specific statute controls. *Grogan v. PSC*, 109 Wis. 2d 75, 81, 325 N.W.2d 82, 85 (Ct. App. 1982). This is especially true when the specific statute is enacted after the general statute.

203 Wis. 2d at 10. The same analysis holds true here. The District should not be allowed to use DNR's general authority as a basis to alter the standards applicable to the high capacity well permitting program.

Other cases concerning agency authority have reached a similar result. In *Martineau v. State Conservation Comm'n*, 46 Wis. 2d 443, 175 N.W.2d 206 (1970), the court concluded that the Commission's general authority to condemn land was limited by subsequently enacted specific authority governing the acquisition of state forest land. The court stated, "It is a cardinal rule of statutory construction that when a general and a specific statute relate to the same subject matter, the specific statute controls and this is especially true when the specific statute is enacted after the enactment of the general statute." *Id.* at 449. *See also*, *Clean Wisconsin,*

Inc., v. Public Serv. Comm'n of Wisconsin, 2005 WI 93, ¶175, 282 Wis. 2d 250, 700 N.W.2d 768.

In this case, there is no dispute that Wis. Stat. §§ 281.34 and 281.35 are more specific and more recent enactments than §§ 281.11 and 281.12,[21] and therefore should control the standards for granting high capacity well permits.

2. Allowing § 281.12 to Add Permit Requirements Would Conflict with §§ 281.34 and 281.35.

The Court of Appeals claims that § 281.12 implements the public trust doctrine and therefore it supersedes other permit programs unless there is evidence that the Legislature intended to revoke such authority. The Court of Appeals stated:

> The public trust doctrine is such an important and integral part of this state's constitution that, before we can accept the Village's argument, there should be some evidence that the legislature intended by these statutes to render nugatory the more general statutes bestowing the DNR with the general duty to manage the public trust doctrine.
> ….
> We therefore conclude that, just because the legislature was silent about the DNR's role with regard to some of the middling wells, this does not mean that the legislature meant to abrogate the DNR's authority to intercede where the public trust doctrine is affected.

App-15-17, ¶¶ 25, 27.

[21] Wis. Stat. §§ 281.11 and 281.12 were originally enacted in 1965 as Wis. Stat. § 144.025. *See* 1965 Laws Ch. 614. This occurred before the changes to the high capacity well statute in 1985 and 2004.

While the public trust doctrine is important, the Court of Appeals is incorrect in its analysis of § 281.12. First, Wis. Stat. § 281.12 provides general powers to DNR, to "carry out the planning, management and regulatory programs necessary for implementing the policy and purpose **of this chapter,**" i.e. Chapter 281 (emphasis added).[22] It does not give DNR plenary authority to implement the public trust doctrine, and it does not give DNR authority act in a manner contrary to specific provisions of Chapter 281.

Second, Wis. Stat. § 281.12 was never intended to alter the permit requirements of other programs. As the court held in *Robinson v. Kunach*, 76 Wis. 2d 436, 454-55, 251 N.W.2d 449 (1977):

> **Nothing in the general statute, sec. 144.025** [now 281.12], Stats., delegating to the DNR the responsibility to "protect, maintain and improve the quality and management of the waters of the state**" in any way changes the permit requirements** or penalties for noncompliance with such requirements as specifically provided for by statute. (Emphasis added).

Third, allowing DNR's general authority to override the specific thresholds, standards and procedures of §§ 281.34 and 281.35 would create a direct conflict with specific legislative choices. The Legislature was not "silent" about the DNR's role with respect to wells in the second

[22] Wis. Stat. § 281.11 does not provide DNR with *any* authority; it is merely, as its title indicates, a "statement of policy and purpose."

"middling" category as the Court of Appeals contends. The Legislature prescribed specific standards and procedures where it believed they were warranted and chose not to provide carte blanche powers. The Court of Appeals decision is in direct conflict with specific legislative choices:

- In 2003 Wisconsin Act 310, the Legislature authorized environmental review of wells in three specific circumstances for Category 2 wells. In the absence of this directive, no environmental review was authorized by statute or by rule. Indeed, it was precluded by rule since DNR exempted high capacity wells from environmental review under NR 150. Requiring environmental review for all wells disregards the legislative choice to limit full environmental review and standards to specified wells;
- The Legislature established specific standards for granting permits for each category of wells. Allowing unspecified review of wells outside of those categories creates a standard-less application and review process; and
- The Legislature provided priority protections to municipal wells in Act 310. Allowing a full environmental review for all category 2 wells disregards those protections.

Allowing § 281.12 to override the specific permitting framework in Wis. Stat. §§ 281.34 and 281.35 is not in harmony with Legislative choices but is directly contrary to them.

The same is true with respect to DNR's argument that §§ 281.34 and 281.35 specify the standards DNR is *required* to apply but does not preclude the DNR from applying additional standards. Allowing full environmental review of all wells as part of a permitting program is in direct conflict with specific legislative choices that limit the scope of the intended review. It is also in conflict with DNR's rules under NR 150.

There may be areas in which DNR's general authority could be applied in a manner consistent with this or other permitting programs. For example, DNR notes that it has promulgated rules such as the well construction code under Wis. Admin. Code § NR 809.01 and safe drinking water regulations under Wis. Stat. Chs. 280 and 281. DNR Pet. Resp. at 8. However, these requirements to do not conflict with the legislative choices made in defining the framework for permitting high capacity wells in § 281.34.

C. Standard Rules Of Statutory Construction Require That Wis. Stat. §§ 281.34 And 281.35 Control Over Its General Authority.

Multiple rules of statutory construction also support the Village's position. First, statutory analysis begins with the plain language of the statute, and that is where the inquiry should end if there is no statutory ambiguity. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. Wis. Stat. § 281.34 is unambiguous. There is a clear standard for Well #7 – it is subject to review and approval under § 281.34(5)(a). That should be the end of the inquiry.

Second, if there is an ambiguity – as the District and DNR assert – then it is appropriate to review legislative history. *Kalal*, 271 Wis. 2d 633, ¶51. It is also appropriate to use legislative history to confirm otherwise clear statutory language. *Id.* That history, as set forth above, could not be any clearer. The Legislature intended to create a graduated permit program subject to specific thresholds and standards and it chose not to expand it. Expanding the scope of permitting criteria is contrary to legislative intent.

Third, statutes must be read as a whole to give effect to the entire statutory scheme. *Id.*, ¶46 ("Context is important to meaning. So, too, is the structure of the statute in which the operative language appears.") Here,

the Legislature clearly has established a multi-level regulatory structure setting forth how and when environmental factors are to be considered in connection with the permitting process. That purpose would be defeated by allowing DNR's general authority to override that permitting process.

Fourth, limiting the scope of review in high capacity well permitting to the factors in §§ 281.34 and 281.35 is compelled by the "*exclusio* rule." This rule of statutory construction means "to include one thing implies the exclusion of the other." *Keip v. Wisconsin Dep't of Health & Family Servs*, 2000 WI App 13, ¶18, 232 Wis. 2d 380, 606 N.W.2d 543. Sections 281.34 and 281.35 specify when and how environmental review is to be undertaken. They limit that review to certain wells based on capacity and environmental circumstances. The failure to include consideration of those factors for all wells shows an intent to exclude them. *C.A.K. v. State*, 154 Wis. 2d 612, 623, 453 N.W.2d 897 (1990).

Finally, a statute must also be read so that no part of it is surplusage, "giving effect to all the words that are used." *Randy A.J. v. Norma I. J.*, 2004 WI 41, ¶22, 270 Wis. 2d 384, 677 N.W.2d 630. The Court of Appeals decision would cast this entire legislative framework and statutory history aside. It would render all of §§ 281.34 and 281.35 surplusage.

D. Abandoning The Graduated Framework In Wis. Stat. §§ 281.34 And 281.35 Will Create Confusion And Uncertainty.

Allowing the general authority in Wis. Stat. § 281.11 and 281.12 to trump the graduated permitting framework in §§ 281.34 and 281.35 should also be rejected because it will create confusion and uncertainty.

1. The Court of Appeals Decision Creates a Standard-less Permit System.

The legislative framework in §§ 281.34 and 281.35 establishes standards and procedures for granting a permit for each high capacity well category. According to the Court of Appeals, DNR can decide on a case-by-case basis whether an environmental review is needed as to any well regardless of capacity or location. Even the Court of Appeals acknowledged that "[T]here is no standard set by statute or case law" to guide this process. App-20, ¶31. There are several key points in the permitting process that are now without a standard. There is no standard to determine *when further investigation* should be undertaken if someone submits evidence to DNR alleging an impact to waters of the state. Moreover, if there is a further investigation, there is no standard for the *scope of the investigation* and no indication whether it would require the kind of environmental assessment mandated by Wis. Act 310 or some other

level of review. Finally, there is no standard that would apply to evaluate the *results of such an investigation*. Thus, the Court of Appeals imposes a duty on DNR, but one with no standards to guide either the DNR or the applicants in carrying out that duty.

It is not enough to say that "the DNR has particular expertise when it comes to water quality and management issues" (App-20, ¶31) or that DNR has experience in applying public trust standards. DNR Pet. Resp. at 13. The fundamental problem is that the current statutory framework embodies several different standards. By what standards will a permit application now be reviewed? Should the Village assume that for Well #7 the more exacting standards for Category 2 wells under Act 310 apply and if so, will there be a corresponding consideration for public water supplies as in § 281.34(5)? Or will all seven criteria for public interest review in Wis. Stat. § 281.35 apply? Or will some other general "public interest" standard such as used in Chapter 30 be deemed applicable? There is no way to know under the Court of Appeals ruling, because of the unfettered discretion that the decision grants to DNR. This lack of standards creates a fundamental problem because it places applicants like the Village in an untenable situation when applying for high capacity well permits.

2. The Court of Appeals Decision Places All Graduated Permit Programs in Doubt.

As noted above, graduated permit programs are commonplace for water permitting. The Court of Appeals decision also creates the potential for unsettling established legislative choices not just for high capacity wells, but for multiple water programs. If DNR has the authority and duty to consider regulating an activity whenever "it has evidence suggesting that waters of the state may be affected," can persons now argue, for example, that DNR should now require permits for grading below the regulatory threshold of 10,000 square feet on the bank of a navigable water under Wis. Stat. § 30.19?

Where a permit program establishes specific limited review standards, can those standards now be ignored? Can DNR now require conditions beyond those in general permits issued under Chapter 30, wastewater general permits and Great Lakes Compact general permits? For example, can persons now argue that DNR must consider the amount of water removed from a nonmetallic mine pit before a wastewater general permit for nonmetallic mining is issued?

In short, if the general authority of DNR is as extensive as the Court of Appeals suggests, then legislative standards and thresholds in numerous

other water permit programs become meaningless. This is an invitation to confusion and litigation that serves no one's interest and is completely unnecessary to protect public trust resources.

3. The Abrogation of Legislative Policy Choices Also Raises Separation of Powers Issues.

The Legislature has made its choices clear in the development of the framework in §§ 281.34 and 281.35. The abrogation of those choices also raises separation of powers concerns. "The separation of powers doctrine is violated when one branch interferes with the constitutionally guaranteed 'exclusive zone' of authority vested in another branch." *Martinez v. Dep't of Indus, Labor & Human Relations*, 165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992). "'The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate – is a power which is vested by our Constitution in the Legislature, and may not be delegated.'" *State ex rel. Evjue v. Seyberth*, 9 Wis. 2d 274, 285, 101 N.W.2d 118 (1960) (*quoting State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 505, 220 N.W. 929 (1928)).

As a result, this Court has repeatedly noted its "obligation to use restraint in adding words to those chosen by the legislature. . . ." *Burbank*

Grease Servs., LLC v. Sokolowski, 2006 WI 103 ¶25, 294 Wis. 2d 274, 717 N.W.2d 781,(*citing State v. Hall*, 207 Wis. 2d 54, 557 N.W.2d 778 (1997)). To ignore this principle is to "usurp[] a power not vested in this court and offend[] the fundamental doctrine of separation of powers. . . ." *See In re Elijah W.L.*, 2010 WI 55, ¶112, 325 Wis. 2d 524, 785 N.W.2d 369 (Abrahamson, J. concurring).

In this case, the Court of Appeals *has* effectively added words to those used by the Legislature. In so doing, the court added language that the Legislature chose not to adopt. Those choices are for the Legislature not the courts.

III. THE COURT OF APPEALS IMPROPERLY REDEFINED THE SCOPE OF THE RECORD BEFORE AN AGENCY.

In this case, the DNR expressly provided the District with notice of its decision to issue the 2005 Approval, which included a notice of appeal rights. R. 8, 6-7; App-51. If the District wanted to present evidence concerning the DNR's decision, such as the Nauta affidavit, it could have requested a contested case hearing under Wis. Stat. § 227.42, and the evidence would have become part of the agency record, but it chose not to do so. When it filed its petition for judicial review six months later, it

could have chosen to request that additional evidence be taken by the agency under Wis. Stat.§ 227.56, but again it chose not to.

As a result of the District's failure to use these procedures, there is no dispute that the affidavit of Mr. Nauta and certain other documents noted by the Court of Appeals were not submitted to the DNR as part of its review in connection with the 2005 Approval and therefore were not considered by the DNR.[23] Nevertheless, the Court of Appeals held that because the Nauta affidavit was sent to DNR's legal counsel in a prior judicial proceeding, possession of the affidavit was imputed to DNR and therefore *deemed* to be part of the agency record administrative record on the 2005 Approval. The Court of Appeals remanded the case to DNR so it "may consider the Nauta affidavit and any other information the agency had pertinent to Well #7 before it issued the 2005 approval." App-25, ¶39. This was an error.

The agency record is not any document in the possession of DNR, but is comprised of those documents that have been submitted to the agency or generated by the agency in connection with a specific proceeding. If the agency record does not include a document that a party considers relevant

[23] App 3, ¶5, n.5 cites to other documents presented at oral argument that were also outside the record.

to the decision-making process, there are procedures to add that document to the record so that it can be considered.

The Court of Appeals decision on this point is not as limited or unique as the Court claims. The fact that the affidavit was sent to a DNR attorney and thereby imputed to the client (in this case, the DNR) produces a result no different than if the document was sent to some other DNR official – either way, it was in DNR's possession. The question is not whether it was in DNR's possession, but rather, was it part of the record in the 2005 Approval proceeding. Similarly, the fact that this affidavit came into DNR's possession close in time to the 2005 Approval process does not provide a principled basis for addressing what is or is not in a record. Where does one draw the line? How far back and how closely related does the document need to be to be "deemed" to be part of the record. The Court of Appeals decision does not answer those questions, but instead invites endless litigation by redefining what constitutes the record.

A. The Record Consists Of Documents In A Specific Proceeding Not Any Documents In An Agency's Possession.

The agency record is defined in Wis. Stat. § 227.55 as, "the entire record of *the proceedings in which the decision under review was made*,

including all pleadings, notices, testimony, exhibits, findings, decisions, orders and exceptions, therein. . . ." (Emphasis added.) Depending on the kind of proceeding, the record may consist of application materials, written comments, hearing testimony or other material submitted to the agency, or information and analysis undertaken by the agency itself with respect to the proceeding. But the agency record is necessarily confined to those documents arising from a specific proceeding. It is a finite and ascertainable set of documents upon which the agency then makes its decision, and upon which a court can conduct judicial review of that decision.

The agency record is not, and cannot be, any document within the DNR's possession from *other* proceedings unless that document was specifically added to the proceeding in which the decision is being made. If documents from other proceedings are simply "deemed" to be part of the agency record, agency decisions are now vulnerable to a new round of attack, parties can be blind-sided and denied the opportunity to rebut the evidence that has been submitted and courts will left with an uncertain basis upon which to evaluate agency decisions.

Both Chapter 227 and case law clearly direct that the scope of

judicial review of an administrative decision is confined to the record. *See* Wis. Stat. § 227.57(1). Wis. Stat. § 227.57(1) provides that, "[t]he review shall be conducted by the court without a jury *and shall be confined to the record*, . . ." (Emphasis added.) As the court noted in *Barnes v. Dep't of Natural Res.*, 184 Wis. 2d 645, 661, 516 N.W.2d 730 (1994), "[s]everal standards set forth in sec. 227.57 for review of administrative determinations are applicable to this case: *Our review is confined to the record."* (Emphasis added; citations omitted.)

Once one deems documents from outside the proceeding in which the decision was made to be part of the agency record, there is no defining principle for what should or should not be in the record. And if one cannot reliably ascertain what is or is not part of the agency record, then the concept of orderly judicial review is lost.

B. Chapter 227 Provides Procedures For Supplementing The Record That Should Not Be Disregarded.

If there is evidence that a party believes should be part of the agency record but which was not included in the record, Chapter 227 provides ways to have it included in the agency record. A party could ask for a contested case hearing on the agency decision under Wis. Stat. § 227.42 and introduce the evidence as part of that proceeding. The District had that

opportunity and failed to request a contested case. Alternatively, on judicial review, a party could seek to have the Court remand the matter to the agency for more fact finding under Wis. Stat. § 227.56. *See State Public Intervenor v. Wisconsin Dep't of Natural Res.*, 171 Wis. 2d 243, 245-46, 490 N.W.2d 770 (Ct. App. 1992) ("The court's role is restricted to a review of the record, and if the court wishes to consider new facts, it should do so by following sec. 227.56(1), Stats., and remanding for further fact-finding before the agency.") The District failed to make a motion under Wis. Stat § 227.56. As a result of the District's actions, the Nauta affidavit was never part of the *agency record*. As a result, DNR's failure to consider the document was not error, and its 2005 Approval should be confirmed.

CONCLUSION

The Court of Appeals decision expands DNR authority by allowing DNR's general authority to supersede specific legislative thresholds and standards. It places the Village and other applicants in the untenable position of having a standard-less permit process and calls into question all of DNR's graduated permit programs. Such a result is not necessary to protect the state's water resources because DNR has other authority to address actual impacts regardless of its permit authority.

Even if such standard-less review were warranted, there is nothing in this agency record to support overturning the 2005 Approval. The agency record is not any document in the DNR's possession, but those documents considered by the DNR in reaching its decision. If there is new evidence that the DNR should consider, there are remedies to present that to the agency that were not followed here. The Court of Appeals should be reversed and the 2005 Approval upheld.

DATED this 6th day of December, 2010.

STAFFORD ROSENBAUM LLP

By: _____

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CERTIFICATE OF COMPLIANCE WITH RULE §§ 809.19(8)(b) AND (c)

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with Times New Roman, 13 point font. The length of this brief is 10,939 words.

Dated this 6th day of December, 2010.

_____

Paul G. Kent (#1002924)

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 80.19(12). I further certify that:

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

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

Dated this 6th day of December, 2010.

_____

Paul G. Kent (#1002924)

CERTIFICATE OF SERVICE

I, Marjorie Irving, am legal assistant to Paul G. Kent. I hereby certify that I caused true and correct copies of this Brief and Appendix of the Village of East Troy Intervening Respondent-Respondent-Cross-Appellant-Petitioner, to be served on counsel for the parties by placing the same in U.S. mail, first class postage, on this date:

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Dated this 6th day of December, 2010.

Marjorie Irving
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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2008AP003170

LAKE BEULAH MANAGEMENT DISTRICT

Petitioner-Appellant-Cross-Respondent, Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner-Co-Appellant-Cross-Respondent,

vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent-Respondent,

VILLAGE OF EAST TROY

.

Intervening Respondent-Respondent-Cross-Appellant; Petitioner.

APPENDIX

On Appeal From A Final Order Entered on
In The Walworth County Circuit Court on September 20, 2008
The Honorable Robert J. Kennedy, Judge
Walworth County Circuit Court Case Nos. 06-CV-172

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APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 6th day of December, 2010.

_____

Paul G. Kent (#1002924)

STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2008AP003170

LAKE BEULAH MANAGEMENT DISTRICT

Petitioner-Appellant-Cross-Respondent, Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner-Co-Appellant-Cross-Respondent,

vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent-Respondent,

VILLAGE OF EAST TROY

Intervening Respondent-Respondent-Cross-Appellant; Petitioner.

APPENDIX

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Dated this 6th day of December, 2010.

Paul G. Kent (#1002924)

COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP3170
STATE OF WISCONSIN

Cir. Ct. No. 2006CV172

IN COURT OF APPEALS
DISTRICT II

LAKE BEULAH MANAGEMENT DISTRICT,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

CO-PETITIONER-CO-APPELLANT-CROSS-RESPONDENT,

V.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-RESPONDENT,

VILLAGE OF EAST TROY,

INTERVENING-RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 BROWN, C.J. This decision explores the interplay between the public trust doctrine and the regulation of high capacity wells, especially when citizens or conservancy organizations such as lake management districts perceive that a proposed well may adversely affect nearby navigable waters. We will go through our analysis in some detail, but for purposes of this introductory statement, it is enough to say the following: The statutes identify three types of water wells, differentiated by the quantity of water they consume—wells consuming 100,000 gallons per day (gpd) or less, wells consuming over 2,000,000 gpd and wells in-between. This case has to do with wells in-between. The parties dispute the role that the public trust doctrine plays with regard to the middling wells. The Village of East Troy says that, with certain statutorily defined exceptions, there is no role. Lake Beulah Management District and Lake Beulah Protective and Improvement Association claim that there is always a role such that the DNR is mandated to thoroughly investigate each proposed middling well for possible public trust doctrine implications. The DNR agrees with the District and the Association that the doctrine always plays a role but asserts that the comprehensiveness of the investigation is solely at its discretion. We agree with the DNR, but we also hold that the DNR misused its discretion here. We therefore reverse and remand with directions that the circuit court remand this case to the DNR for further proceedings. We also affirm a side issue and a cross-appeal.

BACKGROUND

¶2 The procedural and factual history of the high capacity well at issue here—Well #7—goes back to 2003 when the Village first applied for and received a now-expired permit from the DNR. We relate this history in detail.

¶3 In 2003, the Village wanted to add a fourth well to its municipal water supply "to eliminate current deficiencies and supplement for future growth." The Village chose a site for the well which was approximately 1400 feet from the shores of Lake Beulah, an 834-acre lake located in Walworth county, and determined that Well #7 would have a 1,440,000 gpd capacity. As part of its application to the DNR, the Village submitted an April 2003 report that its consultant prepared. Based upon analysis of pump test data, the report "estimated that a well producing [1,440,000 gpd] would avoid any serious disruption of groundwater discharge to Lake Beulah."

¶4 The DNR then issued the permit via a letter dated September 4, 2003. The letter stated the DNR's conclusion: "It is not believed that the proposed well will have an adverse effect on any nearby wells owned by another water utility." And it included an excerpt from the Village's consultant which contained the consultant's opinion that Well #7 "would avoid any serious disruption of groundwater discharged to Lake Beulah." The 2003 permit was valid for two years and required the Village to submit a new application if it did not commence construction or installation of the improvements within those two years.

¶5 On October 3, 2003, just short of one month after the DNR issued the 2003 permit, the Lake Beulah Management District petitioned for a contested case before the DNR, alleging that the DNR "failed to comply with ... [its] responsibility to protect navigable waters, groundwater and the environment as a whole" in issuing the permit to the Village. The District wanted the DNR to independently consider the environmental effects before approving the permit. The DNR denied the petition later that month on the basis that it lacked the authority to consider the environmental concerns which the District presented.

¶6 But about three months later, on January 13, 2004, the DNR changed its mind and granted a contested case hearing on the issue of whether the DNR "should have considered any potentially adverse effects to the waters ... when the [DNR] granted a conditional approval of the plans and specifications for proposed Municipal Well No. 7 in the Village of East Troy." The Village responded on March 26, 2004, by filing a motion for summary disposition with the administrative law judge (ALJ). The Village argued that the DNR lacked the statutory authority to consider the environmental effects because Well #7 is not located in a place where the Wisconsin statutes specifically mandate environmental review prior to permit approval. At this point in the procedural history, even though the DNR had reversed course and granted a contested case hearing, it still held the same view as the Village on the scope of the DNR's authority over wells. The Lake Beulah Protective and Improvement Association then successfully intervened and has been allied with the District ever since. We will hereafter refer to the two entities as one—the conservancies.

¶7 On June 11, 2004, the ALJ presiding over the contested case granted the Village's motion and agreed with the Village that "because the statute requires that the [DNR] consider certain impacts ... the statute should be construed to exclude consideration of other factors." The ALJ also commented that even if what the conservancies contended was true (that in some cases the DNR may have a "basis other than the express statutory standards for reconsidering the preliminary approval in a contested case proceeding"), Well #7 was not such a case because the conservancies failed to present any "scientific evidence" that the well would have an adverse effect.

¶8 On July 16, 2004, the conservancies filed a petition for judicial review of the 2003 permit. During the briefing for that petition, the DNR reversed

its prior position and concluded that "it has authority under certain circumstances to consider the Public Trust Doctrine in its analysis of high capacity well approvals" and that it can "condition or limit a high capacity well approval where operation of the well has negative impacts on public rights in navigable waters."[1] The DNR also stated, however, that it had no duty to consider environmental impacts in the instant matter because no one presented it with any evidence that the "operation of the Village's high capacity well approval would adversely impact Lake Beulah." On June 24, 2005, the circuit court, the Honorable James L. Carlson presiding, dismissed the petition and affirmed the ALJ's decision and reasoning.

¶9 On August 4, 2005, the conservancies moved for reconsideration and filed the affidavit of Robert Nauta, a Wisconsin licensed geologist. The conservancies also served the motion and affidavit on the attorneys for the DNR and the Village. The affidavit stated, inter alia, that Nauta had reviewed the Village consultant's 2003 report and other reports concerning the Lake Beulah area, and had installed his own test wells and conducted surface water studies relating to the hydrology of Lake Beulah. Though he had a limited amount of time to review and conduct those studies, he concluded that the Village's consultant

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[1] The public trust doctrine is rooted in our state constitution and provides that the state holds title to navigable waters in trust for public purposes. WISCONSIN CONST. art. IX, § 1, states in pertinent part:

> [T]he river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

reached erroneous findings about the water table and the aquifer's condition and the consultant's tests were "inadequately designed and improperly conducted." He also opined that the consultant's brief test did confirm a lowering of groundwater and wetland water levels, and thus, given the specific hydrology of Lake Beulah and its surrounding environs, the tests results "clearly demonstrate potential for adverse impacts to Lake Beulah." He therefore reasoned that Well #7 "would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah."

¶10 The circuit court denied the conservancies' motion for reconsideration. The conservancies then appealed to this court. We dismissed the appeal in an order dated June 28, 2006, because the 2003 permit had expired and, as we explain next, the DNR had issued another permit in 2005 for Well #7. Therefore, the appeal was moot. *See* ***Lake Beulah Lake Mgmt. Dist. v. DNR***, Nos. 2005AP2230 & 2005AP2231, unpublished slip op. (WI App June 28, 2006).

¶11 The record shows that, while litigation over the 2003 permit ensued, the Village applied to "extend" its 2003 permit for two additional years because it had not yet started building and the 2003 permit would expire on September 4, 2005. With its application, the Village submitted the $500 application fee and information demonstrating that the physical circumstances were unchanged from the 2003 application. On September 6, 2005, the DNR granted the Village a two-year "extension" of the 2003 permit, concluding that Well #7 complied with the

groundwater protection law.[2] The DNR mailed to the conservancies a copy of the 2005 permit (still addressed to the Village), which included the thirty-day appeal deadline.

¶12 On March 3, 2006, nearly six months after the 2005 permit was issued and while the appeal concerning the 2003 permit was still pending, the conservancies filed a petition for review of the 2005 permit. The petition restated many of the concerns it expressed in the litigation over the 2003 permit, namely that Well #7 would adversely affect the quantity of water available to maintain the water level of Lake Beulah and that the DNR failed to consider Well #7's effect on Lake Beulah. The conservancies requested that the circuit court "remand[] the matter to the DNR for reconsideration of the [2005] approval to include consideration of its Public Trust Doctrine obligations to protect the navigable waters of Lake Beulah and its connecti[ng] waterways."

¶13 On September 23, 2008, the circuit court, the Honorable Robert J. Kennedy presiding, denied the petition and held that (1) the 2005 permit was a "new" permit (not an extension); (2) the DNR had a right to consider the public trust doctrine to determine whether a high capacity well, regardless of its size, will negatively impact the waters of the State; (3) if the DNR had a "solid, affirmative

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[2] After the 2003 approval but before the Village requested the 2005 approval, the Wisconsin legislature enacted a new groundwater protection law. *See* 2003 Wis. Act 310, §§ 5-12. The new law became effective on May 7, 2004, and mandated that the DNR conduct environmental review of additional wells near specified water resources. *Id.*; *see* WIS. STAT. § 281.34(4) (2007-08). The Village's proposed well was not located such that the new law specifically included it in the category of wells for which it mandated environmental review. We will explain the relevant details of the new law in our discussion.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

indication" that waters of the state would be "significantly harmed" or "adverse[ly] affect[ed]," then the DNR should consider the information and possibly conduct further studies; and (4) there was "an absolute dearth of any proof," so the DNR did not fail its obligation to protect the waters of the state. The circuit court also assumed, without deciding, that the conservancies' petition for judicial review was timely. The conservancies then brought this appeal.

DISCUSSION

¶14 We start our discussion by briefly addressing a side issue.[3] The conservancies argue that the 2005 permit was a "nullity" because the DNR: (1) had nothing to extend since the DNR's approval came two days after the 2003 permit expired and (2) could not grant a "new" permit since the Village applied for an *extension* of the 2003 permit, not a *new* permit. But the facts are to the

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[3] There is also an issue brought by the Village via a cross-appeal. The Village argues that the conservancies had only thirty days to file their petition for review and yet they waited nearly six months, making the conservancies' petition untimely. But in ***Habermehl Electric, Inc. v. DOT***, 2003 WI App 39, ¶18, 260 Wis. 2d 466, 659 N.W.2d 463, we held that the thirty-day rule found in WIS. STAT. § 227.53(1)(a)2. does not apply to noncontested cases and, instead, the six-month "default limitation" applies. The petition for review on appeal is not based on a decision in a contested case. So the six-month time limit applies. The petition was timely.

In so concluding, we decline the Village's request to distinguish or criticize ***Habermehl Electric*** and the two other cases reaching the same conclusion, ***Collins v. Policano***, 231 Wis. 2d 420, 605 N.W.2d 260 (Ct. App. 1999), and ***Hedrich v. Board of Regents of University of Wisconsin System***, 2001 WI App 228, 248 Wis. 2d 204, 635 N.W.2d 650. Unless or until ***Habermehl*** is reversed or modified by our supreme court, it remains the law and we will follow it. *See City of Sheboygan v. Nytsch*, 2008 WI 64, ¶5, 310 Wis. 2d 337, 750 N.W.2d 475 ("It is well settled that the court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals."). Further, no supreme court case, including ***Waste Management of Wisconsin, Inc. v. DNR***, 149 Wis. 2d 817, 440 N.W.2d 337 (1989), reaches a conflicting conclusion about the time limit in WIS. STAT. § 227.53(1)(a)2. *See Cuene v. Hilliard*, 2008 WI App 85, ¶15, 312 Wis. 2d 506, 754 N.W.2d 509 ("To the extent that a supreme court holding conflicts with a court of appeals holding, we follow the supreme court's pronouncement.").

contrary. In 2005 the DNR received an application from the Village for a new approval of Well #7. The application included information demonstrating that the physical circumstances were unchanged from the 2003 application. And the Village paid an application fee of $500—the same as it would if applying for a new permit. *See* WIS. STAT. § 281.34(2). Regardless of how the Village labeled its application, and regardless of how the DNR labeled its approval, the fact is that the DNR received the application with the required fee for a "new" permit, determined that the circumstances remained unchanged since the original 2003 approval and that the proposed well complied with the new groundwater law promulgated between the 2003 permit and the 2005 permit, and based on that determination, granted a new permit. Inasmuch as the DNR had a new fee and had to review the application in consort with new legislation, the DNR issued a new permit and its conduct comported with it being a new permit. The 2005 permit is not a nullity.

¶15 With that side issue disposed of, we can now concentrate on setting the table to discuss the major issues at hand. Central to the DNR's grant of the 2005 permit was its conclusion that the facts had not changed since the 2003 permit.[4] But that is not altogether true. The record shows that, before the DNR granted the 2005 permit, its attorney of record in the 2003 permit proceedings had

[4] The Village sent the DNR a letter from its engineer stating that the conditions were unchanged. And the DNR accepted that in its review for compliance with the groundwater protection act that came into effect after it issued the 2003 permit.

new information: the affidavit from the conservancies' expert, Robert Nauta.[5] During oral argument, we asked the DNR's attorney of record in this case, who was also the same attorney of record in the 2003 case, whether the Nauta affidavit had come to the attention of the DNR permit decision makers. She replied that it had not. We asked whether she thought she had a duty to convey this information to the decision makers and she said she did not. She contended that it was the conservancies' obligation to bring this affidavit to the attention of the permit decision makers and that the conservancies had failed to do so. So, in her view, the DNR did not have any new information and the DNR therefore was not specifically alerted to a possible public trust doctrine problem such that it should have investigated the permit claim more fully before issuing it.

¶16 The facts and circumstances provided in our rendition of the background, along with the information gained by way of oral argument, raise several questions: Does the DNR have a duty to investigate public trust doctrine concerns with regard to middling wells? If so, what is that duty? If there is a duty, does that duty arise on a case-by-case basis or is it present in every case involving a high capacity well? If the duty exists only case by case, how is this

[5] During oral argument, the conservancies also pointed to three other pieces of information they claim the DNR had before the 2005 approval but did not consider. These include: (1) an April 2003 report from the Village's engineering firm, which we referenced early during our recitation of the facts surrounding the 2003 approval; (2) a June 3, 2003 e-mail from the United States Geological Services' Daniel Feinstein stating that his interpretation of the Village engineer's 2003 report was that the test well had an effect of drawing down the water levels; and (3) a June 28, 2003 letter from Philip Evenson of the Southeastern Wisconsin Regional Planning Commission, which states that the commission staff agree with the District's concern regarding the potential for negative impacts on the wetlands and Lake Beulah itself from the proposed well, but that the current information is insufficient to estimate whether the negative impacts would be significant. It is unclear whether the DNR had this information, however, with the exception of the 2003 report from the Village's expert. So when we refer to the Nauta affidavit, we refer to the information that the DNR had but did not consider.

duty triggered and what information is necessary? What process must citizens and conservancy groups employ to bring the triggering information to the DNR's attention? Regardless of the normal process, since this information came to the DNR attorney's attention in the 2003 case, does the attorney-client imputation rule apply such that if an attorney for the DNR had new facts in a legal file, the DNR should be held to have had such knowledge in its agency record when the agency record concerns the same underlying matter as the legal file? Those are the issues we now address.

High Capacity Wells and the Duty to Consider the Public Trust Doctrine

¶17 The Village claims that the DNR is precluded by statute from considering the public trust implications of Well #7. In other words, the Village claims that the DNR has no duty. This requires us to examine the relevant statutes in detail. There are four statutes at issue here: two statutes provide a broad, general grant of authority to the DNR—WIS. STAT. §§ 281.11 and 281.12—and two statutes create specific rules for high capacity wells—WIS. STAT. §§ 281.34 and 281.35.[6] Since we are construing statutes involving the scope of an agency's power, we give no deference to the agency's opinion. ***Grafft v. DNR***, 2000 WI App 187, ¶4, 238 Wis. 2d 750, 618 N.W.2d 897. Nor do we defer to the circuit court. *See* ***Moonlight v. Boyce***, 125 Wis. 2d 298, 303, 372 N.W.2d 479 (Ct. App. 1985). Instead, we interpret these statutes de novo. ***Grafft***, 238 Wis. 2d 750, ¶4.

[6] These are the statutes that the legislature created or updated in 2003 Wis. Act 310, §§ 5-12, which comprise the new groundwater protection law that became effective in 2004.

¶18 The general statutes explain, inter alia, that the DNR "shall have general supervision and control over the waters of the state"[7] and "shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of [WIS. STAT. ch. 281]." WIS. STAT. § 281.12(1). The policy and purpose section states that the DNR

> *shall* serve as the central unit of state government to *protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private....* The purpose of this subchapter is to *grant necessary powers* and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, this subchapter ... shall be *liberally construed in favor of the policy objectives set forth* in this subchapter.

WIS. STAT. § 281.11 (emphasis added).

¶19 We interpret these general statutes as expressly delegating regulatory authority to the DNR necessary to fulfill its mandatory duty "to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private." *See id*; *see also* ***Karow v. Milwaukee County Civil Serv. Comm'n***, 82 Wis. 2d 565, 570, 263 N.W.2d 214 (1978) (the word "shall" is

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[7] "Waters of the state" means

> those portions of Lake Michigan and Lake Superior within the boundaries of this state, all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems *and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction.*

WIS. STAT. § 281.01(18) (emphasis added).

generally construed as imposing a mandatory duty). That these general statutes do not mention wells in particular does not mean that the statutes do not grant the DNR the authority to control or regulate wells by considering environmental factors relevant to protecting, maintaining and improving waters of the state. After all, wells have everything to do with waters of the state—they withdraw groundwater, one type of water which comprises the definition of waters of the state—therefore, the DNR necessarily has authority over them. *See* WIS. STAT. § 281.01(18) (defining waters of the state).

¶20 But we must construe statutes in the context in which they are used, considering surrounding and closely related statutes. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. The Village argues that the specific statutes relating to wells create a comprehensive statutory framework within which the DNR can protect waters of the state, and thus, the Village contends that WIS. STAT. §§ 281.11 and 281.12 are general grants of authority which are superseded by specific statutes regulating wells. The essence of the Village's assertions is that the specific statutes, WIS. STAT. §§ 281.34 and 281.35, represent the legislature's policy decision that the protections provided in §§ 281.34 and 281.35 are sufficient to satisfy the DNR's duties to protect the waters of the state, and so any authority the DNR might previously have had from §§ 281.11 and 281.12 to regulate wells was overridden by the legislature's enactment of §§ 281.34 and 281.35. We now consider §§ 281.34 and 281.35.

¶21 These specific statutes classify wells into three categories: (1) wells with a capacity of less than or equal to 100,000 gpd, (2) wells with a capacity of more than 100,000 gpd and less than or equal to 2,000,000 gpd in any thirty-day period, and (3) wells with a capacity of more than 2,000,000 gpd in any thirty-day

period. *See* WIS. STAT. § 281.34(1)(b) (defining a high capacity well as one with a capacity of more than 100,000 gpd); WIS. STAT. § 281.35(4)(b) (providing a second threshold level at more than 2,000,000 gpd in any thirty-day period and, therefore, creating three categories of wells).

¶22 WISCONSIN STAT. §§ 281.34 and 281.35 also provide the DNR with guidance about when environmental review[8] is required for certain wells within the second category and all wells within the third category. In the second category, which we have referred to above as the "middling wells," § 281.34(4) requires that the DNR conduct environmental review in only three instances. Those instances are if the proposed well will: (1) be located in a groundwater protection area, (2) result in a water loss of more than ninety-five percent of the amount of water withdrawn, or (3) potentially have a significant environmental impact on a spring. *Id.* For the third category, § 281.35(4)(b) and (5)(d) require the DNR to determine that the proposed well will not adversely affect public water rights in navigable waters and will not conflict with any applicable plan for future uses of the waters of the state.

¶23 For the remaining wells, WIS. STAT. §§ 281.34 and 281.35 are silent as to whether the DNR may review or consider the well's potential environmental effects. The only guidance given to the DNR is the mandate in § 281.34(2) that "[a]n owner shall apply to the department for approval before construction" of a

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[8] WISCONSIN STAT. §§ 281.34 and 281.35 require the DNR to use the environmental review process found in the Wisconsin Environmental Policy Act (WEPA), WIS. STAT. § 1.11. *See also* WIS. ADMIN. CODE ch. NR 150 (the DNR's procedures for implementing WEPA). These statutes also authorize the DNR to require an applicant for approval of a high capacity well to submit an environmental impact report. Secs. 281.34(5) and 281.35(4)(b).

well over 100,000 gpd (a high capacity well). The statute gives no specifics on what the application entails (except for a $500 fee) or what standards, if any, the DNR may or must use when deciding whether to approve or deny permits for wells between 100,000 and 2,000,000 gpd, such as the well here.[9] *See id.*

¶24 As we alluded to earlier, the Village interprets this silence in the presence of a comprehensive scheme to regulate high capacity wells as tacitly revoking any other authority the DNR might have over other wells, including its general authority to protect waters of the state. Well #7 is one of those "other wells." The Village's position goes so far as to argue that WIS. STAT. §§ 281.34 and 281.35 limit the DNR's authority to consider *anything* not specifically listed in that scheme before approving a high capacity well permit. It interprets the statutes to prohibit the DNR from enacting any regulations that would constrict wells, including WIS. ADMIN. CODE ch. NR 812. As we interpret the Village's argument, if taken to its logical conclusion, the DNR would be prevented from, for example, requiring permit seekers to use certain construction methods when building a well, *see, e.g.*, WIS. ADMIN. CODE § NR 812.11, and preventing permit seekers from placing waste in a well, *see* WIS. ADMIN. CODE § NR 812.05.

¶25 The public trust doctrine is such an important and integral part of this state's constitution that, before we can accept the Village's argument, there should be some evidence that the legislature intended by these statutes to render nugatory the more general statutes bestowing the DNR with the general duty to

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[9] We also note that the statutes provide no guidance on whether the DNR has the authority to regulate wells under 100,000 gpd when necessary to protect, maintain or improve waters of the state. Though that exact issue is not before us, the conclusion we reach today is relevant to that issue.

manage the public trust doctrine. *See* ***Columbia Hosp. Ass'n v. City of Milwaukee***, 35 Wis. 2d 660, 668-69, 151 N.W.2d 750 (1967). Outside of what the Village considers to be the plain intent of the statutes, the only evidence of legislative intent is that, *in 2007*, the legislature rejected an advisory committee's recommendation to amend WIS. STAT. § 281.34 by adding to the list of enumerated circumstances always requiring the DNR to conduct a formal environmental review.[10] The immediate response to the Village's argument is that the legislature's actions after this permit was issued do not affect our analysis of the statutes and legislative history that existed at the time. *See* ***Schaul v. Kordell***, 2009 WI App 135, ¶23 n.12, 321 Wis. 2d 105, 773 N.W.2d 454. And we have not found any legislative history suggesting that 2003 Wis. Act 310 was meant to *revoke* the DNR's general authority. But the more measured response is that the rejection of the advisory committee's suggestion proves nothing. The action of rejecting the idea of requiring formal environmental review in every instance gives us no guidance as to whether the DNR could investigate a middling well at its discretion. We conclude that there is no evidence that the legislature intended to revoke the general grant of authority to the DNR regarding these other wells.

¶26 Moreover, we underscore the legislature's *explicit* command that the DNR's authority be "liberally construed" in favor of protecting, maintaining and improving waters of the state. WIS. STAT. § 281.11; *see also* ***Wisconsin's Envtl. Decade, Inc. v. DNR***, 85 Wis. 2d 518, 528-29, 271 N.W.2d 69 (1978)

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[10] *See* Wisconsin Groundwater Advisory Committee, *2007 Report to the Legislature*, § 2.2.4, available at http://dnr.wi.gov/org/water/dwg/gac/GACFinalReport1207.pdf (last visited June 1, 2010).

(interpreting the predecessor of § 281.11[11] and concluding that "in keeping with the broad authority conferred on the DNR and explicit legislative intent," the DNR's statutory authority should be broadly construed).

¶27 We therefore conclude that, just because the legislature was silent about the DNR's role with regard to some of the middling wells, this does not mean that the legislature meant to abrogate the DNR's authority to intercede where the public trust doctrine is affected. We are even more confident in our conclusion when we consider that the DNR must grant a permit for construction of all middling wells. Why would an agency have to grant a permit if it did not have any reviewing authority over a well? The permit process has to be, as a matter of common sense, more than a mechanical, rubber-stamp transaction. It must mean that the DNR has authority to become involved whenever it sees a public trust doctrine problem. In fact, the Village's own well application included its engineer's well pump test data and conclusion that the well "would avoid any serious disruption to the groundwater discharge at Lake Beulah." We question why the Village thought it necessary to provide this data if it did not think the DNR could consider the public trust doctrine.

¶28 We are convinced that we have harmonized the statutes to avoid conflict and ensured that no statute is surplusage. *See* ***Jones v. State***, 226 Wis. 2d 565, 575-76, 594 N.W.2d 738 (1999) (holding that specific statutes control general ones only when there is truly a conflict and courts are to harmonize statutes to avoid conflicts when a reasonable construction of the statutes permits that). We

[11] The legislature renumbered WIS. STAT. § 144.025 (1975-76) to WIS. STAT. § 281.11 in 1995 Wis. Act 227.

agree with the conservancies and the DNR and hold that the legislature's mandate that the DNR complete a formal environmental review for only certain wells does not prohibit or rescind the DNR's authority to review other middling wells under WIS. STAT. §§ 281.11 and 281.12. The DNR's mission must be to protect waters of the state from potential threats caused by unsustainable levels of groundwater being withdrawn by a well, whatever type of well that may be.[12]

Whether the DNR's Duty is Absolute

¶29 We have rejected the Village's contention that the DNR has no authority to act in this case. We likewise now reject the conservancies' completely opposite contention that the DNR was *required* to conduct a full and thorough environmental review. As our foregoing discussion makes plain, the fact that the DNR had the authority to consider environmental factors with regard to Well #7 does not mean that it was required to do so. We disagree with the conservancies' contention that the DNR *always* has a sua sponte *affirmative obligation* to consider a well's effect on the waters of the state regardless of whether the DNR is presented with any information suggesting that the well might have a negative effect. We agree with the DNR that this would present it with an impossible and costly burden were we to adopt the conservancies' reasoning. We

[12] We can envision, however, circumstances where the DNR could exercise its authority under WIS. STAT. §§ 281.11 and 281.12 in a way that would conflict with the high capacity well statutes. For example, if the DNR were to ban all wells or require the same kind of environmental review for all wells, that action would seem to conflict with the high capacity well statutes for the same reason that we held the DNR's ban of sulfide mineral mining conflicted with the Mining Act. *See* ***Rusk County Citizen Action Group, Inc. v. DNR***, 203 Wis. 2d 1, 552 N.W.2d 110 (Ct. App. 1996). But, for the reasons already stated, we conclude that there is no conflict between the statutes in interpreting the general statutes to provide the DNR the flexibility to consider the environmental effect of a well on waters of the state when deciding whether to approve or deny a well permit.

further agree with the DNR that its public trust duty arises only when it has evidence suggesting that waters of the state may be affected by a well. If the law were that the DNR always has a duty to conduct environmental review for every well application, even if it had no information that the waters of this state would possibly be adversely affected by a well, then the legislature would have had little reason to have enacted the specific high capacity well statutes. Such a duty would render WIS. STAT. §§ 281.34 and 281.35 largely surplusage, and we are to avoid interpreting statutes in such a way. *See* ***Randy A.J. v. Norma I.J.***, 2004 WI 41, ¶22, 270 Wis. 2d 384, 677 N.W.2d 630.

¶30 The conservancies contend that, in spite of what the statutes say about high capacity wells, there is common law authority mandating that the DNR, as the trustee of our state's waterways, has an absolute sua sponte duty to investigate every high capacity well proposal to see whether it will harm waters of the state. This is incorrect. The DNR is not an independent arm or a fourth branch of government; it is a legislatively created agency. ***Kegonsa Joint Sanitary Dist. v. City of Stoughton***, 87 Wis. 2d 131, 143-44, 274 N.W.2d 598 (1979). As such, the DNR has only those powers which are expressly conferred by or which are necessarily implied from the *statutes* under which it operates. *See* ***Oneida County v. Converse***, 180 Wis. 2d 120, 125, 508 N.W.2d 416 (1993). The public trust doctrine found in our state constitution does not have any self-executing language authorizing the DNR to do anything—the statutes do that. So the authority and duty that the conservancies claim the DNR has ("to investigate and determine whether the operation of [Well # 7] will have a significant negative

impact on Lake Beulah") must come from state statutes.[13] We conclude that there is no requirement mandating the DNR to do a full examination of every well to see if the public trust doctrine is affected.

How this Duty is Triggered

¶31 The DNR asserts that the type of evidence necessary to trigger the DNR's duty to investigate public trust concerns with regard to wells like Well #7 is what the ALJ presiding over the June 2004 contested case termed as "scientific evidence" of a likely adverse impact to Lake Beulah from the Village's well. We do not have the expertise to say exactly what kind of evidence will prompt the DNR to further investigate a well's adverse environmental impacts or to condition or deny a well permit. There is no standard set by statute or case law. But we do have case law which recognizes that the DNR has particular expertise when it comes to water quality and management issues. *See* ***Wisconsin's Envtl. Decade, Inc.***, 85 Wis. 2d at 529-30. The DNR is the central unit of state government in charge of water quality and management matters. ***Id.*** We will leave it to the DNR to determine the type and quantum that it deems enough to investigate. But, certainly, "scientific evidence" suggesting an adverse affect to waters of the state should be enough to warrant further, independent investigation.

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[13] We are not suggesting that the DNR can ignore common law interpreting the agency's authority, nor that the public trust doctrine has no bearing on the interpretation of its statutory authority.

How Citizens Can Present Evidence to the DNR Regarding the Environmental Impact of a Well

¶32 The DNR posits that concerned citizens who want to affect the decisions of DNR permit decision makers have three options. Two options allow citizens to submit information in a way that requires consideration of the new information: (1) presenting the information to the permit decision makers while the permit process is ongoing or (2) if the permit has already been granted, requesting a contested case hearing and, at this hearing, present the information. The third option is to petition for judicial review after the DNR has issued the permit. However, under this option, the concerned citizen may not be able to submit new information.[14] The DNR suggests that a contested case is the proper way to present information after it has issued a permit because a contested case hearing provides an opportunity for every party, including concerned citizens, to rebut or offer countervailing evidence.[15] At the conclusion of the testimony, the

[14] A concerned citizen may be able to use WIS. STAT. § 227.56 during a petition for judicial review to present evidence that the court would use to determine whether to remand to the agency for further fact-finding. *See* ***State Public Intervenor v. DNR***, 171 Wis. 2d 243, 245-46, 490 N.W.2d 770 (Ct. App. 1992). Under this statute, a citizen can apply "to the circuit court for leave to present additional evidence on the issues in the case," and the circuit court has the discretion to admit the additional evidence upon such terms as it may deem proper if the person presenting the evidence shows to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceedings before the agency. Sec. 227.56(1). The conservancies, however, did not use § 227.56 to get their information to the DNR.

[15] The DNR did not explain or cite any authority at oral argument about how exactly concerned citizens would go about submitting information at a contested case hearing which was not before the permit decision makers at the time the permit decision was made. We note that WIS. STAT. § 227.45 discusses evidence in contested cases and mandates that the "agency or hearing examiner shall admit all testimony having reasonable probative value" and is specifically required to exclude only evidence that is "immaterial, irrelevant or unduly repetitious testimony" or evidence that is inadmissible under a statute relating to HIV testing. ***Rutherford v. LIRC***, 2008 WI App 66, ¶¶21-22, 309 Wis. 2d 498, 752 N.W.2d 897. WISCONSIN STAT. § 227.44(3) also mandates that all parties shall be afforded the opportunity "to present evidence and to rebut or offer countervailing evidence."

hearing examiner may then decide whether there is sufficient evidence of a potential adverse impact and, if so, may issue specific orders to the DNR.

¶33 The DNR is further of the view that, if the permit is not challenged under any of the three foregoing options, then a concerned citizen's only remaining option, if he or she has information that a well is adversely impacting the public trust, is to bring a nuisance action against the permit holder under ***State v. Deetz***, 66 Wis. 2d 1, 13, 224 N.W.2d 407 (1974). *See also* WIS. STAT. § 30.294. Or, once the permit has been granted, if the agency itself decides that the well is adversely affecting waters of the state, then it can bring a WIS. STAT. § 30.03 action to alter the permit approval.

¶34 We generally agree with the DNR and hold that these are the procedures commonly used to give information to the DNR decision makers and to challenge the ultimate decision. We also agree with the DNR that the conservancies did not use these procedures to submit their information. The conservancies did not present information *to* the permit decision makers that would have flagged Well #7 as possibly affecting a navigable waterway, either before issuance of the 2005 permit, at a contested case hearing on the 2005 permit, or by using WIS. STAT. § 227.56 to supplement the record during the 2005 petition for judicial review, as we described in the footnote. So, all things being equal, the conservancies would be out of court.

How the Attorney-Client Relationship Applies to this Case

¶35 But all things are not equal here. The facts show that the DNR did have the conservancies' information, albeit not presented in the way described above. The conservancies presented the Nauta affidavit to the DNR's attorney on August 4, 2005, as part of the litigation on the 2003 permit. This was little more than one month before the DNR issued the 2005 approval. The affidavit directly challenged the Village consultant's conclusion and the DNR's resultant decision that Well #7 would not seriously disrupt groundwater flow to Lake Beulah. However, the DNR argues that since the evidence was presented to its attorney during litigation on a prior permit and was not provided to its decision makers regarding the instant permit, the Nauta affidavit was not part of the "agency record" and therefore did not require its consideration. Thus, even though the attorney represented the decision makers on both the 2003 and 2005 permit challenges and therefore knew there was an affidavit calling into question the efficacy of Well #7, the attorney contends that the decision makers did not have the information since it was not in the right file. Because the decision makers did not consider the affidavit, they were able to conclude when issuing the 2005 permit that there had been no change since 2003.

¶36 As a general rule, however, the knowledge of an attorney acquired while acting within the scope of the client's authority is imputed to the client. *See* ***Suburban Motors of Grafton, Inc. v. Forester***, 134 Wis. 2d 183, 192-93, 396 N.W.2d 351 (Ct. App. 1986). "In the context of an enduring attorney-client relationship, knowledge acquired by the attorney is imputed to the client as a matter of law." 7 AM. JUR. 2D *Attorneys at Law* § 153 (2010) (footnote omitted); *see also* ***Wauwatosa Realty Co. v. Bishop***, 6 Wis. 2d 230, 236, 94 N.W.2d 562 (1959). The presumption is that the attorney will communicate the information to

the client; the fact that the attorney has not actually communicated his or her knowledge to the client is immaterial. 7 AM. JUR. 2D *Attorneys at Law* § 153 (2010); ***Wauwatosa Realty Co.***, 6 Wis. 2d at 236-37.

¶37 For the purposes of the imputation rule, the DNR attorney's clients were the DNR employees making the permit decisions. The attorney was an "in-house" attorney employed by the state and assigned to handle legal matters for the litigation over the 2003 and 2005 Well #7 permits. At oral argument, the attorney stated that everything in the 2003 application file would also be in the 2005 file; she had to have known that the 2003 case was linked to the 2005 permit decision and that any information submitted during litigation over the 2003 permit was relevant to the decision makers' consideration of the 2005 permit application. We thus rule that anything in the DNR's attorney file for the litigation concerning Well #7 is imputed to the DNR employees making the decisions regarding the permit for Well #7. It follows, therefore, that the attorney file is part of the agency record for the 2005 permit approval, regardless of whether the DNR's attorney actually gave the Nauta affidavit to the decision makers, because it concerns the same parties and the same precise contested issue.

¶38 And frankly, we are a bit perplexed as to why the DNR attorney did not show the affidavit to the decision makers when she presumably consulted with them after the conservancies filed their motion for reconsideration. The conservancies gave *her* the affidavit a mere day after the Village applied to *her* to extend its permit. And the affidavit directly contradicted the previous evidence before the DNR about Well #7's environmental impacts. It should have occurred to her that the Nauta affidavit was relevant to the Village's request and that the affidavit was a factual change requiring the consideration of the DNR's decision makers. Attorneys are supposed to share information with their clients. *See* SCR

20:1.4(1). One of the benefits of having people with different expertise in an agency is that they can *communicate* and *pool information* and thus be more efficient and responsive to the general public for whom they ultimately work. The DNR provides no reason why the decision makers did not have that Nauta affidavit in the formal "agency record" when its attorney had it in a legal file on the same underlying matter.[16]

¶39 Since we have concluded that the DNR had a duty to consider the information from a scientist that the proposed well "would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah," we reverse and remand to the circuit court with directions to, in turn, remand this case to the DNR so that it may consider the Nauta affidavit and any other information the agency had pertinent to Well #7 before it issued the 2005 approval.

¶40 No costs to either party on appeal.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Recommended for publication in the official reports.

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[16] As a practical matter, the situation whereby the DNR's own attorney represents the agency in a case such as this is unique. Normally, the Department of Justice has the duty to represent the DNR pursuant to WIS. STAT. § 165.25. However, the DOJ refused to represent the DNR in the instant case because it disagreed with the DNR's grant of both the 2003 and 2005 permits. Thus, the agency's own attorney was the attorney of record for the DNR. The attorney-client discussion here, therefore, may be limited to the facts of this case. This is not to say that it cannot be applied in future cases. It is only to say that courts will have to look closely at the facts and circumstances in each case.

STATE OF WISCONSIN CIRCUIT COURT, BRANCH 1 WALWORTH COUNTY

LAKE BEAULAH MANAGEMENT, DISTRICT,
Petitioner,
and

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,
Co-Petitioner,
v.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondent,
and

VILLAGE OF EAST TROY,
Intervening Respondent.

DECISION

CASE NO. 06-CV-172

TRANSCRIPT OF PROCEEDINGS

Transcript of proceedings in the above-entitled action before the Honorable Robert J. Kennedy, Circuit Judge, Walworth County Circuit Court, Elkhorn, Wisconsin, on September 23, 2008.

APPEARANCES:

DEAN P. LAING, Attorney at Law, Milwaukee, Wisconsin, on behalf of the Petetioner, via telephone.

WILLIAM T. STUART, Attorney at Law, Milwaukee, Wisconsin, on behalf of the Co-Petitioner, via telephone.

JUDITH MILLS OHM, Attorney at Law, Madison, Wisconsin, on behalf of the Respondent, via telephone.

PAUL G. KENT, Attoreny at Law, Madison, Wisconsin, on behalf of the Intervening Respondent, via telephone.

Sandra S. Elderbrook
Court Reporter

(In open court at 8:30 AM)

THE CLERK: Okay, judge.

THE COURT: Hello. Can everybody hear me?

UNIDENTIFIED SPEAKER: Yes, judge.

THE COURT: Well, let's see who can hear me. This is Lake Beulah Management District and Lake Beulah Protective and Improvement Association, both as petitioner and co-petitioner, versus, um, what is known as the DNR--that is the State of Wisconsin, Department of Natural Resources--and the Village of East Troy.

First, on behalf of the petitioner and if co-petitioner -- if the co-petitioner is present.

MR. LAING: Yes, judge. It's Dean Laing on behalf of the petitioner.

THE COURT: Anybody on --

MR. STUART: Good morning, your Honor.

THE COURT: Go ahead.

MR. STUART: Good morning, your Honor. Bill Stuart on behalf of the co-petitioner.

THE COURT: Thank you. How about DNR?

MS. OHM: Judy Ohm on behalf of DNR.

THE COURT: And the Village.

MR. KENT: Yes, your Honor, Paul Kent on behalf of the Village of East Troy.

THE COURT: All right. Um, some people

recently thought that, um, the purpose of this hearing was to hear argument. It is not. It is to give my decision. And this is the decision on 6-CV-172, um, which you people have briefed as I directed.

Um, first of all, the status of this case. The case concerns a well which the Village of East Troy wishes to erect near the shores of Lake Beulah to provide water for the Village of East Troy. The petitioners, who are land owners in the area of that lake, oppose the construction of the well.

A summary of the history of the matter is as follows:

Prior to September 4th, 2003, the Village of East Troy--who I'll refer to as the Village--submitted an application to the DNR for a permit to construct a well with a capacity to pump 1,440,000 gallons of water per day from a location near Lake Beulah. The Village's application specifically included a report from an engineering firm which concluded that a well, producing that amount of water, would avoid any serious disruption of groundwater discharge to Lake Beulah.

On 9/4/03, the DNR issued the Village the permit.

On 10/3/03, the petitioners filed a petition for a contested case hearing with the DNR. The request of the petitioner alleged that the amount of water being taken

by the well would affect the lake in sensitive environmental areas, as well as adversely affect nearby private wells, et cetera, et cetera. In other words, a whole list of ills that would befall the lake and the lake area if their well were produced.

The petitioner's request did not include any scientific reports, technical studies, or the like to confirm that there would be such an affect on the waters of Lake Beulah, et cetera, much less to quantify that particular affect.

Initially, the DNR sidestepped the petition by taking the position that if the well had a capacity of less than two million gallons per day, then Section 281.17 Statutes would only allow the Department to consider the impact on public utility wells in determining whether or not to approve the application.

A number of months later, the DNR reversed itself and decided -- decided to order a contested case hearing. The idea of the hearing was for the Department to consider any potentially adverse affects to the waters of the lake, and private wells, and ecosystem, et cetera, et cetera.

The Village responded by a motion for summary disposition; in effect, a motion for summary judgment. The Village took the exact same position that the DNR

had originally taken, to the effect that since the water loss would be less than two million gallons per day, Section 281.17 of the statutes only allows the Department to consider the impact of the well on the public utility wells--example, the existing public drinking water supplies--in determining whether or not to approve the application.

Briefs were filed by the petitioner and the Village in regard to this motion for, in effect, summary judgment. And subsequently, on 6/11/04, the Administrative Law Judge granted the motion and refused to hold a contested hearing. The essence of the ALJ's decision--that's my reference from now on for Administrative Law Judge--was that there was absolutely no evidence that the well in question, with its present proposed capacity, would adversely affect the lake, its ecosystem, or private wells, et cetera.

It should be noted here that the petitioners, also in their briefs, did not attach any affidavit showing any scientific or technical reports to demonstrate any such adverse affects as they claimed would occur. Just as in their original request for the contested hearing, their assertions were based upon the possibility that there might be adverse affects, and their insistence that the DNR had a duty to conduct some kind of

indefinite studies or analysis to determine whether such adverse affects might occur if the well was allowed to be constructed and operated. In short, it was the position of the petitioners that they did not have to present any such scientific or technical evidence, but, instead, the DNR should be required to conduct some kind of studies before it would issue the permit to determine whether any of these adverse affects on the lake, et cetera, would occur.

Bear with me a second. Um, the petitioner's position was that the petitioner had no obligation to conduct such studies. Bear with me a second. Yeah, let me start that again.

The petitioner's position was that the petitioner had no obligation themselves to conduct such studies, and it was up to the DNR, under the public trust doctrine, to do so in the first place. Since the DNR had not done so, petitioners argued they should not have issued the permit.

The ALJ concluded that in the absence of any evidence, produced by anybody in the briefs, of an adverse affect, there was no reason to conduct a contested -- a contested hearing. That is because at the contested hearing, there would be, in fact, no evidence produced of an adverse affect. If there was

going to be such proof, it would have been in the briefs or attachments; example, affidavits. Instead, all that would be produced would be the suggestion of the petitioners that adverse affects might occur; and because the petitioners felt that they might occur, petitioners would argue that the DNR had to conduct some kind of scientific or technical studies to determine if any kind of or any such adverse affects would occur under the requirements of the public trust doctrine.

The ALJ rejected that position. In fact, the ALJ said,

> ". . . any potential damage is purely speculative because there has been no factual record developed to support the allegations made in the petition. There are 'no disputed issues of fact or undisputed facts from which reasonable alternatives may be drawn' with respect to either likely injury to public waters or to private wells."

Quite naturally, the petitioners took issue with the ALJ's decision and filed a petition and complaint for judicial review in case 4-CV-683. During the briefing in that case, the DNR did agree that under certain circumstances, it -- it could consider the public trust doctrine in its analysis of well approvals.

However, the DNR did not concede that under the facts in this case it had any obligation to conduct some sort of indefinite scientific or technical studies beyond what had already been provided by the Village in their report from an engineer to the affect that the well would have no serious consequences upon the lake, et cetera.

The DNR further took the position, in its briefs in case 4-CV-683, that even though it had the authority to consider the public trust doctrine in granting the permit, it had no duty to do so in this matter because the petitioners did not submit any evidence by affidavit to establish that the well would adversely affect Lake Beulah, et cetera.

On 6/24/05, Judge Carlson issued a decision affirming the ALJ's denial and adopting the DNR position that while it had the authority to consider the doctrine, it was not required to do so and certainly not under these facts. That was especially so, according to Judge Carlson, in light of the fact that there was absolutely no evidence of any adverse affect on the lake that would bring into play the public trust doctrine in the first place.

Judge Carlson pointed out that the petitioners had argued that the public trust doctrine should be considered broadly and claimed that they wished to have

an opportunity to show why they believed there would be scientific evidence showing adverse affects. But, as Judge Carlson pointed out, they were given an opportunity in the briefing, not to mention before the ALJ on the motion for summary disposition, to show that they had such evidence; and they failed to take that opportunity. In short, they showed no evidence whatsoever from a scientific or technical point of view that the well would have any kind of adverse affect.

The petitioners appealed the trial court's decision, but the appeal dragged on for some time. In the meantime -- In the meanwhile, that is, the time limit of two years set in the original 9/4/03 permit began to draw to a close; and the Village had not yet constructed the well. The Village then chose to either ask for an extension of the well permit or for a new well, or -- excuse me -- for an extension of the well permit or for a new well permit. There is considerable debate about what the effect of the Village's request was in regard to a new or continuing permit to construct the well.

On 9/6/05, the DNR issued another permit or extended the original permit, depending on one's point of view. Eventually, the appellate court resolved the matter by ruling that the 9/6/05 permit was a new permit

and not an extension. The appellate court then dismissed the appeal in file 4-CV-683 because it was moot since this was a new 9/6/05 permit. The 9/6/05 is referring to the date of the permit.

During the course of the appellate proceedings in 4-CV-683, the petitioners had alertly recognized that the permit of 9/6/05 might be determined to be a new permit; however, they had only 30 days since 9/6/05 to ask for a contested hearing on that new permit. They had not done so. Under those circumstances, the petitioners concluded that if they were to contest the new permit, they had to find some other vehicle other than a contested case hearing. They concluded that they had a right of judicial review of a new permit if they filed a petition for the same within six months of issuance of the permit. Therefore, they did file such a petition; and that is the petition that is contained in the present file 6-CV-172.

The defendants, by the way, in their recent briefs, have contested whether or not this is an appropriate procedure. But for purposes of argument at this time, I'm going to concede it is. However, even in this petition, the petitioners continue to simply assert that the construction of the well might -- I stress the word "might" have adverse affects upon the environment.

Nothing in the new 6-CV-172 file, which I'm dealing with now, provided any evidence from a scientific or technical point of view that such adverse impact would affect -- in effect occur, much less how significant it would be, nor did they suggest in their petition that the DNR had had any evidence previous to their issuing of the permit on 9/6/05 that there was scientific or technical evidence indicating that such adverse affects to the lake and environment would occur.

However, in the plaintiff's 5/1/08 brief, filed earlier in the year, the plaintiff mentions a report by Dr. Robert J. Nauta--that's N-A-U-T-A--and, um, you should see page 10 of footnote 3 of said 5/1/08 brief. Assuming the footnote correctly summarizes Nauta's conclusions, that clearly would have been important information to provide to the ALJ back in early '04 when he was considering the summary disposition.

However, there's no suggestion that Nauta's opinion was even available back then, much less provided to the ALJ. In fact, there's no evidence the DNR had knowledge of Nauta's report when they used -- when they issued the 9/6/05 permit. Just because Nauta's report is dated 8/4/05 doesn't mean it was disseminated before 9/6/05 to anyone, much less the DNR.

The plaintiff cannot ask this court to judicially

review a DNR permit decision based on evidence the DNR was not aware of or provided with before they issued the permit. Whether or not Nauta's report would have changed the DNR's mind is a moot question. Furthermore, there is not a whole lot of information detailing Nauta's report to suggest whether there were any qualifications to that report, or how strong it was, et cetera.

Returning then, um, to the status of this case. The DNR and the Village ended up replying to the petition for judicial review in this file 6-CV-172, and a briefing schedule was ordered.

Initially, the court had received briefs on subsequent issues that had arisen and in subsequent files but has decided, and the parties have followed the court's direction, um, to decide, first of all, 6-CV-172 with the new briefs that have recently been filed.

The court has carefully reviewed those briefs at this time. There is a lot of discussion there about what the standard of proof should be and how much weight I should give to the DNR decision. But for purpose of argument, this court has decided to assume that this is an appropriate judicial review and appropriate method; and, furthermore, is deciding the particular matter in the light most favorable to the petitioners.

I now turn to discussion and decision. In that light, the first argument of the petitioners is that the permit of 9/6/05 is not a valid permit.

The problem with this argument of the petitioners is that it rests upon certain facts without a supporting legal basis. The petitioners argue that the Village never submitted a new application, um, for a new permit. In fact, they did submit an application for what they called an extension, but the appellate court has subsequently ruled it was a request for a new permit and that it was a new permit which was granted.

Further, the court notes, as defendant's briefs have pointed out, that all the requirements for an application for a new permit were met. See pages 18 through 20 of the Village's brief filed 8/25/08.

The appellate court has spoken. It is a new permit. The fact that the respondents originally applied for it as if it were an extension does not matter. In fact, if the DNR had not issued a new permit, the appellate court would have ruled that the old permit question is now moot and that there was no existing permit for the construction of a well. Instead, the appellate court ruled that the 9/6/05 was a new permit.

The petitioners next argue that their petition for

judicial review was timely.

The court handles this simply assuming, for purposes of argument, that the petitioner is correct. This court's review of the statute certainly indicates that within six months of the issuing of the permit, the petitioners are arguably entitled to seek judicial review concerning whether it was an appropriate action of the Department to issue the permit; although, I do note that there is a convincing counterargument by the respondents in this regard.

Am I getting -- Are you people getting an echo from me, by the way, as I read?

UNIDENTIFIED SPEAKER: I'm not.

MR. KENT: I'm not, your Honor. This is Paul Kent. I'm not.

THE COURT: All right.

MS. OHM: I'm not either.

THE COURT: I'll still stay a little farther from the mic. Is the court reporter getting it?

COURT REPORTER: I'm okay, but I don't know who is speaking unless they identify themselves.

THE COURT: Um, all I can say is the parties have all indicated that they're not getting an echo so I'm -- I'm sure they're hearing my decision; so I'll go on.

The petitioners next argue that the new permit is void. However, their basis for arguing that it is void is their reassertion of the claim that the DNR was required to conduct some kind of analysis of whether the well would negatively impact the waters of Lake Beulah, et cetera. They claim that the DNR had to do so under the public trust doctrine. Nowhere does the petitioner suggest that it provided the DNR with any technical, scientific information that would confirm that the well would have this negative impact upon the waters of Lake Beulah, et cetera. Their whole argument is that the public trust doctrine requires the DNR to conduct this analysis. The petitioners, as I've said before, do not suggest what this analysis would consist of. They simply claim it wasn't done. Obviously, they do -- they do not accept the fact that the DNR received a report from the Village's engineer to the affect that the well would have no serious affect upon Lake Beulah, et cetera. In the eyes of the petitioners, that is simply enough -- not enough. They claim that the simple statement of the engineer that it would not have adverse affects is too indefinite. But the petitioners do not explain why it is not enough nor what more is needed. They simply claim that because this analysis--whatever it is--was not done, the DNR has violated the public

trust doctrine; and, therefore, the granting of the permit is void.

This court concludes that while the DNR has the right to consider the public trust doctrine, in fact, in the presence of some solid, affirmative indication that the waters of Lake Beulah, or the wells, or the surrounding area, et cetera, would be significantly harmed, this court agrees that the DNR should consider that information and even perhaps conduct further studies to confirm whether that is so or not. But if there is an absolute dearth of any evidence suggesting that there would be harm to the lake or its environs, then this court does not agree that the DNR is failing to comply with its requirements under the public trust doctrine if it does not do some kind of analysis, which is never described or delineated by the plaintiffs.

The petitioners continue in their brief by talking about the common law in regard to the public trust doctrine and to the statutory enactment of the public trust doctrine. Neither this court, nor for that matter, the DNR or the Village are claiming that there is no such thing as a public trust doctrine. They fully realize it exists and recognize it. Further, this court agrees with the petitioners that it should be considered. In fact, the court disagrees with the

respondents on this point. But it is the position of the DNR and the Village, and also this court, that there is nothing to suggest that the public trust doctrine has to come into play in this case because there is no evidence that there will be any adverse affect to the waters of Lake Beulah and the environs caused by the well in question.

It should be noted that the petitioners make a great deal about the amount of water that will come out of the well, but they present no technical evidence as to whether this amount of water, under the circumstances, is an extremely high amount of water. As far as this court knows, that amount of water coming from a well may be a drop in the bucket under the circumstances. It may well be that a well like this could draw millions upon millions of gallons per day and still not essentially affect the environs because of the incredible amount of water available to replace it. The court simply does not know if this is truly a great amount of water in a relative sense in this situation.

The petitioners never present any technical or scientific evidence to the affect that it is a very significant relative amount of water compared to the other amounts of water needed to keep up the Lake Beulah environment.

The petitioners complete their brief on the subject by indicating that the statutory obligations do not abrogate the common law obligations, they merely add to them. The court does not disagree. This court agrees that the DNR has an obligation, both statutorily and under the common law, to protect the public under the public trust doctrine in regard to the lakes, rivers, and their environs. But -- but -- excuse me -- if they have information to that effect, they must consider it. But, there is an absolute dearth of any proof that the DNR has failed that obligation under the facts in this case.

Once again, the court notes that the petitioners are asking for some sort of indefinite analysis and claiming that in the absence of such an analysis, the DNR simply can't issue a permit. It takes far more than vague assertions that there might be damage and vague assertions about the need of some kind of analysis before this court sees a good reason to reverse the DNR's decision to grant the permit on the theory that they have violated the public trust doctrine.

Based upon the above, um, statement, this court denies the petitioner's petition to reverse the decision of the DNR in granting the permit on 9/6/05 for the reasons above stated.

Further, this court directs that if the plaintiffs intend to contest further the modifications of the well permit made after 9/6/05--that is, see file 6-CV-673, 7-CV-674, and 8-CV-915--they must amend their pleadings to remove as contested areas any matters ruled on by this court in this decision.

That's the decision of this court. I would direct the respondents to prepare an order accordingly. Gentlemen, thank you very much for your, um, consideration and time here in making this decision.

Um, I'm going to break the connection unless somebody states a reason why I should not.

MR. LAING: Your Honor, this is Dean Laing. Um, I'm assuming that that was on the record. And I guess my question is, um, when will a transcript be available for that? The reason I ask is, um, given your last directive, I'd like an opportunity to review the transcript certainly before making any decisions on amending any pleadings.

THE COURT: Before anybody else speaks, my court reporter is here; and, um, you can -- she will prepare the transcript at your cost, of course, and contact her, please. Um, Sandy, do you want to give them --

COURT REPORTER: Please have them send a

letter.

THE COURT: Please just send a letter to my court reporter.

MR. LAING: Okay.

THE COURT: Just address it to Sandy, and that will get it.

All right. Now, um, Dean, that takes care of your statement. Anybody else?

UNIDENTIFIED SPEAKER: Nothing.

UNIDENTIFIED SPEAKER: Nothing.

THE COURT: Okay. Hearing nothing, everything's fine. I'm breaking the connection. Thank you, gentlemen.

UNIDENTIFIED SPEAKER: Thank you, your Honor.

UNIDENTIFIED SPEAKER: Thank you.

THE COURT: Okay.

(Whereupon proceedings concluded at 9:00 AM)

STATE OF WISCONSIN)

) SS

COUNTY OF WALWORTH)

I, Sandra S. Elderbrook, Court Reporter, certify that the foregoing proceedings were taken by me in Walworth County Circuit Court Branch I, Elkhorn, Wisconsin, that the foregoing pages have been carefully compared by me with my stenographic notes; that the same is a true and correct transcript of all such proceedings taken on September 23, 2008.

Dated this 25th day of September, 2008.

Sandra Elderbrook, Court Reporter

STATE OF WISCONSIN CIRCUIT COURT WALWORTH COUNTY

LAKE BEULAH MANAGEMENT DISTRICT,

Petitioner,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner,

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent,

VILLAGE OF EAST TROY,

Intervening Respondent.

Case No. 06-CV-172

ORDER FOR JUDGMENT

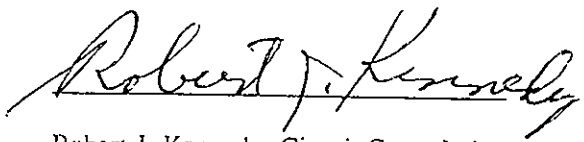
For the reasons stated on the record in a conference call on September 23, 2008;

IT IS HEREBY ORDERED:

That judgment be entered in favor of the Respondent, State of Wisconsin Department of Natural Resources, and Intervening Respondent, Village of East Troy, affirming the decision of the Wisconsin Department of Natural Resources to issue the high capacity well approval to the Village of East Troy on September 6, 2005.

Dated this 30 day of September, 2008.

BY THE COURT:



Robert J. Kennedy, Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT WALWORTH COUNTY

LAKE BEULAH MANAGEMENT DISTRICT,

Petitioner,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner,

vs. Case No. 06-CV-172

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent,

VILLAGE OF EAST TROY,

Intervening Respondent.

JUDGMENT

This matter having come before the Court on the Petition of the Lake Beulah Management District and the Lake Beulah Protective and Improvement Association for review under Sections 227.52 and 227.53, Wis. Stat., of the decision of the Wisconsin Department of Natural Resources to issue a high capacity well approval to the Village of East Troy on September 6, 2005, and the Court having stated its reasons on the record in a conference call on September 23, 2008, and thereafter the Court having issued its Order for Judgment,

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

The Petitioner's Petition to reverse the decision of the Wisconsin Department of Natural Resources to issue the high capacity well approval to the Village of East Troy on September 6, 2005, is DENIED for the reasons stated on the record by the Court.

Rendered this 30 day of September, 2008.

BY THE COURT:

Robert J. Kennedy, Circuit Court Judge

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711

September 6, 2005

Judy Weter
East Troy Village Administrator
P.O. Box 166
East Troy, WI 53120-0166

Re: Request for Extension of High Capacity Well Approval; Village of East Troy; Project Number W-2003-0665A

Dear Ms. Weter:

The Village of East Troy has requested an extension of the Department of Natural Resources (DNR) Water System Facilities Plan and Specification Approval (for Well #7), dated September 4, 2003. Your request has been assigned Project Number W-2003-0665A. Paul Kent, an attorney representing the Village in this matter, requested this extension by a letter to DNR attorney Judy M. Ohm, dated August 3, 2005. A follow up letter was sent to me from Kelly L. Zylstra, of Crispell-Snyder, Inc. and Daniel Peplinski, of Layne-Northwest, consultants for the Village, dated August 30, 2005.

Mr. Kent's letter indicated that the Village has been precluded from commencing construction of Well #7 because of litigation concerning the DNR approval (DNR has been a party to this litigation) and litigation regarding annexation of the well location into the Village. The letter from Mr. Zylstra and Mr. Peplinski indicates that there have been no changes in the physical circumstances upon which the application was based.

DNR has considered the Village's request under the standards set forth in 2003 Wisconsin Act 310, which became effective on May 7, 2004. This law was enacted after the original DNR approval was issued (September 4, 2003), but before the request for an extension was received. Under s. 281.34(4) and (5), Wis. Stats., DNR approves the request for an extension of the original approval, for a period of two years. Thus, the original approval is valid until September 4, 2007, subject to the conditions listed in the original approval (attached).

As a result of the ongoing litigation regarding the original approval, DNR is aware that the Lake Beulah Management District and the Lake Beulah Protective and Improvement Association are interested parties. Therefore, DNR is providing a copy of this approval to their attorneys.

Appeal Rights

If you believe that you have a right to challenge this decision, you should know that the Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed. For judicial review of a decision pursuant to sections 227.52 and 227.53, Wis. Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to file your

petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review must name the Department of Natural Resources as the respondent.

To request a contested case hearing pursuant to section 227.42, Wis. Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for hearing on the Secretary of the Department of Natural Resources. All requests for contested case hearings must be made in accordance with section NR 2.05(5), Wis. Adm. Code, and served on the Secretary in accordance with section NR 2.03, Wis. Adm. Code. The filing of a request for a contested case hearing is not a prerequisite for judicial review and does not extend the 30 day period for filing a petition for judicial review.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
For the Secretary

Lee H. Boushon, P.E., Chief
Public Water Supply Section

Attachment

c: Kelly L. Zylstra
Crispell-Snyder

Paul Kent
Anderson & Kent
Attorney for Village

Dennis L. Fisher
Meissner Tierney Fisher & Nichols
Attorney for Lake Beulah Management District

Daniel Peplinski
Layne-Northwest

Judy M. Ohm
DNR—LS/5

David V. Meany
DeWitt Ross & Stevens
Attorney for Lake Beulah Protective and Improvement Association

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary
Gloria L. McCutcheon, Regional Director

Southeast Region Headquarters
2300 N. Dr. Martin Luther King, Jr. Drive
PO Box 12436
Milwaukee, Wisconsin 53212-0436
Telephone 414-263-8749
FAX 414-263-8483
TTY 414-263-8713

September 4, 2003

MS JUDY WETER
VILLAGE OF EAST TROY
PO BOX 166
EAST TROY WI 53120

Project Number: W-2003-0665
PWSID#: 26501233
DNR Region: SE
County: WALWORTH

SUBJECT: WATER SYSTEM FACILITIES PLAN AND SPECIFICATION APPROVAL

Dear Ms. Weter:

The Wisconsin Department of Natural Resources, Division of Water, Bureau of Drinking Water and Groundwater, is conditionally approving plans and specifications for the following project. The project submittal included an engineering report or information of sufficient detail to meet the requirements of NR 811.13(3).

Water system name: Village of East Troy
Date received: 6/20/03
Length of time extension: none
Design firm: Crispell-Snyder, Inc.
Project Designer: Kelly L. Zylstra
Regional DNR Contact: Petwara Toyingtraknon – Southeast Region Plymouth Service Center
Project description: Site Investigation and Proposed Construction for Well No. 7

The proposed project involves the conversion of the existing NR 812 (sand & gravel) test well into a production well. Well No. 7 will be located in the SW1/4 of the SW1/4 of Section 17, T4N, R18E, Town of East Troy, Walworth County, Wisconsin. The Village will purchase the site pending consolidation/annexation approval for the proposed subdivision where the well will be located.

The nearest sand and gravel well serving a utility is approximately 6 miles to the northeast. It is not believed that the proposed well will have an adverse effect on any nearby wells owned by another water utility. If there is an actual adverse effect caused by the proposed well to nearby utility wells, or any other wells, the injured party may seek relief under the reasonableness of use tests set forth in State of Wisconsin v. Michels Pipeline Construction, Inc., 63, Wis. 2nd, 278 (1974).

If rotary methods and an outer casing is used, the Well No. 7 will be constructed (within the same drillhole as the test well) with the following specifications:

Outer Drillhole:	27 inch - drilled to a depth of 312 feet
Optional Outer Casing:	24 inch; installed in the 27 inch drillhole from the surface to a depth of 312 feet; completely withdrawn, or withdrawn to a maximum allowable depth of 239 feet if permanent installation
Screen:	As connected to 16 inch casing; installed from 262 feet to 312 feet; stainless steel; continuous slot; wire wrap; #30 slot size
Filter Pack:	To be installed from a depth of 312 feet to 242 feet; Colorado Silica Sand, Inc. 10-20 filter media (see also Part 2.5 of Section 0215)
Sand/Bentonite Seal:	Two foot sand seal installed from a depth of 242 feet to 240 feet One foot sand seal installed from a depth of 240 to 239 feet

Grout:	If the 24 inch casing is completely withdrawn To be installed in the annular space between the 16 inch casing and the 27 inch drillhole from the ground surface to a depth of 239 feet If the 24 inch casing is left in-place (maximum casing depth of 234 feet) To be installed in the annular space between the 16 inch casing and the 27 drillhole from a depth of 239 feet to 234 feet and in the annular space between the 16 inch casing and the 24 inch casing between the surface and a depth of 234 feet
Grout Placement:	Tremie pipe placed at the bottom of the annular space after gravel pack and bentonite seal placement
Grout Mixture:	Neat cement; 6 gallons (maximum) of water to 94 pounds of cement

If the 24 inch outer casing is installed by percussion methods or a Barber rig, no annular space is generated outside the casing. If the 24 inch outer casing is completely withdrawn (during the grouting operation), grout will placed in the annular space outside the 12 inch casing from the ground surface to a depth of 60 feet. If the 24 inch outer casing is to remain as part of the permanent well construction, the maximum allowable depth casing is 234 feet.

According to Section 02030 of the Specifications, Well No. 7 will be test pumped at approximately 1,000 gpm for 24 continuous hours. Note that NR 811.16(15)(c) requires that the test be run for a minimum of 4 hours at a rate equal to the anticipated capacity of the final well pump.

A finished floor elevation of 787.5 feet is proposed for the pumpstation. The revised site plan for Well No. 7 indicates that the well site may be located less than 200 feet to the future sanitary sewer. Sanitary sewer within 200 feet of the well site shall be constructed of piping and joints complying with water main standards.

Additional background information

The results of pumping the test well were discussed in an April 2003 report prepared by Layne-Geosciences. As discussed on Page 3 of the report:

> ...at the request of the Village; Layne coordinated with the Lake Buelah Management District's consultant (RSV Engineering, Inc.) and Dr. Ken Bradbury of the Wisconsin Geologic and Natural History Survey (WGNHS) to develop a supplemental groundwater monitoring program that could be used to better-predict the impacts of groundwater production at the test well site on Lake Buelah. Based upon the results of several discussions between RSV Engineering, the WGNHS and Layne, the Village authorized the installation of one additional approximately 300-foot deep monitoring well, two 70 foot-deep shallow monitoring wells; a shallow well point and a lake level staff guage, which were monitored throughout the pump test.

A 72 hour pump test was started at 9:06 a.m. on February 24, 2003. The test well was pumped at approximately 400 gpm. In addition to the groundwater monitoring points described above, three private wells were also monitored. Groundwater elevations before and at the end of the pump test [from the installed groundwater monitoring points] were provided on Page 4 of the report. Based on the pump test data, estimates of aquifer parameters were provided on Page 6 of the report.

Based upon the analysis from the pump test data, Layne-Northwest estimated that a well producing 2,500 gpm could be constructed – based upon local aquifer hydraulics. Layne-Northwest estimated that a well producing 1,000 gpm would avoid any serious disruption of groundwater discharge to Lake Beulah (reference Page 7).

Variances being issued to Chapter NR 811, Wis. Adm. Code: None

Approval conditions related to Chapter NR 811, Wis. Adm. Code:

1. A preconstruction conference shall be held to ensure the understanding of, and compliance with, the approved plans and specifications, the proposed method of erosion control, the duties of the resident project representative, the disinfection and bacteriological sampling requirements of NR 811.07(3), and any special conditions listed below.

2. Erosion control methods shall be used to prevent siltation to lands and waterways adjoining the construction area. These methods shall include but not be limited to the following:

   a. siltation fences,
   b. trench stabilization,
   c. immediate mulching and seeding, and
   d. the use of dewatering settling basins

3. A chlorine residual shall be maintained in the well throughout the drilling operation.

4. The owner, or the owners agent, shall provide Petwara Toyingtrakoon of the Department's Plymouth Service Center, phone number 920-892-8756 extension 3034, telefax number 920-892-6638, written notification of the intent to grout the well at least 2 working days prior to grouting. The notification shall include the name and telephone number of the resident project representative, the proposed method of grouting, the method for determining grout density, and the casing thickness and manufacturer's markings.

5. The resident project representative shall have documentation at the well site at the time of grouting to indicate a thorough knowledge and understanding of the approval, method of grouting, and WAC NR 811 requirements. This documentation shall include a copy of the DNR approval and any approved modifications, a copy of the plans and specifications, a drawing of the well as constructed, a method of determining the grout density, the calculations of the annular space volume, the calculations showing the volume of grout required, the volume of grout ordered, a copy of the letter notifying the DNR of the resident project representative, and a copy of WAC NR 811.

6. The well shall be test pumped for a minimum of 12 consecutive hours. The pump test shall include pumping at minimum of 4 hours - at a rate equal to the anticipated capacity of the final well pump.

7. Any sanitary sewer within a 200 foot radius of Well No. 7 shall be constructed using water main pipe and installation standards.

8. A wellhead protection plan shall be approved before Well No. 7 is placed into service. In addition to the wellhead protection plan, the required Form 3300-215 [PUBLIC WATER SUPPLY POTENTIAL CONTAMINANT USE INVENTORY] shall also be submitted.

9. The construction of the pumphouse, pump discharge piping, connecting water main and the installation of the well pump are not being approved at this time. Plans and specifications for these improvements shall be submitted to the Department for review and approval following the construction and test pumping of the well. The well construction reports, test pumping data, plumbness and alignment data, water quality data and the contaminant use inventory must be submitted to this office prior to or with the submission of the plans and specifications.

Approval conditions related to other Department requirements: None

Approval constraints: This approval is valid for two years from the date of approval and is subject to the conditions listed above. If construction or installation of the improvements has not commenced within two years the approval shall become void and a new application must be made and approval obtained prior to commencing construction or installation.

This approval is based upon the representation that the plans submitted to the Department are complete and accurately represent the project being approved. Any approval of plans that do not fairly represent the project because they are incomplete, inaccurate, or of insufficient scope and detail is voidable at the option of the Department.

Appeal rights: The project was reviewed in accordance with s. 281.41, Statutes for compliance with Chapters NR 108 and NR 811 Wis. Adm. Code and is hereby approved in accordance with s. 281.41, Statutes subject to the

conditions listed above. If you believe you have a right to appeal this decision, you may file a written request for a contested case hearing pursuant to s. 227.42, Wis. Stats., or file for judicial review under s. 227.52 and 227.53, Statutes. You have 30 days after this approval is mailed to file your written request for hearing or file and serve your petition for judicial review. Your request for hearing or petition for judicial review must name the Secretary of the Department as respondent. This notice is provided pursuant to s. 227.48, Statutes.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
For the Secretary

Francis G. Fuja, P.E.
DG Plan Review Engineer

cc: Tom Rossmiller - Water Supt.
Kelly Zylstra – Crispell-Snyder, Inc.
Bob Nauta – RSV Engineering, Inc., 112 S. Main St., Jefferson, WI 53549
David Skotarzak – Lake Beulah Management District, P.O. Box 71, East Troy, WI 53120-0071
Paul Didier – Lake Beulah Protective & Improvement Association, 1019 Rooster Run, Middleton, WI 53562
Dan Peplinski – Layne Geosciences, W229 N5005 Duplainville Rd., Pewaukee, WI 53072
Petwara Toyingtrakoon – SER Plymouth Service Center
Heidi Bunk – SER Waukesha Service Center
Jim D'Antuono – SER Waukesha Service Center
Randy Shumacher – SER Waukesha Service Center
Lee Boushon – DG/2
Fuja - DG Reviewer at SER Milwaukee
Kenneth Bradbury - WG&NHS
USGS
PSC

plumbing inside and in connection with buildings served, and service pipes from building to street main.

(15) "Solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded or salvageable materials, including solid, liquid, semisolid, or contained gaseous materials resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solids or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under ch. 283, or source material, as defined in s. 254.31 (10), special nuclear material, as defined in s. 254.31 (11), or by–product material, as defined in s. 254.31 (1).

(16) "System or plant" includes water and sewerage systems and sewage and refuse disposal plants.

(17) "Wastewater" means all sewage.

(18) "Waters of the state" includes those portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction.

(19) "Water supply" means the sources and their surroundings from which water is supplied for drinking or domestic purposes.

(20) "Waterworks" or "water system" means all structures, conduits and appurtenances by means of which water is delivered to consumers except piping and fixtures inside buildings served, and service pipes from building to street main.

(21) "Wetland" has the meaning given in s. 23.32 (1).

History: 1995 a. 227; 1999 a. 9; 2001 a. 6.

SUBCHAPTER II

WATER RESOURCES

Cross Reference: See also chs. NR 110 and 121, Wis. adm. code.

281.11 Statement of policy and purpose. The department shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private. Continued pollution of the waters of the state has aroused widespread public concern. It endangers public health and threatens the general welfare. A comprehensive action program directed at all present and potential sources of water pollution whether home, farm, recreational, municipal, industrial or commercial is needed to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water. The purpose of this subchapter is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed in favor of the policy objectives set forth in this subchapter. In order to achieve the policy objectives of this subchapter, it is the express policy of the state to mobilize governmental effort and resources at all levels, state, federal and local, allocating such effort and resources to accomplish the greatest result for the people of the state as a whole. Because of the importance of Lakes Superior and Michigan and Green Bay as vast water resource reservoirs, water quality standards for those rivers emptying into Lakes Superior and Michigan and Green Bay shall be as high as is practicable.

History: 1995 a. 227 s. 374.

Cross Reference: See also s. NR 103.05, Wis. adm. code.

A possessor of land who withdraws ground water for beneficial purposes is not liable for interference with another's water use unless the withdrawal causes unreasonable harm by lowering the water table or artesian pressure, the ground water forms an underground stream, or the withdrawal has a substantial effect on a watercourse or lake. State v. Michels Pipeline Construction, Inc. 63 Wis. 2d 278, 217 N.W.2d 339, 219 N.W.2d 308 (1974).

A municipality's supplying of water to its inhabitant is not a proprietary function immune from the provisions of ch. 144 [now chs. 280–299]. The protection of public health is a matter of state–wide concern over which the legislature may exercise its police powers to insure a healthful water supply. Village of Sussex v. DNR, 68 Wis. 2d 187, 228 N.W.2d 173 (1975).

Department regulatory power over wetlands is discussed. 68 Atty. Gen. 264.

The public trust doctrine. 59 MLR 787.

Theories of water pollution litigation. Davis, 1971 WLR 738.

Carrying capacity controls for recreation water uses. Kusler, 1973 WLR 1.

281.12 General department powers and duties. (1) The department shall have general supervision and control over the waters of the state. It shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter. The department also shall formulate plans and programs for the prevention and abatement of water pollution and for the maintenance and improvement of water quality.

(3) The department, upon request, shall consult with and advise owners who have installed or are about to install systems or plants, as to the most appropriate water source and the best method of providing for its purity, or as to the best method of disposing of wastewater, including operations and maintenance, taking into consideration the future needs of the community for protection of its water supply. The department is not required to prepare plans.

(5) The department may enter into agreements with the responsible authorities of other states, subject to approval by the governor, relative to methods, means and measures to be employed to control pollution of any interstate streams and other waters and to carry out such agreement by appropriate general and special orders. This power shall not be deemed to extend to the modification of any agreement with any other state concluded by direct legislative act, but, unless otherwise expressly provided, the department shall be the agency for the enforcement of any such legislative agreement.

History: 1995 a. 227 ss. 376, 383, 385, 987; 1995 a. 378 s. 42.

Cross Reference: See also chs. NR 809, 811, 812, and 845, and ss. NR 1.50, 1.95, and 103.05, Wis. adm. code.

The DNR's general supervision and control over the state's waters is not so sweeping as to authorize the DNR to ban all activities that might adversely affect water quality or to establish limitations for any one specific industry. Rusk County Citizen Action Group, Inc. v. DNR, 203 Wis. 2d 1, 552 N.W.2d 110 (Ct. App. 1996), 95–3125.

281.13 Surveys and research. (1) (a) The department is authorized to act with the U.S. geological survey in determining the sanitary and other conditions and nature of the natural water sources in this state, for the following purposes:

1. To determine the nature and condition of the unpolluted natural water sources.

2. To determine to what extent the natural water sources are being contaminated by sewage from cities, villages and towns.

3. To determine to what extent the natural water sources are being polluted by other wastes.

4. To assist in determining the best sources of water.

(b) The department is hereby empowered and instructed to make the necessary rules and regulations, in conjunction with the U.S. geological department, to carry this subsection into effect.

(3) The department may conduct scientific experiments, investigations, waste treatment demonstrations and research on any matter under its jurisdiction. It may establish pilot plants, prototypes and facilities in connection therewith and lease or purchase land or equipment.

History: 1995 a. 227 ss. 372, 382; 1995 a. 378 s. 40; 1997 a. 35.

281.14 Wisconsin River monitoring and study. (1) In this section:

(a) "Nonpoint source" has the meaning given in s. 281.16 (1) (e).

(b) "Point source" has the meaning given in s. 283.01 (12).

(g) The department, or a county, city, village, or town to which the department delegates the authority to act under this paragraph, may issue a special order directing the immediate cessation of work on a construction site described in par. (a) until any required plan approval is obtained or until the site complies with standards established by rules promulgated under this subsection.

(h) The department shall promulgate rules for the administration of this section.

(4) MODEL ORDINANCES; STATE PLAN; DISTRIBUTION. The department shall prepare a model zoning ordinance for construction site erosion control at sites where the construction activities do not include the construction of a building and for storm water management in the form of an administrative rule. The model ordinance is subject to s. 227.19 and other provisions of ch. 227 in the same manner as other administrative rules. Following the promulgation of the model ordinance as a rule, the department shall distribute a copy of the model ordinance to any city, village, town or county that submits a request. The department shall distribute a copy of the state plan to any agency which submits a request.

(5) COOPERATION. The department, the municipalities and all state agencies shall cooperate to accomplish the objective of this section. To that end, the department shall consult with the governing bodies of municipalities to secure voluntary uniformity of regulations, so far as practicable, shall prepare model ordinances under sub. (4), shall extend assistance to municipalities under this section, shall prepare the plan under sub. (2), shall encourage uniformity through the implementation of this plan and the utilization of memoranda of understanding which are substantially similar to the plan and shall extend assistance to agencies under this section.

History: 1983 a. 416; Stats. 1983 s. 144.265; 1983 a. 538 s. 150; Stats. 1983 s. 144.266; 1985 a. 182 s. 57; 1987 a. 27; 1989 a. 31; 1993 a. 16, 246; 1995 a. 27 ss. 4303cm, 9116 (5); 1995 a. 201; 1995 a. 227 s. 434; Stats. 1995 s. 281.33; 2009 a. 28 ss. 2075d to 2075j, 2576n, 2576p.

Cross Reference: See also chs. NR 152 and 216, Wis. adm. code.

281.34 Groundwater withdrawals. (1) DEFINITIONS. In this section:

(a) "Groundwater protection area" means an area within 1,200 feet of any of the following:

1. An outstanding resource water identified under s. 281.15 that is not a trout stream.

2. An exceptional resource water identified under s. 281.15 that is not a trout stream.

3. A class I, class II, or class III trout stream, other than a class I, class II, or class III trout stream that is a farm drainage ditch with no prior stream history, as identified under sub. (8) (a).

(b) "High capacity well" means a well that, together with all other wells on the same property, has a capacity of more than 100,000 gallons per day.

(c) "Local governmental unit" means a city, village, town, county, town sanitary district, utility district under s. 66.0827 that provides water, public inland lake protection and rehabilitation district that has town sanitary district powers under s. 33.22 (3), joint local water authority created under s. 66.0823, or municipal water district under s. 198.22.

(d) "Owner" means a person who owns property on which a well is located or proposed to be located or the designated representative of such a person.

(e) "Potentiometric surface" means a measure of pressure of groundwater in an aquifer based on the level to which groundwater will rise in a well placed in the aquifer.

(f) "Spring" means an area of concentrated groundwater discharge occurring at the surface of the land that results in a flow of at least one cubic foot per second at least 80 percent of the time.

(g) "Water loss" means a loss of water from the basin from which it is withdrawn as a result of interbasin diversion or consumptive use or both.

(h) "Well" means any drillhole or other excavation or opening deeper than it is wide that extends more than 10 feet below the ground surface and is constructed for the purpose of obtaining groundwater.

(2) APPROVAL REQUIRED FOR HIGH CAPACITY WELLS. An owner shall apply to the department for approval before construction of a high capacity well begins. No person may construct or withdraw water from a high capacity well without the approval of the department under this section or under s. 281.17 (1), 2001 stats. An owner applying for approval under this subsection shall pay a fee of $500.

(2m) TEMPORARY DEWATERING WELLS. The department shall issue a single approval under sub. (2) for all high capacity wells constructed for one project, as determined by the department, for temporary dewatering of a construction site, including a construction site for a building, road, or utility. The department shall provide for amendments to a project under this subsection. A person applying for approval of high capacity wells for a project under this subsection is only required to pay one $500 fee.

(3) NOTIFICATION REQUIRED FOR OTHER WELLS. (a) An owner shall notify the department of the location of a well that is not a high capacity well before construction of the well begins. An owner notifying the department under this subsection shall pay a fee of $50.

(b) The department may appoint any person who is not an employee of the department as the department's agent to accept and process notifications and collect the fees under par. (a).

(c) Any person, including the department, who accepts and processes a well notification under par. (a) shall collect in addition to the fee under par. (a) a processing fee of 50 cents. An agent appointed under par. (b) may retain the processing fee to compensate the agent for the agent's services in accepting and processing the notification.

(4) ENVIRONMENTAL REVIEW. (a) The department shall review an application for approval of any of the following using the environmental review process in its rules promulgated under s. 1.11:

1. A high capacity well that is located in a groundwater protection area.

2. A high capacity well with a water loss of more than 95 percent of the amount of water withdrawn.

3. A high capacity well that may have a significant environmental impact on a spring.

(b) If, under sub. (5) (b), (c), or (d), the department requests an environmental impact report under s. 23.11 (5) for a proposed high capacity well, the department may only request information in that report that relates to the decisions that the department makes under this section related to the proposed high capacity well.

(5) STANDARDS AND CONDITIONS FOR APPROVAL. (a) *Public water supply.* If the department determines that a proposed high capacity well may impair the water supply of a public utility engaged in furnishing water to or for the public, the department may not approve the high capacity well unless it is able to include and includes in the approval conditions, which may include conditions as to location, depth, pumping capacity, rate of flow, and ultimate use, that will ensure that the water supply of the public utility will not be impaired.

(b) *Groundwater protection area.* 1. Except as provided in subd. 2., if the department determines, under the environmental review process in sub. (4), that an environmental impact report under s. 23.11 (5) must be prepared for a proposed high capacity well located in a groundwater protection area, the department may not approve the high capacity well unless it is able to include and includes in the approval conditions, which may include conditions as to location, depth, pumping capacity, rate of flow, and ultimate use, that ensure that the high capacity well does not cause significant environmental impact.

2. Subdivision 1. does not apply to a proposed high capacity well that is located in a groundwater protection area and that is a water supply for a public utility engaged in supplying water to or for the public, if the department determines that there is no other

reasonable alternative location for a well and is able to include and includes in the approval conditions, which may include conditions as to location, depth, pumping capacity, rate of flow, and ultimate use, that ensure that the environmental impact of the well is balanced by the public benefit of the well related to public health and safety.

(c) *High water loss.* If the department determines, under the environmental review process in sub. (4), that an environmental impact report under s. 23.11 (5) must be prepared for a proposed high capacity well with a water loss of more than 95 percent of the amount of water withdrawn, the department may not approve the high capacity well unless it is able to include and includes in the approval conditions, which may include conditions as to location, depth, pumping capacity, rate of flow, and ultimate use, that ensure that the high capacity well does not cause significant environmental impact.

(d) *Impact on a spring.* 1. Except as provided in subd. 2., if the department determines, under the environmental review process in sub. (4), that an environmental impact report under s. 23.11 (5) must be prepared for a proposed high capacity well that may have a significant environmental impact on a spring, the department may not approve the high capacity well unless it is able to include and includes in the approval conditions, which may include conditions as to location, depth, pumping capacity, rate of flow, and ultimate use, that ensure that the high capacity well does not cause significant environmental impact.

2. Subdivision 1. does not apply to a proposed high capacity well that may have a significant environmental impact on a spring and that is a water supply for a public utility engaged in supplying water to or for the public, if the department determines that there is no other reasonable alternative location for a well and is able to include and includes in the approval conditions, which may include conditions as to location, depth, pumping capacity, rate of flow, and ultimate use, that ensure that the environmental impact of the well is balanced by the public benefit of the well related to public health and safety.

(dm) *Water supply service area plan.* If a proposed high capacity well is covered by an approved water supply service area plan under s. 281.348, the department may not approve the high capacity well unless it is consistent with that plan.

(e) *All high capacity wells.* 1. If s. 281.35 (4) applies to a proposed high capacity well, the department shall include in the approval conditions that ensure that the high capacity well complies with s. 281.35 (4) to (6).

2. The department shall include in the approval for each high capacity well requirements that the owner identify the location of the high capacity well and submit an annual pumping report.

(6) PREEXISTING HIGH CAPACITY WELLS. (a) The owner of a high capacity well for which the department issued an approval under s. 281.17 (1), 2001 stats., shall provide to the department information concerning the location of the well and an annual pumping report.

(b) The department shall promulgate rules specifying the date and method by which owners of high capacity wells shall comply with par. (a).

(7) MODIFYING AND RESCINDING APPROVALS FOR HIGH CAPACITY WELLS. The approval of a high capacity well issued under this section or under s. 281.17 (1), 2001 stats., remains in effect unless the department modifies or rescinds the approval because the high capacity well or the use of the high capacity well is not in conformance with standards or conditions applicable to the approval of the high capacity well.

(8) GROUNDWATER PROTECTION AREAS. (a) The department shall promulgate rules identifying class I, class II, and class III trout streams for the purposes of this section. The department shall identify as a class I trout stream a stream or portion of a stream with a self–sustaining population of trout. The department shall identify as a class II trout stream a stream or portion of a stream that contains a population of trout made up of one or more age groups, above the age one year, in sufficient numbers to indicate substantial survival from one year to the next but in which stocking is necessary to fully utilize the available trout habitat or to sustain the fishery. The department shall identify as a class III trout stream a stream or portion of a stream that has marginal trout habitat with no natural reproduction of trout occurring, requiring annual stocking of trout to provide trout fishing, and generally without carryover of trout from one year to the next. In the rules under this paragraph, the department shall identify any class I, class II, or class III trout stream that is a farm drainage ditch with no prior stream history.

(b) The department shall create accurate images of groundwater protection areas.

(c) A person who proposes to construct a high capacity well may request the department to determine whether the proposed location of the high capacity well is within a groundwater protection area.

(d) The department shall administer a program to mitigate the effects of wells constructed before May 7, 2004, that are located in groundwater protection areas. Mitigation may include abandonment of wells and replacement of wells, if necessary, and management strategies. Under the mitigation program, the department may order the owner of a well constructed before May 7, 2004, that is located in a groundwater protection area to undertake mitigation but only if the department provides funding for the full cost of the mitigation, except that full funding is not required if the department is authorized under ch. 280 to require the well to be abandoned because of issues regarding public health.

(9) GROUNDWATER MANAGEMENT AREAS. (a) The department shall, by rule, designate 2 groundwater management areas including and surrounding Brown County and Waukesha County consisting of the entire area of each city, village, and town at least a portion of which is within the area in which, on May 7, 2004, the groundwater potentiometric surface has been reduced 150 feet or more from the level at which the potentiometric surface would be if no groundwater had been pumped.

(b) The department shall assist local governmental units and regional planning commissions in groundwater management areas designated under par. (a) by providing advice, incentives, and funding for research and planning related to groundwater management.

(c) If the groundwater advisory committee created under 2003 Wisconsin Act 310, section 15 (2) (b) does not issue the report under 2003 Wisconsin Act 310, section 15 (2) (e) by January 1, 2007, the department shall promulgate rules using its authority under ss. 281.12 (1) and 281.35 to address the management of groundwater in groundwater management areas.

(d) If the department promulgates rules under par. (c) and the rules require mitigation in the same or a similar manner as under sub. (8) (d), the department may not require mitigation for a well under the rules unless the department provides funding for the full cost of the mitigation, except that full funding is not required if the department is authorized under ch. 280 to require the well to be abandoned because of issues regarding public health.

(10) RESEARCH AND MONITORING. To aid in the administration of this section the department shall, with the advice of the groundwater coordinating council, conduct monitoring and research related to all of the following:

(a) Interaction of groundwater and surface water.

(b) Characterization of groundwater resources.

(c) Strategies for managing water.

History: 2003 a. 310; 2007 a. 227; 2009 a. 28.
Cross Reference: See also ch. NR 820, Wis. adm. code.

281.343 Great Lakes — St. Lawrence River Basin Water Resources Compact. (1) LEGISLATIVE DETERMINATION. The legislature determines that it is in the interests of this state to ratify the Great Lakes — St. Lawrence River Basin Water Resources Compact. Nothing in this section may be interpreted to change the application of the public trust doctrine under article

(c) A person preparing a plan under par. (a) shall include all of the following in the plan:

1. Delineation of the area for which the plan is being prepared and proposed water supply service areas for each public water supply system making a withdrawal covered by the plan, except as provided in par. (cm).

2. An inventory of the sources and quantities of the current water supplies in the area.

3. A forecast of the demand for water in the area over the period covered by the plan.

3m. Identification of the existing population and population density of the area for which the plan is prepared and forecasts of the expected population of the area during the period covered by the plan based on growth projections for the area and municipally planned population densities.

4. Identification of the options for supplying water in the area for the period covered by the plan that are approvable under other applicable statutes and rules and that are cost–effective based upon a cost–effectiveness analysis of regional and individual water supply and water conservation alternatives.

5. An assessment of the environmental and economic impacts of carrying out specific significant recommendations of the plan.

6. A demonstration that the plan will effectively utilize existing water supply storage and distribution facilities and wastewater infrastructure to the extent practicable.

7. Identification of the procedures for implementing and enforcing the plan and a commitment to using those procedures.

8. An analysis of how the plan supports and is consistent with any applicable comprehensive plans, as defined in s. 66.1001 (1) (a), and applicable approved areawide water quality management plans under s. 283.83.

9. Other information specified by the department.

(cm) For the purposes of plans under par. (a), an areawide water quality planning agency designated by the governor under ch. NR 121, Wis. Adm. Code, shall delineate the proposed water supply service areas for all of the public water supply systems in the planning area for which the agency is designated. An areawide water quality planning agency shall delineate proposed water supply service areas that are consistent with the approved areawide water quality management plan under s. 283.83 for the planning area and that permit the development of plans that are approvable under par. (d). An areawide water quality planning agency may also provide regional water needs assessments and other regional water supply planning information. The process for conducting regional activities under this subsection may be the same as the process for regional water supply planning for a groundwater management area designated under s. 281.34 (9).

(d) The department may not approve a plan under this subsection unless all of the following apply:

1. The plan provides for a water supply system that is approvable under this section and other applicable statutes and rules based on a cost–effectiveness analysis of regional and individual water supply and water conservation alternatives.

2. The plan will effectively utilize existing water supply storage and distribution facilities and wastewater infrastructure to the extent practicable.

3. The plan is consistent with any applicable comprehensive plans, as defined in s. 66.1001 (1) (a).

4. The plan is consistent with any applicable approved areawide water quality management plans under s. 283.83.

5. Beginning on December 8, 2011, if the plan covers a public water supply system that withdraws water from the Great Lakes basin, the plan complies with any applicable requirements in s. 281.346 (5e).

(e) The department shall specify in a plan under this section a water supply service area for each public water supply system making a withdrawal covered by the plan. The department may not limit water supply service areas based on jurisdictional boundaries, except as necessary to prevent waters of the Great Lakes basin from being transferred from a county that lies completely or partly within the Great Lakes basin into a county that lies entirely outside the Great Lakes basin.

(f) A person applying for an approval under s. 281.344 (4) or 281.346 (4) may use elements of an approved plan under this subsection to show compliance with requirements under s. 281.344 (4) or 281.346 (4) to which the plan is relevant.

(4) WITHDRAWAL AMOUNT IN CERTAIN PLANS. In a plan under this section that covers a public water supply system making a withdrawal from the Great Lakes basin, the department shall specify a withdrawal amount for the public water supply system equal to the greatest of the following:

(a) The amount needed for the public water supply system to provide a public water supply in the water supply service area in the plan during the period covered by the plan, as determined using the population and related service projections in the plan.

(b) If the withdrawal is covered by an individual permit issued under s. 281.344 (5) or 281.346 (5) when the department approves the plan, the withdrawal amount in that permit when the department approves the plan or, if the withdrawal is covered by a general permit issued under s. 281.344 (4s) or 281.346 (4s) when the department approves the plan, the withdrawal amount for the public water supply system in the database under s. 281.346 (4s) (i) when the department approves the plan.

History: 2007 a. 227; 2009 a. 28.

281.35 Water resources conservation and management. (1) DEFINITIONS. In this section:

(a) "Approval" means a permit issued under s. 30.18, 281.344 (5), or 281.346 (5) or an approval under s. 281.17 (1), 2001 stats., or s. 281.34 or 281.41.

(b) "Authorized base level of water loss" means any of the following:

1. The maximum 30–day average water loss authorized as a condition of an approval.

2. If subd. 1. does not apply, the highest average daily water loss over any 30–day period that is reported to the department under s. 281.17, 2001 stats., or s. 30.18 (6) (c), 281.34, 281.344 (5), 281.346 (5), or 281.41.

3. If there is no water loss from an existing withdrawal, zero gallons per day.

(bm) "Compact's effective date" means the effective date of the Great Lakes — St. Lawrence River Basin Water Resources Compact under s. 281.343.

(c) "Consumptive use" means a use of waters of the state, other than an interbasin diversion, that results in a failure to return any or all of the water to the basin from which it is withdrawn. "Consumptive uses" include, but are not limited to, evaporation and incorporation of water into a product or agricultural crop.

(cm) "Facility" means an operating plant or establishment providing electricity to the public or carrying on any manufacturing activity, trade, or business on one site, including similar plants or establishments under common ownership or control located on contiguous properties.

(d) "Great Lakes basin" means the watershed of the Great Lakes and the St. Lawrence River upstream from Trois–Rivieres, Quebec.

(e) "Great Lakes charter" means the document establishing the principles for the cooperative management of Great Lakes water resources, signed by the governors and premiers of the Great Lakes region on February 11, 1985.

(f) "Great Lakes region" means the geographic region composed of the states of Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin, the commonwealth of Pennsylvania and the provinces of Ontario and Quebec, Canada.

(g) "Interbasin diversion" means a transfer of the waters of the state from either the Great Lakes basin or the upper Mississippi River basin to any other basin.

(h) "International joint commission" means the commission established by the boundary water agreement of 1909 between the United States and Canada.

(i) "Person" has the meaning given in s. 281.01 (9) and also includes special purpose districts established under s. 66.0827, other states and provinces and political subdivisions of other states and provinces.

(j) "Upper Mississippi River basin" means the watershed of the Mississippi River upstream from Cairo, Illinois.

(k) "Upper Mississippi River region" means the geographic region composed of the states of Illinois, Iowa, Minnesota, Missouri and Wisconsin.

(L) "Water loss" means a loss of water from the basin from which it is withdrawn as a result of interbasin diversion or consumptive use or both.

(m) "Withdrawal" means the removal or taking of water from the waters of the state.

(2) AGGREGATION OF MULTIPLE WITHDRAWALS. In calculating the total amount of an existing or proposed water loss for purposes of determining the applicability of sub. (4), a person shall include all separate interbasin diversions and consumptive uses, or combinations thereof, which the person makes or proposes to make to supply a single facility or public water supply system.

(4) WATER LOSS APPROVAL REQUIRED. (a) This subsection applies to all of the following:

1. A person to whom a permit has been issued under s. 30.18 or who is required to obtain a permit under that section before beginning or increasing a withdrawal.

2. A person who is operating a well under an approval issued under s. 281.17 (1), 2001 stats.

2m. A person who is operating a well under an approval issued under s. 281.34 or who is required to obtain an approval under that section before constructing a well.

3. An owner who is operating a system or plant under plans approved under s. 281.41 or who is required to submit plans and obtain an approval under that section before construction or extension of a proposed system or plant.

4. A person to whom a permit under s. 281.344 (5) or 281.346 (5) has been issued or who is required to obtain a permit under one of those provisions before beginning or increasing a withdrawal.

(b) Before any person specified in par. (a) may begin a new withdrawal or increase the amount of an existing withdrawal, the person shall apply to the department under s. 30.18, 281.34, 281.344 (5), 281.346 (5), or 281.41 for a new approval or a modification of its existing approval if either of the following conditions applies:

1. The person proposes to begin a new withdrawal that will result in a water loss averaging more than 2,000,000 gallons per day in any 30–day period.

2. The person proposes to increase an existing withdrawal that will result in a water loss averaging more than 2,000,000 gallons per day in any 30–day period above the person's authorized base level of water loss.

(5) APPLICATION; APPROVAL; DENIAL. (a) *Application.* An application under sub. (4) (b) shall contain a statement of and documentation for all of the following:

1. The current operating capacity of the withdrawal system, if the proposed increase requires the expansion of an existing system.

2. The total new or increased operating capacity of the withdrawal system.

3. The place and source of the proposed withdrawal.

4. The place of the proposed discharge or return flow.

5. The place and nature of the proposed water use.

6. The estimated average annual and monthly volumes and rates of withdrawal.

7. The estimated average annual and monthly volumes and rates of water loss.

8. The anticipated effects, if any, that the withdrawal will have on existing uses of water resources and related land uses both within and outside of the Great Lakes basin or the upper Mississippi River basin.

9. Any land acquisition, equipment, energy consumption or the relocation or resiting of any existing community, facility, right–of–way or structure that will be required.

10. The total anticipated costs of any proposed construction.

11. A list of all federal, state, provincial and local approvals, permits, licenses and other authorizations required for any proposed construction.

13. A statement as to whether the proposed withdrawal complies with all applicable plans for the use, management and protection of the waters of the state and related land resources, including plans developed under s. 283.83.

14. A description of other ways the applicant's need for water may be satisfied if the application is denied or modified.

15. A description of the conservation practices the applicant intends to follow.

16. Any other information required by the department by rule.

(b) *Great Lakes basin; consultation required.* If the department receives an application before the compact's effective date that, if approved, will result in a new water loss to the Great Lakes basin averaging more than 5,000,000 gallons per day in any 30–day period, or an increase in an existing withdrawal that will result in a water loss averaging 5,000,000 gallons per day in any 30–day period above the applicant's authorized base level of water loss, the department shall notify the office of the governor or premier and the agency responsible for management of water resources in each state and province of the Great Lakes region and, if required under the boundary water agreement of 1909, the international joint commission. The department shall also request each state and province that has cooperated in establishing the regional consultation procedure under sub. (11m) to comment on the application. In making its determination on an application, the department shall consider any comments that are received within the time limit established under par. (c).

(c) *Department response.* Within the time limit established by the department by rule, which shall be consistent with the time limit, if any, established by the governors and premiers of the Great Lakes states and provinces, the department shall do one of the following in writing:

1. Notify the applicant that the application is approved or denied, and if it is denied, the reason for the denial.

2. Notify the applicant of any modifications necessary to qualify the application for approval.

(d) *Grounds for approval.* Before approving an application, the department shall determine all of the following:

1. That no public water rights in navigable waters will be adversely affected.

2. That the proposed withdrawal does not conflict with any applicable plan for future uses of the waters of the state, including plans developed under ss. 281.12 (1) and 283.83.

3. That both the applicant's current water use, if any, and the applicant's proposed plans for withdrawal, transportation, development and use of water resources incorporate reasonable conservation practices.

4. That the proposed withdrawal and uses will not have a significant adverse impact on the environment and ecosystem of the Great Lakes basin or the upper Mississippi River basin.

5. That the proposed withdrawal and uses are consistent with the protection of public health, safety and welfare and will not be detrimental to the public interest.

6. That the proposed withdrawal will not have a significant detrimental effect on the quantity and quality of the waters of the state.

7. If the proposed withdrawal will result in an interbasin diversion, all of the following:

a. That each state or province to which the water will be diverted has developed and is implementing a plan to manage and conserve its own water quantity resources, and that further development of its water resources is impracticable or would have a substantial adverse economic, social or environmental impact.

b. That granting the application will not impair the ability of the Great Lakes basin or upper Mississippi River basin to meet its own water needs.

c. That the interbasin diversion alone, or in combination with other water losses, will not have a significant adverse impact on lake levels, water use, the environment or the ecosystem of the Great Lakes basin or upper Mississippi River basin.

d. That the proposed withdrawal is consistent with all applicable federal, regional and interstate water resources plans.

(e) *Right to hearing.* Except as provided in s. 227.42 (4), any person who receives notice of a denial or modification requirement under par. (c) is entitled to a contested case hearing under ch. 227 if the person requests the hearing within 30 days after receiving the notice.

(f) The department shall charge each applicant for an approval under this subsection the fee established under sub. (10) (a) 5. All moneys collected under this paragraph shall be credited to the general fund.

(6) APPROVAL. (a) *Issuance; contents.* Subject to par. (am), if an application is approved under sub. (5), the department shall modify the applicant's existing approval or shall issue a new approval that specifies all of the following:

1. The location of the withdrawal.

2. The authorized base level of water loss from the withdrawal.

3. The dates on which or seasons during which water may be withdrawn.

4. The uses for which water may be withdrawn.

5. The amount and quality of return flow required and the place of discharge.

6. The requirements for reporting volumes and rates of withdrawal and any other date specified by the department.

7. Any other conditions, limitations and restrictions that the department determines are necessary to protect the environment and the public health, safety and welfare and to ensure the conservation and proper management of the waters of the state.

8. Any requirements for metering, surveillance and reporting that the department determines are necessary to ensure compliance with other conditions, limitations or restrictions of the approval.

9. If the department determines that a time limit is necessary, the date on which approval for the withdrawal expires.

(am) *Water loss permit.* If the department approves an application under sub. (5) for a withdrawal that is covered by a permit under s. 281.344 (5) or s. 281.346 (5) and another approval, the department shall modify the permit under s. 281.344 (5) or 281.346 (5), rather than the other approval, to specify the matters under par. (a).

(b) *Review.* The department shall review each approval prior to the expiration date specified under par. (a) 9., if any, or within 5 years from the date of issuance and at least every 5 years thereafter.

(c) *Modification by department.* The department may at any time propose modifications of the approval or additional conditions, limitations or restrictions determined to be necessary to ensure continued compliance with this section or with any other applicable statute or rule.

(d) *Revocation.* If the department determines that a person to whom an approval has been issued would be unable under any conditions, limitations or restrictions to comply with this section or another applicable statute or rule, it shall revoke the approval.

(e) *Request for modification.* A person to whom an approval has been issued or any person adversely affected by a condition, limitation or restriction of an approval may request that the department modify a condition, limitation or restriction of an approval.

(f) *Notice; right to hearing.* The department shall notify the person to whom the approval has been issued and any other person who has in writing requested notice of the receipt of a request to modify an approval or of the department's intent to modify or revoke an approval. The person to whom the approval is issued is entitled to a contested case hearing under ch. 227 before a revocation or modification takes effect. Any other person who may be adversely affected by a proposed modification is entitled to a contested case hearing under ch. 227.

(g) *Fees.* The department shall periodically collect from each person whose application under this subsection is approved the fee established under sub. (10) (a) 5. All moneys collected under this paragraph shall be credited to the general fund.

(7) EMERGENCY ORDER. The department may, without a prior hearing, order a person to whom an approval is issued to immediately stop a withdrawal if the department determines that there is a danger of imminent harm to the public health, safety or welfare, to the environment or to the water resources or related land resources of this state. The order shall specify the date on which the withdrawal must be stopped and the date, if any, on which it may be resumed. The order shall notify the person that the person may request a contested case hearing under ch. 227. The hearing shall be held as soon as practicable after receipt of a request for a hearing. An emergency order remains in effect pending the result of the hearing.

(9) AMENDMENT OF COASTAL MANAGEMENT PROGRAM. (a) The Wisconsin coastal management council, established under executive order number 62, dated August 2, 1984, shall amend this state's coastal management program submitted to the U.S. secretary of commerce under 16 USC 1455, to incorporate the requirements of this section and, before the compact's effective date, s. 281.344 and the findings and purposes specified in 1985 Wisconsin Act 60, section 1, as they apply to the water resources of the Great Lakes basin, and shall formally submit the proposed amendments to the U.S. secretary of commerce.

(b) After approval of the amendments submitted to the U.S. secretary of commerce under par. (a), the Wisconsin coastal management council shall, when conducting federal consistency reviews under 16 USC 1456 (c), consider the requirements, findings and purposes specified under par. (a), if applicable.

(c) If the department issues an approval for a withdrawal to which this section applies, and the withdrawal is subject to a federal consistency review under 16 USC 1456 (c), the Wisconsin coastal management council shall certify that the withdrawal is consistent with this state's coastal management program.

(d) This subsection does not apply after the compact's effective date.

(10) RULE MAKING; FEES. (a) The department shall promulgate rules establishing all of the following:

1. The procedures for reviewing and acting on applications under subs. (4) and (5).

2. Requirements for reporting volumes and rates of withdrawals.

3. The method for determining what portion of a withdrawal constitutes a consumptive use.

5. A graduated schedule for the fees required under subs. (5) (f) and (6) (g) and a schedule for collecting the fees under sub. (6) (g) periodically.

(b) The department may promulgate any other rule necessary to implement this section.

(11) COOPERATION WITH OTHER STATES AND PROVINCES. Before the compact's effective date, the department shall do all of the following:

(a) Cooperate with the other Great Lakes states and provinces to develop and maintain a common base of information on the use and management of the water resources of the Great Lakes basin and to establish systematic arrangements for the exchange of such information.

(b) Collect and maintain information regarding the locations, types and quantities of water use, including water losses, in a form that is comparable to the form used by the other Great Lakes states and provinces.

(c) Collect, maintain and exchange information on current and projected future water needs with the other Great Lakes states and provinces.

(d) Cooperate with the other Great Lakes states and provinces in developing a long–term plan for developing, conserving and managing the water resources of the Great Lakes basin.

(e) As provided in the Great Lakes charter, participate in the development of a regional consultation procedure for use in exchanging information on effects of proposed interbasin diversions and consumptive uses.

(11m) UPPER MISSISSIPPI RIVER BASIN CONSULTATION. The department shall participate in the development of an upper Mississippi River basin regional consultation procedure for use in exchanging information on the effects of proposed water losses from that basin.

(12) MISCELLANEOUS PROVISIONS. (a) The enumeration of any remedy under this section does not limit the right to any other remedy available in an action under the statutory or common law of this state or any other state or province, federal law or Canadian law.

(b) Proof of compliance with this section is not a defense in any action not founded on this section.

(c) This state reserves the right to seek, in any state, federal or provincial forum, an adjudication of the equitable apportionment of the water resources of the upper Mississippi River basin and, before the compact's effective date, of the Great Lakes basin, and the protection and determination of its rights and interests in those water resources, in any manner provided by law.

History: 1985 a. 60; 1987 a. 27, 186; 1987 a. 403 s. 256; 1989 a. 31; 1989 a. 56 s. 259; 1991 a. 32; 1991 a. 39; 1995 a. 227 s. 400; Stats., 1995 s. 281.35; 1999 a. 150 s. 672; 2003 a. 310; 2007 a. 96, 227; 2009 a. 180.

NOTE: Section 1 of 1985 Act 60, which created this section is entitled "Legislative findings; purpose."

Cross Reference: See also ch. NR 142, Wis. adm. code.

281.36 Water quality certification for nonfederal wetlands. (1) DEFINITIONS. In this section:

(a) "Additional federal law or interpretation" means any of the following:

1. An amendment to 33 USC 1344 (f) that becomes effective after January 9, 2001.

2. Any other federal statutory provision that affects the exemptions under 33 USC 1344 (f) and that becomes effective after January 9, 2001.

3. A regulation, rule, memorandum of agreement, guidance letter, interpretive document, or other provision established by a federal agency that is promulgated or adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC 1344 (f), that applies to wetlands located in this state, and that becomes effective after January 9, 2001.

4. A decision issued by a federal district or federal appellate court that affects the application of a federal amendment or provision described in subds. 1. to 3., that applies to wetlands located in this state, and that is issued after January 9, 2001.

(am) "Area of special natural resource interest" has the meaning given in s. 281.37 (1) (a).

(b) "Existing federal law or interpretation" means any of the following:

1. 33 USC 1344 (f), as amended to January 8, 2001.

2. A regulation, rule, memorandum of agreement, guidance letter, interpretive document, or other provision established by a federal agency that is promulgated or adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC 1344 (f), that applies to wetlands located in this state, and that is in effect on January 8, 2001.

3. A decision issued by a federal district or federal appellate court that affects the application of a federal statute or provision described in subd. 1. or 2., that applies to wetlands located in this state, and that is issued on or before January 8, 2001.

(bg) "Federal transportation agency" means the federal aviation administration, the federal highway administration, or the federal railroad administration.

(c) "Nonfederal wetland" means a wetland that is identified as such under sub. (1m).

(cm) "Political subdivision" means a city, village, town, or county.

(cr) "State transportation agency" means the department of transportation or the office of the commissioner of railroads.

(d) "Water quality standards" means water quality standards set under rules promulgated by the department under s. 281.15.

(1m) DETERMINATION OF NONFEDERAL WETLANDS. (a) A wetland is identified as a nonfederal wetland if either of the following applies:

1. Any discharges of dredged or fill material into the wetland are determined not to be subject to regulation under 33 USC 1344 due to the decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99–1178 (U.S. Jan. 9, 2001) or any subsequent interpretations of that decision by a federal agency or by a federal district or federal appellate court that applies to wetlands located in this state.

2. The wetland is determined to be a nonnavigable, intrastate, and isolated wetland under the decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99–1178 (U.S. Jan. 9, 2001) or any subsequent interpretations of that decision by a federal agency or by a federal district or federal appellate court that applies to wetlands located in this state.

(b) For the purpose of identifying wetlands under par. (a):

1. If the U.S. army corps of engineers issues a determination as to whether a wetland is a nonfederal wetland, the department shall adopt that determination.

2. If the U.S. army corps of engineers does not issue a determination as to whether a wetland is a nonfederal wetland, the department shall determine whether the wetland is a nonfederal wetland.

(2) CERTIFICATION REQUIREMENT. (a) No person may discharge dredged or fill material into a nonfederal wetland unless the discharge is authorized by a water quality certification issued by the department under this section. No person may violate any condition imposed by the department in a water quality certification under this section. The department may not issue a water quality certification under this section unless it determines that the discharge will comply with all applicable water quality standards.

(b) 1. The department shall approve or deny a complete application for a water quality certification under this section within 120 days after the date the department determines that a complete application for the certification has been submitted unless the applicant and the department agree to extend the time period. The department may not determine an application to be complete until the requirements under s. 1.11 have been met and until all of the items of information for the water quality certification and for any associated permits or other approvals have been submitted to the department. If the department fails to approve or deny the complete application within the applicable time period,

STATE OF WISCONSIN
SUPREME COURT
Appeal No.: 2008 AP 3170

LAKE BEULAH MANAGEMENT DISTRICT,
Petitioner-Appellant-Cross-Respondent

and

LAKE BEULAH PROTECTIVE AND
IMPROVEMENT ASSOCIATION,
Co-Petitioner-Co-Appellant-Cross-Respondent,

vs.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,
Respondent-Respondent,

VILLAGE OF EAST TROY,
Intervening Respondent-Respondent-Cross-Appellant- Petitioner.

BRIEF OF LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION

On Appeal from a Decision of the Court of Appeals, District II dated June 16, 2010, Affirming in Part and Reversing in Part a Judgment Entered in the Walworth County Circuit Court on September 20, 2008, The Honorable Robert J. Kennedy, Presiding, Walworth County Circuit Court Case Nos. 06-CV-172

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December 27, 2010

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By Order dated November 5, 2010, this Court ordered that this case be scheduled for oral argument on the same calendar assignment as Case No. 2009AP2010, *Lake Beulah Management District v. Village of East Troy.*

Lake Beulah Protective and Improvement Association respectfully requests publication. The outcome of this case will determine a matter of substantial and continuing public interest. This case affects many property owners along the shores of Lake Beulah, may of which are also members of The Lake Beulah Protective and Improvement Association. The Court's decision in this case will also: (1) clarify the law applicable to the issuance of high capacity well permits under Chapter 281 of the Wisconsin Statutes and other applicable environmental statutes; (2) enunciate the obligations of the State of Wisconsin and the Department of Natural Resources to protect the navigable waterways of the State of Wisconsin under the Public Trust Doctrine; and (3) resolve conflicts as to the Department of Natural Resources' interpretation of its responsibilities under the Public Trust Doctrine. Therefore, the Lake Beulah Protective and Improvement Association believes that publication is warranted in this case pursuant to sections 809.23(1)(a)1, 2, 3 and 5, Wis. Stats.

INTRODUCTION

This appeal is the latest in a number of attempts by the Village of East Troy (the "Village") to prevent a full and impartial review of the potential adverse impacts of the operation of its high capacity water well ("Well No. 7") on Lake Beulah and its environs. Well No. 7 is located approximately 1,200 feet from the waterline of Lake Beulah and has the capacity to withdraw one million four hundred and forty four thousand (1,440,000) gallons of water ***per day***. (R.17, p.101) (Bates No. 00097).[1] Because Well No. 7 withdraws from the groundwater aquifers that supply the springs and other hydrogeologic structures of Lake Beulah, the operation of this well will unquestionably intercept and withdraw groundwater that would otherwise supply Lake Beulah.

On September 4, 2003, the State of Wisconsin Department of Natural Resources ("DNR") issued a permit for the Village's construction of Well No. 7 (the "2003 Permit"). The 2003 Permit, which was effective for a two (2) year period, was extended by the DNR on September 6, 2005 (the "2005 Permit").

Resolution of the primary issue in this case comes down to this: do Wis. Stat. §§ 281.34 and 281.35 prohibit the DNR from

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[1] R.__ citations are to the Record of the Circuit Court. When referring to citations within Document # 17 (which is Bates labeled), LBPIA will also refer to the Bates numbers for the Court's convenience.

considering any potential environmental impact of a high capacity well (such as Well No. 7) when considering a permit in all situations except those specifically cited by the statutes, or do these statutes merely establish a minimum level of environmental review for those specifically cited situations. Stated differently, do Wis. Stat. §§ 281.34 and 281.35 act as constraints on the broad authority granted the DNR under Wis. Stat. §§ 281.11 and 281.12, or do they provide a minimum level of guidance to the DNR on how it must fulfill its duty under §§ 281.11 and 281.12?

The Lake Beulah Protective and Improvement Association ("LBPIA") argues that in light of §§ 281.11 and 281.12's broad grant of authority and corresponding duties to the DNR to protect the State's natural resources, the DNR may always consider the potential negative environmental impact of a high capacity well when considering the issuance of a permit under §§ 281.34 and 281.35. Sections 281.34 and 281.35 do not prohibit the DNR from considering relevant factors (in addition to those specifically listed) consistent with the broad duties and obligations delegated to it under Wis. Stat. §§ 281.11 and 281.12. Instead, these sections provide guidance on how the DNR is to implement its well permitting duties and obligations.

The Village, on the other hand, argues Wis. Stat. §§ 281.34 and 281.35 set the maximum limits of DNR review allowed and prohibit the DNR from considering any factors other than those specifically set forth in the text of §§ 281.34 and 281.35—even if the other factors are relevant under §§ 281.11 and 281.12. Acknowledging, as it must, the broad grant of authority to the DNR by §§ 281.11 and 281.12, and the absence of any language in §§ 281.34 and 281.35 expressly limiting the DNR's authority, the Village resorts to various rules of statutory construction to support its argument that Wis. Stat. §§ 281.34 and 281.35 eliminate the broad authority granted to the DNR by §§ 281.11 and 281.12.

The Village's analysis, however, completely ignores the historical development of the public trust doctrine embodied in the great weight of authority provided by this Court and the intermediate appellate courts of this State analyzing the parameters of the doctrine and, instead, relies on a skewed view of the Legislature's related enactments implementing the doctrine. Contrary to the Village's argument, the broad legislative grant of authority embodied in Wis. Stat. §§ 281.11 and 281.12 (as well as other similar legislative grants of authority to the DNR), and the corresponding absence of any limiting language in §§ 281.34 and 281.35, show a clear and unambiguous intent by the Legislature that §§ 281.34 and 281.35

merely establish a minimum threshold and do not otherwise limit the DNR's consideration of other relevant factors embodied in §§ 281.11 and 281.12.

The remaining issue in this case is whether the DNR should have considered certain "scientific evidence," which recognizes potential damage to Lake Beulah from the operation of Well No. 7, that was in its possession prior to issuing the 2005 Permit. The Village's position is that the DNR could ignore such "scientific evidence" prior to issuing the 2005 Permit because this evidence was not part of the record for the 2005 Permit. Rather, it was only part of the record for the 2003 Permit. The Village's argument is based on the fact that the "scientific evidence" at issue was only provided to counsel for the DNR in connection with a motion for reconsideration of 2003 Permit.

Given that the two permits involved the same parties, the same issues and the same legal counsel for the Village and the DNR, the Village's overly-formalistic view of the record before the DNR for the 2005 Permit is unsupportable. Moreover, at one point, the 2005 Permit was viewed by legal counsel for the Village and the DNR as nothing more than an "extension" of the 2003 Permit. Thus, the Court of Appeals correctly held that this scientific evidence was

in the DNR's possession at the time it issued the 2005 Permit and should have been considered.

STATEMENT OF THE CASE

The Respondents

The Respondents, Lake Beulah Management District ("Lake District") and LBPIA have a unique interest in the preservation, use, beauty and character of Lake Beulah and its surrounding environs. The Lake District is a Lake Management District which exists to improve and protect the quality of inland lakes, such as Lake Beulah. (R.22, p.67); *see also* Wis. Stat. § 33.11. LBPIA is a non-profit, unincorporated association largely made up of various property owners along or near the shores of Lake Beulah. (R.22, p.68). Its primary purpose is to improve and protect Lake Beulah and its adjacent waterways and surroundings. (*Id.*). LBPIA and Lake District shall be collectively referred to herein as the "Conservancies."

Relevant Facts and Procedural History

The Court of Appeals Decision presented an extensive recitation of the facts and procedural history of this matter. However, LBPIA believes that the following additional facts are helpful to understand the overall context of this case.

A. The September 4, 2003 Permit.

On September 4, 2003, the DNR conditionally approved the plans and specifications for Well No. 7. (R.22, pp.12-15).

Before issuing the 2003 Permit, the DNR reviewed and considered only a few reports prepared by the Village's consulting firms. In that regard, on June 18, 2003, Crispell-Synder, Inc. ("Crispell-Snyder") submitted two reports: (1) a Well Site Investigation Report dated June 2003 ("Investigation Report") and (2) a Detailed Specifications For Well No. 7 Village of East Troy, Walworth County, Wisconsin. (R.17). While the Investigation Report addressed potential impacts of Well No. 7 on "adjacent municipal supply systems," it did not directly address the potential negative impacts to Lake Beulah. (R.17, p.96 (Bates number 000093)).

Apparently, based on its review of these reports, the DNR summarily concluded that the high capacity well "would avoid any ***serious*** disruption of groundwater discharge to Lake Beulah." (R.22, p.13). The DNR did not provide any analysis of what constituted a "serious disruption" or how it arrived at its conclusion. In addition, there is no indication that DNR conducted any analysis, or made any determination, whether Well No. 7 would negatively impact the navigable waters of Lake Beulah.

The 2003 Permit stated that it was only valid for two (2) years following its issuance date, and would be automatically void if the Village did not commence the "construction or installation" of the well within that two (2) year deadline. (R.22, p.14).

B. The Challenge to the 2003 Permit.

On October 3, 2003, the Lake District filed a "Petition for Contested Case Hearing" with the DNR in which it requested a hearing to determine whether Well No. 7 would have any negative impact on Lake Beulah or its surrounding environment.[2] (R.22, pp.16-23). In that Petition, the Lake District asserted that the DNR had failed to fulfill its obligations under the public trust doctrine. (R.22, p.18, ¶5).

The DNR granted a contested case hearing on the following issue:

> Whether the DNR should have considered any potentially adverse effects to the waters of Lake Beulah, including subsurface water sources feeding the lake, the groundwater aquifer in amounts affecting the lake and sensitive environmental areas and the overall ecosystem, and nearby private wells, when the Department granted a conditional approval of the plans and specifications for proposed Municipal Well No. 7 in the Village of East Troy.

(R.22, p.28).

[2] LBPIA intervened in this proceeding. (R.22, pp.93-100).

The case was assigned to an Administrative Law Judge (the "ALJ"). (R.22, pp.73-91). The Village filed a Motion for Summary Disposition arguing that the case only presented a "legal question that does not require an evidentiary hearing" and could be resolved solely on the basis of statutory interpretation, without regard to the public trust doctrine. (R.22, pp.30, 33-37). The Village also argued that, when considering whether to approve Well No. 7, the only issue the DNR could consider was whether the well impacted a public utility. (R.22, pp.31-42).

The ALJ granted the motion to dismiss, but acknowledged that the DNR had an obligation to consider evidence of "secondary impacts upon the surface waters of the lake or upon a private well," if such evidence was presented. (*Id.*, p.76). The ALJ determined that there was no such evidence presented and dismissed the case. (*Id.*, pp.77-78).

C. Judicial Review of the 2003 Permit.

On July 16, 2004, the Lake District filed a "Petition and Complaint for Judicial Review" of the ALJ's decision in the Walworth County Circuit Court, Case No. 04-CV-683. The Lake District alleged that the ALJ had erroneously dismissed its Petition in direct contradiction to the DNR's directive to hold a contested case hearing, and that the operation of Well No. 7 would "harm the

myriad of interests of its residents, property owners and the overall environment of Lake Beulah as a whole." (R.22, pp.92-100).

During briefing, the DNR acknowledged that it had the authority under the public trust doctrine to deny an application for a high capacity well that otherwise met the applicable statutory criteria, if the well negatively impacted the navigable waters of the State. (R.22, pp.103-104).

On June 24, 2005, the Circuit Court of Walworth County, the Honorable James L. Carlson presiding, affirmed the ALJ's denial of the Conservancies' Petition for Contested Case Hearing. (R.22, pp.117-31). The circuit court adopted the reasoning of the ALJ and held that "Petitioners argue that the public trust doctrine should be considered broadly, and that they wish the opportunity to show why they believe there will be scientific evidence showing the problem with granting the approval of the Village's well," but "[t]hey were given that opportunity and failed to take it." (R.22, p.130).

D. Motion for Reconsideration.

On August 4, 2005, the Conservancies filed a Motion for Reconsideration of Judge Carlson's decision attaching the Affidavit of Robert J. Nauta (the "Nauta Affidavit"). (*See* App.-135). Nauta, a licensed professional geologist with over eighteen (18) years of experience in performing and interpreting hydrogeological studies,

had been retained by the Lake District to assess the probable impacts of Well No. 7. (R.19, pp.5-29, ¶¶ 2-3).

Nauta reviewed reports submitted by the Village's consultants in connection with Well No. 7, installed his own "test wells," and was otherwise "conducting groundwater and surface water studies relating to the hydrology of Lake Beulah, Wisconsin." (App.-135, ¶ 5). From his work, Nauta concluded:

(1) The proposed well site for Well No. 7 was within approximately 1,200 feet of "a shoreland wetland adjacent to the south shore of Lake Beulah (the "Sensitive Wetland")", (*Id.*, ¶10);

(2) That groundwater was Lake Beulah's primary source of water with lesser contributions to the Lake from precipitation and surface flow, (*Id.*, ¶17);

(3) Lake Beulah was a "flow-through" Lake, "meaning that groundwater enters the Lake at one end (the south end), and the Lake water discharges to the groundwater system at the other end (north end)," (*Id.*, ¶18);

(4) Well No. 7 is located at the south end of Lake Beulah where the groundwater flows into the Lake, (*Id.*, ¶18);

(5) Layne-Northwest, the Village's consultant, had performed an aquifer test at the approximate site of proposed Well No. 7 in February 2003 ("Aquifer Test"). The test was pumped "at a rate of 400 gpm which is less than one-half the requested Well No. 7 permit capacity of 1,000 gpm, for a period of only 72 hours. Several wells were monitored for changes in the groundwater elevation in the area surrounding the test well during the pump test, including one well in the Sensitive Wetland, (*Id.*, ¶ 20);

(6) That the Village's consultants had confirmed during the Aquifer Test that the groundwater

beneath the Sensitive Wetland was lowered nearly .2 feet during a "relatively short duration of the test pump period." "In addition, the same documentation disclosed that the aquifer had not yet reached a steady state before the test pump was terminated, indicating that, water levels were still dropping when the pump was turned off." (*Id.*, ¶21);

(7) The Aquifer Test also indicated that there was a "substantial lowering of groundwater levels" of the other shallow wells being monitored, (*Id.*, ¶22);

(8) That the actual "drawdown of shallow groundwater" in the Sensitive Wetland was likely to be greater than .2 feet, (*Id.*, ¶23);

(9) That the Aquifer Test proves, that once in operation, Well No. 7 will intercept groundwater that would otherwise have been discharged into the Lake. This interception could result in "reversing the groundwater flow direction beneath the south end of Lake Beulah" and force water to flow out of the Lake to Well No. 7, (*Id.*, ¶24);

(10) That "a significant reduction or reversal of [the groundwater] flow gradient could be caused by the operation of the proposed Well No. 7, resulting in the reduction or elimination of groundwater flow into this portion of the Lake," (*Id.*, ¶25);

(11) Because of the proposed residential development of the area, any water removed from Lake Beulah for Well No. 7 would be used and discharged into the Village's sanitary sewer system and thus be permanently removed from the Lake's watershed, (*Id.*, ¶28);

(12) That the aquifer tests performed by Layne-Northwest were "inadequately designed and improperly conducted for the purpose of evaluating environmental impacts to sensitive environmental features and navigable surface water," (*Id.*, ¶29); and

(13) Even though Layne-Northwest's tests were inadequately designed, those tests still "clearly demonstrate potential for adverse impacts to

> Lake Beulah and to an environment already classified by the WDNR as a sensitive environmental feature. ***Moreover, the aquifer test results clearly demonstrate interruption or disruption of groundwater supply to Lake Beulah and a diversion of surface water from Lake Beulah, which are likely to cause adverse effects to the Lake and wildlife dependent upon the Lake."*** (*Id.*, ¶29) (emphasis added).

In his Affidavit, Nauta concluded that "[i]t is my opinion that the existing data can only support the conclusion ***that pumping of proposed Well No. 7 would cause adverse environmental impacts to the Wetland and navigable surface waters of Lake Beulah.***" (*Id.*, ¶31) (emphasis added).

E. Appeal of Decision on the 2003 Permit and the 2005 Permit.

The Conservancies also appealed the Circuit Court's decision. (R.22, pp.162-65). During that appeal, the Wisconsin Department of Justice (the "DOJ") moved the Court of Appeals for leave to file an *amicus curiae* brief asserting that the DNR had failed to fulfill its responsibilities under the public trust doctrine.[3] (R.22, pp.133-50). In its *amicus brief*, the DOJ stated:

> [D]espite DNR's shared concern that the high capacity well's impacts on navigable waters are likely and should be considered at the application stage, DNR did not act on that concern. DNR did not conduct an investigation to allay its shared concern either before or after the contested hearing was held. As trustee it should have.

[3] The DOJ's motion was denied on the basis that the State of Wisconsin was already a party to the action and being represented by the DNR. For purposes of protecting navigable waters, the DNR was dominant to the Attorney General. (R.22, p.152).

. . . .

> An agency of the State has no authority to approve permits that would violate the public trust or to follow a statute that obligates it to do so.

(R.22, p.142).

While that appeal was pending, the Village sent a letter to the DNR requesting an "extension" of the 2003 Permit for an additional two (2) years. (R.22, pp.156-57). Counsel for the DNR initially stated it could not grant an "extension" of the 2003 Permit, but that the DNR could only grant a new permit because the applicable law had changed in the meantime. (R.22, tab 15). In response, counsel for the Village informed the DNR that the Village did not want a new permit because that would provide the District a new opportunity for a contested case hearing (which the Village specifically wanted to avoid and could avoid if an extension was granted instead of a new permit). (*Id.*). On September 6, 2005, the DNR granted the 2005 Permit. (R.22, pp.159-60).

The 2005 Permit was issued on the basis of the same reports and information in the DNR's files from the 2003 Permit. In fact, the only "new" information in the DNR's files in connection with the 2005 Permit was a "review" whether the well application fell within the requirements of Wis. Stat. § 281.34(5)(b)-(d) regarding "exceptional resource waters," springs, and "volumes above 2,000,000 gallons per day." (R.22, pp.162-65). The DNR also received a letter from Crispell-Snyder confirming there had been "no

changes in the physical circumstances upon which the application was based" since the 2003 Permit. (R.8, p.6). The DNR did not consider the Nauta Affidavit or undertake any analysis whether Well No. 7 would negatively impact Lake Beulah.

During the appeal of the 2003 Permit, the Village argued that the 2005 Permit was not an "extension," but rather a new permit. The Court of Appeals accepted this argument and determined that the appeal was moot. (R.22, pp.162-65).

F. Judicial Review of the 2005 Permit.

To preserve its appellate rights in case the 2005 Permit was deemed a "new" permit, the Conservancies filed a "Petition and Complaint for Judicial Review" in the Walworth County Circuit Court, Case No. 06-CV-172, on March 3, 2006. (R.22, pp.167-81). The Petition alleged that Well No. 7 was likely to negatively impact nearby private wells and the waters of Lake Beulah, and that the DNR failed to consider these impacts before issuing the 2005 Permit. (R.22, pp.167-73). The Petition requested that the Court remand the matter to the DNR to reconsider the approval and include consideration of its public trust doctrine obligations. (R.22, p.172).

On September 23, 2008, the Circuit Court denied the Conservancies' Petition for Review and held that the 2005 Permit was not void under the public trust doctrine. (R.40, p.13). It held

that the DNR had the authority to consider the potential negative impacts of the high capacity well on navigable waters, but that the Conservancies had not presented evidence of that harm. (R.40, pp.15-17). The Circuit Court acknowledged that the DNR had an obligation to review evidence of potential harm to Lake Beulah. It expressly mentioned the Nauta Affidavit, but mistakenly concluded that the DNR was not in possession of that document when it issued the 2005 Permit. (R.40, p.11).

G. The Court of Appeals' Decision.

The Court of Appeals concluded that the DNR had an obligation to consider the Nauta Affidavit (and other evidence of potential harm to Lake Beulah) when reviewing the application for Well No. 7.

The Court of Appeals determined that the Wisconsin Legislature had given the DNR the general duty of managing the public trust doctrine. (App.-115, 116). It found this authority in Wis. Stat. § 281.12(1), which gave the DNR "general supervision and control over the waters of the state" and the power to "carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of [Wis. Stat. ch. 281]." (App.-112). It also relied on § 281.11, which states:

> The department shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private. . . . ***The purpose of this subchapter is to grant necessary power and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed in favor of the policy objectives set forth in this subchapter.***

Wis. Stat. § 281.11 (emphasis added).

The Court of Appeals interpreted Wis. Stat. §§ 281.11 and 281.12(1) as "expressly delegating regulatory authority to the DNR necessary to fulfill its mandatory duty 'to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private.'" (App.-112). The fact the statute did not expressly mention governance over wells was of no consequence. (App.-113). The primary issue was the protection of the waters of the state, and the Court of Appeals held that the DNR could regulate wells to the extent they had an impact on the waters of the State. (*Id.*)

The Court of Appeals rejected the Village's argument that the regulatory framework of Wis. Stat. §§ 281.34 and 281.35 provided the exclusive criteria upon which the DNR would evaluate a well permit application. (App.-114). In doing so, the Court of Appeals held that there was nothing in the language of Wis. Stat. §§ 281.34

and 281.35 to evidence any intent by the Legislature to abrogate the DNR's general authority under Wis. Stat. §§ 281.11 and 281.12(1). (App.-115, 116). Moreover, the Court of Appeals held that Wis. Stat. §§ 281.34 and 281.35 only identified those circumstances in which the DNR was ***required to investigate*** well applications. (App.-116). The statutes did not, however, state that those were the only circumstances in which the DNR ***could investigate***. (*Id.*).

The Court of Appeals then defined when the DNR's duty to investigate was triggered and determined that the DNR had a duty to investigate a well's adverse environmental impacts whenever it was presented with sufficient evidence of that potential harm. (App.-120). The Court of Appeals relied on the DNR's "particular expertise when it comes to water quality and management issues" and left it "to the DNR to determine the type and quantum that it deems enough to investigate." (App.-120) (citations omitted).

As relates to this case, it held that "scientific evidence" suggesting an adverse effect was clearly enough to warrant further investigation. (*Id.*). Further, even though the Nauta Affidavit had not been presented to the DNR through the ordinary means, the "decision makers" at the DNR were deemed to have been in possession of that document. (*Id.*)

The Court acknowledged that, generally, a citizen is required to present evidence in connection with a well application while the permit process is ongoing, through a contested case hearing or in a proceeding for judicial review through a motion to supplement the record under Wis. Stat. § 227.56. (App.-121). It also noted that although the Conservancies did not use any of these approaches, the Nauta Affidavit was deemed a part of the "agency record" under the unique facts of this case. The Court of Appeals noted that the DNR's counsel had been served with a copy of the Nauta Affidavit with the motion for reconsideration of Judge Carlson's decision, a day ***after*** the same lawyer received the request by the Village to "extend" the 2003 Permit. (App.-124). While the DNR lawyer gave her client a copy of the request for extension, she did not pass along the Nauta Affidavit. (*Id.*). Under these circumstances, the Court of Appeals imputed the DNR's lawyer's possession of the document to the "decision makers" at the DNR. (*Id.*).

Thus, the Court of Appeals reversed the Circuit Court's decision and remanded "with directions to, in turn, remand this case to the DNR so that it may consider the Nauta affidavit and any other information the agency had pertinent to Well #7 before it issued the 2005 approval." (App.-125).

ARGUMENT

The LBPIA believes that the absence of any language qualifying or limiting the DNR's broad grant of authority to protect, preserve and manage this State's waters sufficiently forecloses any further discussion on the subject and renders unnecessary any alternative rules of statutory construction such as the historical development of Wis. Stat. §§ 281.34 and 281.35. Nonetheless, LBPIA believes a close examination of the historical development is important here because the Village uses such alternative rules of statutory construction and does so in a manner that ignores the much broader historical development of the public trust doctrine and the legislative enactments leading up to the passage of §§ 281.34 and 281.35.

The public trust doctrine derives from the organic laws of the State of Wisconsin and predates its Constitution. Article IX, § 1 of Wisconsin's Constitution was copied verbatim from the Northwest Ordinance of 1787, and has been construed over the years to vest in the State title to its navigable waters, in trust for the use of the public. *State v. Village of Lake Delton*, 93 Wis. 2d 78, 90, 286 N.W.2d 622 (1978); Madison *v. Wisowaty,* 211 Wis. 23, 27, 247 N.W. 527 (1933). Over time, the public's rights in navigable waters have been expansively interpreted. *Village of Lake Delton,* 93 Wis.

2d at 89-91 (citing *Muench v. Public Service Comm'n,* 261 Wis. 492, 508, 53 N.W.2d 514 (1952)). As this Court has directed, the public trust doctrine is to be "broadly and beneficially construed." *R.W. Docks and Slips v. State*, 2001 WI 73, ¶23, 244 Wis. 2d 497, 512, 628 N.W.2d 781 (citations omitted).

"Art. IX, sec. 1 of the Wisconsin Constitution, is a limitation upon the legislature to protect public rights in navigable waters from dissipation or diminution by acts of the legislature as trustee of such waters." *Omernik v. State,* 64 Wis. 2d 6, 13-14, 218 N.W.2d 734 (1974). The State, through its Legislature, therefore has an *affirmative* duty to protect and preserve its waters for a variety of uses. *Wisconsin's Envtl. Decade, Inc. v. Dep't of Natural Resources,* 85 Wis. 2d 518, 526-27, 271 N.W.2d 69 (1978). The Legislature, in turn, has delegated broad authority to the DNR to serve as protector and enforcer of the public trust. *ABKA Ltd. P'ship v. Dep't of Natural Resources*, 2002 WI 106, ¶12, 255 Wis. 2d 486, 497, 648 N.W.2d 854.

In the case of high capacity wells, the Village, however, contends that the DNR's ability to act as protector and enforcer of the public trust is circumscribed only by legislative decree; a result which is not supported by the judicial interpretation and application of the doctrine and the corresponding legislative enactments. (*See,*

e.g., Brief of Village of East Troy ("Village's Brief"), at 10-20). Contrary to the Village's assertions, as set forth below, the common law history of the public trust doctrine and the corresponding body of legislative enactments demonstrate an expanded definition and application of the doctrine and corresponding grant of authority to the DNR. *See State v. Land Concepts, Ltd.*, 177 Wis. 2d 24, 30, 501 N.W.2d 817 (Ct. App. 1993) (relying, in part, on historical context of the law's development to help determine legislative intent).

I. THE HISTORICAL DEVELOPMENT OF THE PUBLIC TRUST DOCTRINE AND THE CORRESPONDING LEGISLATIVE ENACTMENTS EVIDENCE A BROAD GRANT OF AUTHORITY TO THE DNR TO PRESERVE AND MANAGE THE STATE'S WATERS.

Prior to the turn of the Twentieth Century, there was very little regulation of the State's waters despite the inclusion of Article IX, § 1 in the State Constitution. Indeed, Article IX, § 1 failed to provide any definition of navigable waters. However, in the early 1900s, as use of and need for water increased, the public trust doctrine was analyzed and its scope defined. As this Court observed in *Diana Shooting Club v. Husting*, "[navigable waters] should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation." 156 Wis. 261, 271, 145 N.W. 816 (1914).

The State, too, began to slowly regulate how its waters were used. Laws were passed regulating the use and construction of dams, bridges and other obstructions to navigable waters[4], the clearing out and removal of obstructions from or changing the natural course of natural or artificial channels, streams and navigable lakes[5], and the diversion of water.[6]

A review of the subsequent amendments and revisions to these legislative enactments show an expanding definition of the public's rights and interests in and to the waters of this State, and the Legislature's corresponding expansion of the powers delegated to the Railroad Commission and its successors, the Public Service Commission and the DNR, to regulate those waters. For example, the definition of navigable waters was changed in 1911, eliminating the saw-log test, which was based on commercial considerations. It was replaced with a definition that included streams or rivers that were "navigable in fact for any purpose whatsoever," including recreational use. *See, e.g.*, *Muench*, 261 Wis. at 505-06. Later, Justice Crownhart, speaking for this Court in *Nekoosa-Edwards Paper Co. v. Railroad Commission*, observed:

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[4] *See* the first Water Power Act, 1911 Laws Ch. 652, and the subsequent versions, *i.e.*, Water Power Law, 1915 Laws Ch. 380 and 1929 Laws Ch. 523.
[5] 1907 Laws Ch. 646.
[6] 1935 Laws Ch. 287.

> Indeed, courts have recognized, and now more than ever before recognize, the public's interest in pleasure and sports as a measure of public health. *State ex rel. Hammann v. Levitan*, 228 N.W. 140. In fact, navigable waters, in contrast with nonnavigable waters, is but one way of expressing the idea of public waters, in contrast with private waters. Boating for pleasure is considered navigation as well as boating for pecuniary profit. *State v. Korrer*, 127 Minn. 60, 148 N.W. 617, 1095, L.R.A.1916C, 139.

201 Wis. 40, 46-47, 228 N.W. 144 (1929).

Similarly, the scope of what constituted the public's right in the State's waters was expanded and defined by several other legislative enactments. For example, in 1929, the Legislature amended Wis. Stat. § 31.06(3) and provided that the enjoyment of scenic beauty is a public right to be considered by the Public Service Commission when considering a permit for a proposed dam. *See* 1929 Laws Ch. 523, § 1. In 1933, the Legislature made it unlawful to deposit any material or to place any structures upon the bed of any navigable water where no shoreline has been established or beyond such shoreline where the same has been established. *See* 1933 Laws Ch. 455, § 2 (creating Wis. Stat. § 30.02(1)(b)).[7] And, in 1949, the Legislature amended § 30.02 to provide for the issuance of permits to build structures on the beds of navigable waters.[8] *See* 1949 Laws Ch. 335.

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[7] Section 30.02(1)(b) is now part of Wis. Stat. § 30.12.

[8] For a more detailed discussion of the progressive expansion of the public trust doctrine and corresponding legislative enactments, see *Muench v. Public Service Commission*, 261 Wis. 492, 53 N.W.2d 514, *on rehearing* 55 N.W.2d 40 (1952).

However, despite the aforementioned legislative enactments designed to protect the State's waters, as the State's population grew, so did its water problems. This Court acknowledged the growing water problems in *Nekoosa Edwards Paper Co. v. Public Service Commission*, where it stated

> Rights of the public, sportsmen, consumptive users such as farmers and irrigators, and nonconsumptive users such as hydro-electric power companies—and the rights of manufacturers, municipalities, and those people interested in recreation, conservation, and the enjoyment of natural scenic beauty—all are a part of the water problem. Many efforts and studies have been made in recent years by the legislature and others to solve this problem. *See* Coates, "Present and Proposed Legal Control of Water Resources in Wisconsin," 1953 Wisconsin Law Review, 256; Beuscher, "Wisconsin's Law of Water Use," 31 The Wisconsin Bar Bulletin 30 (October, 1958); Modjeska, "Wisconsin's Water Diversion Law: A Study of Administrative Case Law," 1959 Wisconsin Law Review 279; Wisconsin Legislative Council Report, 1959, Vol. 4, "Water Resources."

8 Wis. 2d 582, 594, 99 N.W.2d 821 (1959).

The Legislature responded. Shortly after the *Nekoosa Edwards'* Court's recognition of the State's water problems, the Legislature passed the Water Quality Act of 1965, a comprehensive act to protect the waters of the state. 1965 Laws Ch. 614. The purpose of the act was to enhance "the quality management and protection of all waters of the state" through a "comprehensive action program . . . to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water." *See id.*

at § 1; Wis. Stat. § 144.025(1) (1967). It created the Department of Resource Development to "serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private." Wis. Stat. § 144.025.

As part of the Water Quality Act, the Navigable Waters Protection Law was passed, which, yet again, expanded the public trust doctrine by requiring the protection of shorelands and wetlands as a component of the State's duty to protect navigable waters. *See* 1965 Laws Ch. 614, § 42; *see also Just v. Marinette County*, 56 Wis. 2d 7, 10-11, 201 N.W.2d 761 (1972). The Navigable Waters Protection Law included a mandate that all counties coordinate with the Department of Resource Development to enact shoreland zoning ordinances, and provided that the purposes of shoreland zoning standards shall "further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structures and land uses and reserve shore cover and natural beauty." *See* 1965 Laws Ch. 614, § 42 (creating Wis. Stat. § 144.26)[9]. The Legislature implemented this purpose by empowering the DNR to develop water conservation standards and to disseminate these

[9] Wis. Stat. § 144.26 is currently numbered Wis. Stat. § 281.31(1).

"general recommended standards and criteria" to local municipalities. Wis. Stat. § 144.26(6) (1967). This Act, the precursor to what is now Wis. Stat. §§ 281.11 and 281.12, was the most expansive and comprehensive legislative implementation to date of the public trust doctrine and delegation of responsibility and authority to the DNR to protect, maintain and improve the quality and management of the waters of the state. *See* Wis. Stat. § 144.26(6) ("the department shall prepare and provide to municipalities general recommended standards and criteria for navigable water protection studies and planning and for navigable water protection regulations and their administration.")

Beginning in 1985, recognizing the increasing demands on the State's groundwater supply, and the lack of any guidance as to how applications for well permits were to be reviewed, the Legislature began enacting a series of statutes that set minimum standards for the application process. In 1985, the Legislature raised the bar in the application process by specifying a particular level of environmental review required before the DNR granted a permit for a high capacity well with a water loss of 2,000,000 gpd or more. *See* 1985 Wis. Act 60, § 15. In 2004, the Legislature raised the bar yet again by specifying a particular level of environmental review required for certain categories of high capacity wells with water loss

of between 100,000 gpd and 2,000,000 gpd. *See* 2003 Wis. Act 310, § 7. Moreover, during this same time period, the Legislature continued to develop laws and regulations addressing the preservation and management of the State's waters.

In addition, the Legislature passed the Wisconsin Environmental Policy Act, which had a purpose of "effect[ing] an across-the-board adjustment of priorities in the decision-making processes of agencies of state government. The Act constitute[d] a clear legislative declaration that protection of the environment is among the 'essential considerations of state policy,' and as such, is an essential part of the mandate of every state agency." *Wisconsin's Envtl. Decade, Inc. v. Public Serv. Comm'n*, 79 Wis. 2d 409, 416, 256 N.W.2d 149 (1977).

In sum, as set forth above, the history of the legislative enactments dealing with the State's resources, and in particular, its waters, clearly demonstrate the expanding application of the public trust doctrine to the State's waters and the Legislature's intent to empower the DNR, as the State's protector, to proactively preserve and manage those waters.

II. LEGISLATION ADDRESSING THE DNR'S DUTIES AND OBLIGATIONS RELATING TO THE STATE'S WATERS AND JUDICIAL INTERPRETATION OF THE PUBLIC TRUST DOCTRINE SUPPORT THE DNR'S AUTHORITY TO CONSIDER NEGATIVE ENVIRONMENTAL IMPACTS WHEN CONSIDERING A HIGH CAPACITY WELL PERMIT.

A. The Wisconsin Statutes Provide The DNR With Broad Authority To Consider Negative Environmental Impacts When Considering a High Capacity Well Permit.

The duties and responsibilities attendant to administering the public trust are simply too expansive for the Legislature to have completely enumerated, or anticipated. Nonetheless, the Village insists that the legislative enactments meant to enforce the public's rights operate, in effect, to limit such duties and responsibilities. Thus the Village clings to a "plain language" reading of Wis. Stat. § 281.34 and ties it to the *exclusio* rule,[10] asserting that the DNR has no authority but to grant a permit for the construction of all high capacity wells except for those that impact municipal water supplies or are proposed for areas so narrowly defined as to preclude study of their potential impact on lakes and wetlands a drop-kick away. (*See, e.g.*, Village's Brief at 41).

[10] The full maxim is "*inclusio unius est exclusion alterius*" which means to "include one thing implies the exclusion of the other." *See, e.g., Keip v. Wis. Dep't of Health & Family Servs.*, 2000 WI App 13, ¶18, 232 Wis. 2d 380, 606 N.W.2d 543.

However, in the words of this Court, the *exclusio* rule is not a "(p)rocrustean standard to which all statutory language must conform." *State ex rel. Sielen v. Circuit Court for Milwaukee County,* 176 Wis. 2d 101, 112, 499 N.W.2d 657 (1993). The *exclusio* rule is not to be applied where, as here, there is some evidence elsewhere in the statutes suggesting a different legislative intent. *Columbia Hosp. Ass'n v. Milwaukee,* 35 Wis. 2d 660, 669, 151 N.W.2d 750 (1967).

Rather than limiting the DNR's charge to protect the environment and the public's rights in navigable waters, the Legislature has declared that agency's mission in broad fashion, most notably at the beginning of the chapter addressing high capacity wells. Wis. Stat. § 281.11, "Statement of policy and purpose", provides, in part:

> The department shall serve as *the central unit of state government to protect, maintain and improve the quality and management of the waters of the state*, ground and surface, public and private . . . . The purpose of this subchapter is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. *To the end that these vital purposes may be accomplished, this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed in favor of the policy objectives set forth in this subchapter.*

Wis. Stat. § 281.11 (emphasis added). Section 281.12, Wis. Stat., "General department powers and duties" provides, in part:

> (1) The department shall have *general supervision and control* over the waters of the state. It shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter. The department also shall formulate plans and programs for the prevention and abatement of water pollution and for the maintenance and improvement of water quality.

Wis. Stat. § 281.12 (emphasis added).

In short, Wis. Stat. §§ 281.11 and 281.12 show clear legislative purpose to establish the DNR as "the central unit of state government" with "general supervision and control over the waters of the state." Wis. Stat. §§ 281.11, 281.12.

This legislative intent, which is clear in Chapter 281 may also be evinced from the broad supervisory powers bestowed on the DNR in the other aspects of water management. *See, e.g., Wisconsin's Envtl. Decade*, 85 Wis. 2d at 536. Such legislation includes directives authorizing the DNR to establish water quality standards to "protect the public interest" and to establish rules for the protection of wetlands. *See, e.g.*, Wis. Stat. § 281.15; Wis. Admin. Code Ch. NR 103; *see also generally* Wis. Stat. Chapter 30, Navigable Waters, Harbors and Navigation; Chapter 31, Regulation of Dams and Bridges Affecting Navigable Waters; Chapter 33, Public Inland Lakes; Chapter 92, Soil and Water Conservation and Animal Waste Management; Chapter 160, Groundwater Protection Standards; Chapter 280, Pure Drinking Water; Chapter 283,

Pollution Discharge Elimination; and the Wisconsin Environmental Policy Act, Wis. Stat. § 1.11. If the DNR's statutory grant of authority is to be understood, these statutes and rules cannot be overlooked. *See Wisconsin v. Clausen*, 105 Wis. 2d 231, 244, 313 N.W.2d 819 (1982) (statutes relating to the same subject matter are examined and interpreted together, *in pari materia*, rather than in isolation).

In fact, the evidence is plentiful that the Legislature, as it must, intended that the DNR undertake the fullest measures to protect the public's rights in navigable waters and their adjacent wetlands. To the extent that the Legislature did not specify every duty incumbent upon the DNR as keeper of the public trust, it does not mean that those responsibilities are not extant. "The rule that an administrative agency, being a creature of statute, is limited in its powers to those expressly delegated by the legislature, permits the exercise of power which arises by fair implication from the express powers." *Wisconsin's Envtl. Decade, Inc., v. Public Serv. Comm'n*, 69 Wis. 2d 1, 16, 230 N.W.2d 243 (1975).

By analogy, the comments of the Wisconsin Supreme Court in *Wisconsin Inspection Bureau v. Whitman* should be considered when contemplating what powers the DNR has by implication:

> The laws of this state conferring upon the industrial commission power to make safety orders, and the act conferring upon the railroad commission power to administer so-called "blue sky laws," are granted in the most general terms because the nature of the subject matter does not permit of a more precise delimitation. No useful purpose would be achieved, nor would the law in fact have any different meaning or application, if every kind of a place of employment imaginable were specified in the act and the industrial commission authorized to promulgate the necessary rules and regulations to make the places of employment specified safe. It would come to the same thing in the end. It would be practically impossible for the legislature to prescribe definite standards to meet the varying situations which arise in the administration of the securities act. It can only indicate in general terms the legislative policy to be achieved and the methods by which the railroad commission is to work out the declared policy. As already indicated, an attempt to specify a standard for rules and regulations to be promulgated by rating bureaus and approved by the commissioner of insurance would be nothing more nor less than the prescribing of the rules and regulations and riders themselves. If this were done by legislative enactment, the flexibility in practice necessary to meet changing conditions in the business world would be destroyed.

196 Wis. 472, 509-10, 220 N.W. 929 (1928).

Similarly, in *State ex rel. La Follette v. Reuter*, this Court stated

> Sections 1 and 2 of ch. 614, Laws of 1965, declare the statutory policy and fix the standards for administering the law. It is obvious that no more than a general standard can be prescribed by the legislature. It could not make specific provisions for all items entering into the operation of the financial assistance program for the very reason that the size, extent, and character of the problems and the curative acts required differ in each area where the evils to be corrected by the act exist.

33 Wis. 2d 384, 395-96, 147 N.W.2d 304 (1967).

In *City of Milwaukee v. Sewerage Commission*, this Court again said:

> The true test and distinction whether a power is strictly legislative, or whether it is administrative and merely relates to

> the execution of the statutory law, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter, no valid objection can be made.

268 Wis. 342, 351, 67 N.W.2d 624 (1954). And, in *Wisconsin's Environmental Decade, supra*, this Court acknowledged the complex nature of environmental issues and an agency's discretion in dealing with them:

> [W]e are not insensitive to the possibility that the environmental issues may in fact be complex and that a comprehensive consideration of these issues might consume considerable time. We have indicated that the obligations imposed by sec. 1.11, Stats., are not inherently discretionary or flexible. However, we think an agency possesses a reasonable amount of discretion as to the precise mode by which compliance is effected.

79 Wis. 2d at 439.

As a final matter, it must be noted that the Legislature has specifically limited the DNR authority when it thought it prudent. *See, e.g.*, Wis. Stat. §§ 160.15,[11] 92.17(2r),[12] 237.05.[13] In this case, it has not seen fit to do so which, again, supports a broad interpretation of the DNR's authority to consider potential negative

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[11] Section 160.15, Wis. Stat., restricts the DNR's authority to establish preventative action limits for certain types of substances.

[12] Section 92.17(2r), Wis. Stat., which concerns shoreland management, states that "[t]he department may not require a county, city, village or town to enact an ordinance under this section as a condition of any other program administered by the department."

[13] Section 237.05(1), Wis. Stat., "Restrictions on authority," provides that "[t]he authority may not issue bonds," and Section 237.05(2) states that "[t]he authority may not sublease all, or any part of, the navigational system without the approval of the department of administration."

impacts of a high capacity well under Wis. Stat. §§ 281.34 and 281.35.

B. Jurisprudence Supports The DNR's Authority to Consider Factors Other Than Those Specifically Enumerated in Wis. Stat. §§ 281.34 and 281.35 in Issuing High Capacity Well Permits.

Interpreting Wis. Stat. §§ 281.34 and 281.35 to allow the DNR to consider the public trust, *i.e.*, any negative environmental impacts on nearby waters, in granting high capacity wells permits is consistent with this Court's jurisprudence. For example, the Court has previously recognized the DNR's authority to consider factors outside of those specifically enumerated in a particular statute when considering the granting of a permit. In *Reuter v. Department of Natural Resources,* the Court reviewed an order of the Department of Natural Resources, Division of Resource Development, granting a permit to dredge an area that was, at the time, a floating bog. 43 Wis. 2d 272, 274-75, 168 N.W.2d 860 (1969). The permit was sought according to the provisions of Wis. Stat. § 30.20(2)(c), which provided that "'[a] permit to remove material from the bed of any lake . . . may be issued by the department if it finds that the issuance of such a permit will be consistent with the public interest in the water involved.'" *Id.* at 274 (quoting Wis. Stat. § 30.20(2)(c)).

The Court acknowledged that the appeal brought with it "wide-ranging arguments covering a broad area of legislative public concern," but concluded that resolution of the matter involved only the narrow issue of statutory construction. *Id.* at 275. The Court phrased the exact question raised on appeal as: "Is the department required to make a specific finding as to effect upon water pollution in ruling on a petition for a permit of the type made here?" *Id.* at 277. The Court held that the DNR was required to make such a specific finding despite the fact that the statute at issue contained no such requirement. *Id.* at 277-78. The Court ruled that the DNR could take into consideration other duties it had under the public trust doctrine, which were not listed within the context of Wis. Stat. § 30.20, when considering the permit. *Id.* at 277.

Following this Court's lead, the Wisconsin Court of Appeals ruled in *Houslet v. Department of Natural Resources* that the DNR was permitted to consider factors other than those contained in Wis. Stat. § 30.20 when considering a permit for dredging. 110 Wis. 2d 280, 289, 329 N.W.2d 219 (Ct. App. 1982); *accord Sterlingworth Condo. Ass'n, Inc. v. Dep't. of Natural Resources*, 205 Wis. 2d 710, 724, 556 N.W.2d 791 (Ct. App. 1996) ("Both [Wis. Stat. §§ 30.12 and 30.13] authorize the DNR to weigh the relevant policy factors which include 'the desire to preserve the natural beauty of our

navigable waters, to obtain the fullest public use of such waters, including but not limited to navigation, and to provide for the convenience of riparian owners'") (citing *Hixon v. Public Serv. Comm'n*, 32 Wis. 2d 608, 620, 146 N.W.2d 577 (1966)).

In another case where this Court found that the DNR's predecessor, the Public Service Commission's, inquiry was not limited to the plain language of the statute at issue, it stated

> we are persuaded that the statutory standard contemplated an evaluation of many factors in determining whether the line conformed "as nearly as practicable to the existing shore." For example, the commission may properly have rendered its judgment after weighing such other elements (in addition to geography) as the existing and potential use of the intermediate area, the existence of engineering complications, the cost of dredging and filling, the prospect of damage to scenic or recreational use of the river, the presence of pollution, and, of course, the influence upon navigation.

Town of Ashwaubenon v. Public Serv. Comm'n, 22 Wis. 2d 38, 50-51, 125 N.W.2d 647 (1963) (interpreting Wis. Stat. § 30.11 which relates to the establishment of a bulkhead line).

In yet another case, the Court of Appeals in *Maple Leaf Farms, Inc. v. Department of Natural Resources* found that the DNR's regulatory authority was not strictly limited to the language of the statute at issue. 2001 WI App 170, ¶15, 247 Wis. 2d 96, 104, 633 N.W.2d 720. In that case, the Court of Appeals considered

whether the DNR had authority to regulate off-site manure applications pursuant Chapter 283, Wis. Stats., entitled "Pollution Discharge Elimination." Because the Court recognized that Chapter 283 did not expressly authorize the DNR to regulate off-site manure applications, the Court considered whether such authority was implied. *Id.* at ¶13.

It reaching its decision, the Court of Appeals noted that Chapter 283's "broad grant of power authorizes the DNR to implement a permit program that protects groundwater as well as surface water . . . This far-reaching power complements the DNR's broad regulatory power to protect waters of the state in other legislative enactments as well [such as Wis. Stat. §§ 281.11 and 281.12]." *Id.* at ¶15 and fn.7. The Court then considered whether the DNR's authority in Wis. Stat. § 283.001[14] could be harmonized

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[14] Section 283.001(1) states the purpose of Wisconsin's water pollution discharge elimination system ("WPDES") program. It provides, in part, that

> [u]nabated pollution of the waters of this state continues to . . . endanger public health; to threaten fish and aquatic life, scenic and ecological values; and to limit the domestic, municipal, recreational, industrial, agricultural and other uses of water. It is the policy of this state to restore and maintain the chemical, physical, and biological integrity of its waters to protect public health, safeguard fish and aquatic life and scenic and ecological values, and to enhance the domestic, municipal, recreational, industrial, agricultural, and other uses of water . . . .

with Wis. Stat. § 283.31,[15] the section dealing with permits, for conferring authority to regulate off-site applications of manure. *Id.* at ¶21. Finding no basis in Wis. Stat. §§ 283.001 or 283.31 (or elsewhere) for distinguishing between on-site and off-site manure application, it concluded that the Legislature had conferred authority on the DNR to regulate Maple Leaf's off-site manure application. *Id.* at ¶¶26-27.

What is significant in the *Maple Leaf* decision is the Court's reliance on other related statutes in its determination of the DNR's scope of authority. This is one of the same analytical approaches applied by the Court of Appeals in the case *sub judice*.

In sum, the DNR's consideration of the public trust and negative environmental impacts on nearby waters in issuing a high capacity well permit would not run afoul of this (and, in fact, would be consistent with) this Court's and the Court's of Appeals previous decisions.

[15] Section 283.31, which relates to WPDES permits, terms and conditions, states, in part, that "(3) The department may issue a permit under this section for the discharge of any pollutant . . . upon condition that such discharges will meet all the following [conditions], whenever applicable . . ."

C. The Village's Strict Interpretation of Wis. Stat. §§ 281.34 and 281.35 Would Render Other Statutory Sections Meaningless.

In this case, the Village's contention that Wis. Stat. §§ 281.34 and 281.35 require the DNR to grant a permit for the construction of all high capacity wells except when the municipal water supply is impacted or when they are proposed for certain narrowly-defined areas would seem to render related statutory schemes (*e.g.,* Wis. Stat. § 30.03(4)),[16] meaningless. (*See, e.g.*, Village's Brief at 29-30).

Under the Village's interpretation of Wis. Stat. §§ 281.34 and 281.35, although the DNR learned that a high capacity well may possibly violate the public trust doctrine, it could not consider that factor in granting the permit, but once issued, could turn around the very next day and file an enforcement action under Wis. Stat. § 30.03(4). Such an interpretation not only promotes unnecessary and wasteful expenditures and time and runs afoul of the doctrine's proactive mandate to preserve and protect the waters of the State, but it is also unfair to a would-be applicant. If there is a "possible

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[16] Section 30.03(4)(a), Wis. Stat., provides, in part, that

> [i]f the department learns of a possible violation of the statutes relating to navigable waters or a possible infringement of the public rights relating to navigable waters, and the department determines that the public interest may not be adequately served by imposition of a penalty or forfeiture, the department may proceed as provided in this paragraph, either in lieu of or in addition to any other relief provided by law . . . .

violation" of the public trust doctrine, presumably an applicant would want to know this before he or she proceeded rather than after the fact. *See, e.g., ABKA Ltd. P'ship,* 2002 WI 106, ¶¶17-18 ("[e]ssentially, under § 30.03(4), the DNR has jurisdiction to pursue any 'possible violation' of the public trust doctrine as embodied in ch. 30 . . . .").[17]

The body of legislative enactments addressing the DNR's duties and obligations with respect to the State's waters and the judiciary's interpretation and application of the acts make it clear that the DNR has authority to consider the potential negative environmental impact when considering a high capacity well permit.

Contrary to the Village's suggestion, the LBPIA does not claim that the DNR has plenary permitting authority over high

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[17] On a related note, the Village suggests that an alternative remedy exists when a high capacity well not specifically covered under Wis. Stat. § 281.34 damages the environment: a nuisance action. (*See* Village's Brief at 23-24). However, neither a post-operative injunction nor monetary compensation will restore a wetland that has died or a lake that has undergone hypereutrophication. As this Court observed in *Hixon*,

> There are over 9,000 navigable lakes in Wisconsin covering an area of over 54,000 square miles. A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist. Our navigable waters are a precious natural heritage; once gone, they disappear forever.

Hixon, 32 Wis. 2d at 631-32. In any event, the dictates of the public trust doctrine require the protection and preservation of Wisconsin's navigable waters, not remedial measures premised on different common law principles.

capacity wells which it can apply in its complete discretion without regard to legislative standards. Nor did the Court of Appeals rule as such in this case and thus, the decision of the Court of Appeals should be affirmed.

III. SECTIONS 281.34 AND 281.35, WIS. STATS., HARMONIZE WITH SECTIONS 281.11 AND 281.12, WIS. STATS.

It is impossible to imagine every scenario in which the right to use and enjoyment of Wisconsin's navigable waters will come into conflict with other competing but legitimate interests. The DNR must have latitude to properly administer its duties as protector of the public trust. LBPIA does not suggest that in every case the rights and interests implicated under the doctrine must prevail. There are imaginable scenarios when it would be in the public's best interest that their rights under the public trust doctrine give way to necessary, yet reasonable, infringements on those rights. However, that determination can only be made after there has been a fair, proper and thorough examination of the alternatives and the degree to which the public's rights are impacted.

The current statutory scheme works within this framework. The Legislature, by appointing the DNR as trustee of the public trust, has empowered it with the broad discretionary powers needed to fulfill the constitutional imperative. *See* Wis. Stat. §§ 281.11 and

281.12. The granting of a permit for the construction of a high capacity well is not automatic. When deciding whether to grant the permit, the DNR will weigh and analyze a high capacity well's potential environmental harm to navigable waters, when that possibility is present, against the benefits of the well. However, in those cases where there is no apparent potential harm to navigable waters, but a well may still adversely impact a municipal water supply, or be located within a protected area, or result in the diversion of 95% of the withdrawn water, then the DNR must take those factors into consideration when deciding whether or how to grant the permit. *See* Wis. Stat. § 281.34(5).

What Wis. Stat. § 281.34 represents is the Legislature's direction to the DNR to, at the very least, conduct a specified level of review in certain situations. The LBPIA does not suggest, as the Village claims, that the DNR has plenary permitting authority over high capacity wells which it can apply in its complete discretion without regard to legislative standards. The LBPIA does not suggest that the DNR can ignore the minimal standard of review set forth in Wis. Stat. § 281.34 or that it can simply refuse to grant a permit.

Because of its constitutional underpinnings, any legislative act that erodes, diminishes or contradicts the public trust doctrine would violate the Wisconsin Constitution. *See State v. Neveau*, 237

Wis. 85, 97, 294 N.W. 796 (1940) (noting that "[t]he constitutional mandates apply to the legislature as well as the courts"). One of the basic tenets of statutory construction is that, if possible, a statute ought to be construed in a way that does not render it unconstitutional. *See White House Milk Co. v. Reynolds*, 12 Wis. 2d 143, 150-51, 106 N.W.2d 441 (1960) ("It is an elementary principle of law in this state that this court will search for a means to sustain a statute. . . . In fact, this court has in the past and will continue to sustain the constitutionality of a statute if any facts can be reasonably conceived which will support its constitutionality."). LBPIA's interpretation does not run afoul of the Constitution or conflict with other statutory provisions. Nor does it render superfluous portions of the extensive statutory scheme. Section 281.34 cannot be read, or applied, in a vacuum. All of Chapter 281, as well as the other duties and responsibilities imposed upon the DNR, should be considered when interpreting Wis. Stat. § 281.34.

IV. THE NAUTA AFFIDAVIT IS PROPERLY PART OF THE DNR RECORD FOR THE 2005 PERMIT.

The Village claims that the DNR had no obligation to consider the Nauta Affidavit as part of its review in connection with the 2005 Permit because the affidavit was not formally submitted as part of the record for the 2005 Permit and that the Court of Appeals

erred in holding to the contrary. (Village's Brief at 45-50). The Village is incorrect.

Notably, the Village does not claim that the Nauta Affidavit fails to establish that Well No. 7 created a potential for harm to Lake Beulah and nearby wildlife. (Village's Brief at 45-50). In addition, the Village does not claim that the DNR did not have the Nauta Affidavit in its possession at the time it issued the 2003 Permit.[18] (*Id.*)

Rather, the Village's argument is based upon the premise that the issuance of the 2003 Permit and the issuance of the 2005 Permit were separate and distinct events such that the record relating to the issuance of each permit should be considered in a vacuum. The Village's argument ignores the very unique factual circumstances in this case and is therefore, unsupportable. Specifically, although this case has undergone a complex procedural history, each phase of the case involved the same parties, the same issues and the same legal counsel for the Village and the DNR. Moreover, all of the parties were well-aware of the issues surrounding Well No. 7; *at every stage of this case*, the Conservancies challenged the permit for Well No. 7

[18] In fact, there is no dispute that the Nauta Affidavit was in the DNR's possession at the time it issued a decision on the 2005 Permit. The Nauta Affidavit was submitted to the DNR's counsel in connection with the Conservancies' August 4, 2005 motion for reconsideration of the circuit court's decision on the 2005 Permit. (App.-123).

on the grounds that it was issued without proper investigation. In short, there could be no doubt to any of the parties involved that the challenges to the 2003 Permit and the 2005 Permit were inextricably intertwined.

Indeed, as previously noted, the DNR's attorney was the person with whom the Village's attorney spoke and corresponded in regard to the granting of an extension verses a new permit because of the impact such a distinction would have on the ability to request a new contested case hearing. (*See* R.22, tab 15). Under these circumstances, the Court of Appeals properly determined that the Nauta Affidavit was to be considered by the DNR as part of the agency record for the 2005 Permit.

As a final matter, the Village suggests that the Court of Appeals allows any document within an agency's possession to be part of the record. (Village's Brief at 47). This is not the case. The Court of Appeals specifically limited the Decision to the unique facts presented. (App-125, ¶38, fn. 16). Thus, the Court of Appeals decision would only be precedential when a DNR lawyer is representing that agency in litigation involving a particular proceeding, and receives information from an opposing party which addresses the same subject matter as a parallel administrative

proceeding involving the same parties and issues. The unique facts of this case are highly unlikely to occur again.

CONCLUSION

Based on the foregoing, the LBPIA respectfully requests that this Court affirm the Court of Appeals decision and determine that: (1) Wis. Stat. §§ 281.34 and 281.35 permit the DNR to consider the potential environmental impact of a high capacity well prior to issuing a high capacity well permit, even in those situations not specifically enumerated by the statutes; and (2) the Nauta Affidavit was properly part of the DNR's record for the 2005 Permit.

Dated this 27th day of December, 2010.

MEISSNER TIERNEY FISHER & NICHOLS S.C.

By: _____

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief confirms 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 10,748 words.

Dated this 27th day of December, 2010.

William T. Stuart

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

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

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

William T. Stuart

STATE OF WISCONSIN
SUPREME COURT
Appeal No.: 2008 AP 3170

LAKE BEULAH MANAGEMENT DISTRICT,
Petitioner-Appellant-Cross-Respondent, Respondent

and

LAKE BEULAH PROTECTIVE AND
IMPROVEMENT ASSOCIATION,
Co-Petitioner-Co-Appellant-Cross-Respondent,

vs.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,
Respondent-Respondent,

VILLAGE OF EAST TROY,
Intervening Respondent-Respondent-Cross-Appellant- Petitioner.

APPENDIX TO BRIEF OF LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION

On Appeal from a Decision of the Court of Appeals, District II dated June 16, 2010, Affirming in Part and Reversing in Part a Judgment Entered in the Walworth County Circuit Court on September 20, 2008, The Honorable Robert J. Kennedy, Presiding, Walworth County Circuit Court Case Nos. 06-CV-172

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CERTIFICATION OF APPENDIX

I hereby certify that this appendix complies with the requirements of s. 809.19(3)(b).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

William T. Stuart

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this Appendix which complies with the requirements of Wis. Stat. § 809.19(13). I further certify that:

This electronic appendix is identical in content to the printed form of the Appendix filed as of this date.

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

William T. Stuart

COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP3170 Cir. Ct. No. 2006CV172

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

LAKE BEULAH MANAGEMENT DISTRICT,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

CO-PETITIONER-CO-APPELLANT-CROSS-RESPONDENT,

V.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-RESPONDENT,

VILLAGE OF EAST TROY,

INTERVENING-RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 BROWN, C.J. This decision explores the interplay between the public trust doctrine and the regulation of high capacity wells, especially when citizens or conservancy organizations such as lake management districts perceive that a proposed well may adversely affect nearby navigable waters. We will go through our analysis in some detail, but for purposes of this introductory statement, it is enough to say the following: The statutes identify three types of water wells, differentiated by the quantity of water they consume—wells consuming 100,000 gallons per day (gpd) or less, wells consuming over 2,000,000 gpd and wells in-between. This case has to do with wells in-between. The parties dispute the role that the public trust doctrine plays with regard to the middling wells. The Village of East Troy says that, with certain statutorily defined exceptions, there is no role. Lake Beulah Management District and Lake Beulah Protective and Improvement Association claim that there is always a role such that the DNR is mandated to thoroughly investigate each proposed middling well for possible public trust doctrine implications. The DNR agrees with the District and the Association that the doctrine always plays a role but asserts that the comprehensiveness of the investigation is solely at its discretion. We agree with the DNR, but we also hold that the DNR misused its discretion here. We therefore reverse and remand with directions that the circuit court remand this case to the DNR for further proceedings. We also affirm a side issue and a cross-appeal.

BACKGROUND

¶2 The procedural and factual history of the high capacity well at issue here—Well #7—goes back to 2003 when the Village first applied for and received a now-expired permit from the DNR. We relate this history in detail.

¶3 In 2003, the Village wanted to add a fourth well to its municipal water supply "to eliminate current deficiencies and supplement for future growth." The Village chose a site for the well which was approximately 1400 feet from the shores of Lake Beulah, an 834-acre lake located in Walworth county, and determined that Well #7 would have a 1,440,000 gpd capacity. As part of its application to the DNR, the Village submitted an April 2003 report that its consultant prepared. Based upon analysis of pump test data, the report "estimated that a well producing [1,440,000 gpd] would avoid any serious disruption of groundwater discharge to Lake Beulah."

¶4 The DNR then issued the permit via a letter dated September 4, 2003. The letter stated the DNR's conclusion: "It is not believed that the proposed well will have an adverse effect on any nearby wells owned by another water utility." And it included an excerpt from the Village's consultant which contained the consultant's opinion that Well #7 "would avoid any serious disruption of groundwater discharged to Lake Beulah." The 2003 permit was valid for two years and required the Village to submit a new application if it did not commence construction or installation of the improvements within those two years.

¶5 On October 3, 2003, just short of one month after the DNR issued the 2003 permit, the Lake Beulah Management District petitioned for a contested case before the DNR, alleging that the DNR "failed to comply with ... [its] responsibility to protect navigable waters, groundwater and the environment as a whole" in issuing the permit to the Village. The District wanted the DNR to independently consider the environmental effects before approving the permit. The DNR denied the petition later that month on the basis that it lacked the authority to consider the environmental concerns which the District presented.

¶6 But about three months later, on January 13, 2004, the DNR changed its mind and granted a contested case hearing on the issue of whether the DNR "should have considered any potentially adverse effects to the waters ... when the [DNR] granted a conditional approval of the plans and specifications for proposed Municipal Well No. 7 in the Village of East Troy." The Village responded on March 26, 2004, by filing a motion for summary disposition with the administrative law judge (ALJ). The Village argued that the DNR lacked the statutory authority to consider the environmental effects because Well #7 is not located in a place where the Wisconsin statutes specifically mandate environmental review prior to permit approval. At this point in the procedural history, even though the DNR had reversed course and granted a contested case hearing, it still held the same view as the Village on the scope of the DNR's authority over wells. The Lake Beulah Protective and Improvement Association then successfully intervened and has been allied with the District ever since. We will hereafter refer to the two entities as one—the conservancies.

¶7 On June 11, 2004, the ALJ presiding over the contested case granted the Village's motion and agreed with the Village that "because the statute requires that the [DNR] consider certain impacts ... the statute should be construed to exclude consideration of other factors." The ALJ also commented that even if what the conservancies contended was true (that in some cases the DNR may have a "basis other than the express statutory standards for reconsidering the preliminary approval in a contested case proceeding"), Well #7 was not such a case because the conservancies failed to present any "scientific evidence" that the well would have an adverse effect.

¶8 On July 16, 2004, the conservancies filed a petition for judicial review of the 2003 permit. During the briefing for that petition, the DNR reversed

its prior position and concluded that "it has authority under certain circumstances to consider the Public Trust Doctrine in its analysis of high capacity well approvals" and that it can "condition or limit a high capacity well approval where operation of the well has negative impacts on public rights in navigable waters."[1] The DNR also stated, however, that it had no duty to consider environmental impacts in the instant matter because no one presented it with any evidence that the "operation of the Village's high capacity well approval would adversely impact Lake Beulah." On June 24, 2005, the circuit court, the Honorable James L. Carlson presiding, dismissed the petition and affirmed the ALJ's decision and reasoning.

¶9 On August 4, 2005, the conservancies moved for reconsideration and filed the affidavit of Robert Nauta, a Wisconsin licensed geologist. The conservancies also served the motion and affidavit on the attorneys for the DNR and the Village. The affidavit stated, inter alia, that Nauta had reviewed the Village consultant's 2003 report and other reports concerning the Lake Beulah area, and had installed his own test wells and conducted surface water studies relating to the hydrology of Lake Beulah. Though he had a limited amount of time to review and conduct those studies, he concluded that the Village's consultant

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[1] The public trust doctrine is rooted in our state constitution and provides that the state holds title to navigable waters in trust for public purposes. WISCONSIN CONST. art. IX, § 1, states in pertinent part:

> [T]he river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

reached erroneous findings about the water table and the aquifer's condition and the consultant's tests were "inadequately designed and improperly conducted." He also opined that the consultant's brief test did confirm a lowering of groundwater and wetland water levels, and thus, given the specific hydrology of Lake Beulah and its surrounding environs, the tests results "clearly demonstrate potential for adverse impacts to Lake Beulah." He therefore reasoned that Well #7 "would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah."

¶10 The circuit court denied the conservancies' motion for reconsideration. The conservancies then appealed to this court. We dismissed the appeal in an order dated June 28, 2006, because the 2003 permit had expired and, as we explain next, the DNR had issued another permit in 2005 for Well #7. Therefore, the appeal was moot. *See* ***Lake Beulah Lake Mgmt. Dist. v. DNR***, Nos. 2005AP2230 & 2005AP2231, unpublished slip op. (WI App June 28, 2006).

¶11 The record shows that, while litigation over the 2003 permit ensued, the Village applied to "extend" its 2003 permit for two additional years because it had not yet started building and the 2003 permit would expire on September 4, 2005. With its application, the Village submitted the $500 application fee and information demonstrating that the physical circumstances were unchanged from the 2003 application. On September 6, 2005, the DNR granted the Village a two-year "extension" of the 2003 permit, concluding that Well #7 complied with the

groundwater protection law.[2] The DNR mailed to the conservancies a copy of the 2005 permit (still addressed to the Village), which included the thirty-day appeal deadline.

¶12 On March 3, 2006, nearly six months after the 2005 permit was issued and while the appeal concerning the 2003 permit was still pending, the conservancies filed a petition for review of the 2005 permit. The petition restated many of the concerns it expressed in the litigation over the 2003 permit, namely that Well #7 would adversely affect the quantity of water available to maintain the water level of Lake Beulah and that the DNR failed to consider Well #7's effect on Lake Beulah. The conservancies requested that the circuit court "remand[] the matter to the DNR for reconsideration of the [2005] approval to include consideration of its Public Trust Doctrine obligations to protect the navigable waters of Lake Beulah and its connecti[ng] waterways."

¶13 On September 23, 2008, the circuit court, the Honorable Robert J. Kennedy presiding, denied the petition and held that (1) the 2005 permit was a "new" permit (not an extension); (2) the DNR had a right to consider the public trust doctrine to determine whether a high capacity well, regardless of its size, will negatively impact the waters of the State; (3) if the DNR had a "solid, affirmative

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[2] After the 2003 approval but before the Village requested the 2005 approval, the Wisconsin legislature enacted a new groundwater protection law. *See* 2003 Wis. Act 310, §§ 5-12. The new law became effective on May 7, 2004, and mandated that the DNR conduct environmental review of additional wells near specified water resources. *Id.*; *see* WIS. STAT. § 281.34(4) (2007-08). The Village's proposed well was not located such that the new law specifically included it in the category of wells for which it mandated environmental review. We will explain the relevant details of the new law in our discussion.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

indication" that waters of the state would be "significantly harmed" or "adverse[ly] affect[ed]," then the DNR should consider the information and possibly conduct further studies; and (4) there was "an absolute dearth of any proof," so the DNR did not fail its obligation to protect the waters of the state. The circuit court also assumed, without deciding, that the conservancies' petition for judicial review was timely. The conservancies then brought this appeal.

DISCUSSION

¶14 We start our discussion by briefly addressing a side issue.[3] The conservancies argue that the 2005 permit was a "nullity" because the DNR: (1) had nothing to extend since the DNR's approval came two days after the 2003 permit expired and (2) could not grant a "new" permit since the Village applied for an *extension* of the 2003 permit, not a *new* permit. But the facts are to the

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[3] There is also an issue brought by the Village via a cross-appeal. The Village argues that the conservancies had only thirty days to file their petition for review and yet they waited nearly six months, making the conservancies' petition untimely. But in ***Habermehl Electric, Inc. v. DOT***, 2003 WI App 39, ¶18, 260 Wis. 2d 466, 659 N.W.2d 463, we held that the thirty-day rule found in WIS. STAT. § 227.53(1)(a)2. does not apply to noncontested cases and, instead, the six-month "default limitation" applies. The petition for review on appeal is not based on a decision in a contested case. So the six-month time limit applies. The petition was timely.

In so concluding, we decline the Village's request to distinguish or criticize ***Habermehl Electric*** and the two other cases reaching the same conclusion, ***Collins v. Policano***, 231 Wis. 2d 420, 605 N.W.2d 260 (Ct. App. 1999), and ***Hedrich v. Board of Regents of University of Wisconsin System***, 2001 WI App 228, 248 Wis. 2d 204, 635 N.W.2d 650. Unless or until ***Habermehl*** is reversed or modified by our supreme court, it remains the law and we will follow it. *See* ***City of Sheboygan v. Nytsch***, 2008 WI 64, ¶5, 310 Wis. 2d 337, 750 N.W.2d 475 ("It is well settled that the court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals."). Further, no supreme court case, including ***Waste Management of Wisconsin, Inc. v. DNR***, 149 Wis. 2d 817, 440 N.W.2d 337 (1989), reaches a conflicting conclusion about the time limit in WIS. STAT. § 227.53(1)(a)2. *See* ***Cuene v. Hilliard***, 2008 WI App 85, ¶15, 312 Wis. 2d 506, 754 N.W.2d 509 ("To the extent that a supreme court holding conflicts with a court of appeals holding, we follow the supreme court's pronouncement.").

contrary. In 2005 the DNR received an application from the Village for a new approval of Well #7. The application included information demonstrating that the physical circumstances were unchanged from the 2003 application. And the Village paid an application fee of $500—the same as it would if applying for a new permit. *See* WIS. STAT. § 281.34(2). Regardless of how the Village labeled its application, and regardless of how the DNR labeled its approval, the fact is that the DNR received the application with the required fee for a "new" permit, determined that the circumstances remained unchanged since the original 2003 approval and that the proposed well complied with the new groundwater law promulgated between the 2003 permit and the 2005 permit, and based on that determination, granted a new permit. Inasmuch as the DNR had a new fee and had to review the application in consort with new legislation, the DNR issued a new permit and its conduct comported with it being a new permit. The 2005 permit is not a nullity.

¶15 With that side issue disposed of, we can now concentrate on setting the table to discuss the major issues at hand. Central to the DNR's grant of the 2005 permit was its conclusion that the facts had not changed since the 2003 permit.[4] But that is not altogether true. The record shows that, before the DNR granted the 2005 permit, its attorney of record in the 2003 permit proceedings had

[4] The Village sent the DNR a letter from its engineer stating that the conditions were unchanged. And the DNR accepted that in its review for compliance with the groundwater protection act that came into effect after it issued the 2003 permit.

new information: the affidavit from the conservancies' expert, Robert Nauta.[5] During oral argument, we asked the DNR's attorney of record in this case, who was also the same attorney of record in the 2003 case, whether the Nauta affidavit had come to the attention of the DNR permit decision makers. She replied that it had not. We asked whether she thought she had a duty to convey this information to the decision makers and she said she did not. She contended that it was the conservancies' obligation to bring this affidavit to the attention of the permit decision makers and that the conservancies had failed to do so. So, in her view, the DNR did not have any new information and the DNR therefore was not specifically alerted to a possible public trust doctrine problem such that it should have investigated the permit claim more fully before issuing it.

¶16 The facts and circumstances provided in our rendition of the background, along with the information gained by way of oral argument, raise several questions: Does the DNR have a duty to investigate public trust doctrine concerns with regard to middling wells? If so, what is that duty? If there is a duty, does that duty arise on a case-by-case basis or is it present in every case involving a high capacity well? If the duty exists only case by case, how is this

[5] During oral argument, the conservancies also pointed to three other pieces of information they claim the DNR had before the 2005 approval but did not consider. These include: (1) an April 2003 report from the Village's engineering firm, which we referenced early during our recitation of the facts surrounding the 2003 approval; (2) a June 3, 2003 e-mail from the United States Geological Services' Daniel Feinstein stating that his interpretation of the Village engineer's 2003 report was that the test well had an effect of drawing down the water levels; and (3) a June 28, 2003 letter from Philip Evenson of the Southeastern Wisconsin Regional Planning Commission, which states that the commission staff agree with the District's concern regarding the potential for negative impacts on the wetlands and Lake Beulah itself from the proposed well, but that the current information is insufficient to estimate whether the negative impacts would be significant. It is unclear whether the DNR had this information, however, with the exception of the 2003 report from the Village's expert. So when we refer to the Nauta affidavit, we refer to the information that the DNR had but did not consider.

duty triggered and what information is necessary? What process must citizens and conservancy groups employ to bring the triggering information to the DNR's attention? Regardless of the normal process, since this information came to the DNR attorney's attention in the 2003 case, does the attorney-client imputation rule apply such that if an attorney for the DNR had new facts in a legal file, the DNR should be held to have had such knowledge in its agency record when the agency record concerns the same underlying matter as the legal file? Those are the issues we now address.

High Capacity Wells and the Duty to Consider the Public Trust Doctrine

¶17 The Village claims that the DNR is precluded by statute from considering the public trust implications of Well #7. In other words, the Village claims that the DNR has no duty. This requires us to examine the relevant statutes in detail. There are four statutes at issue here: two statutes provide a broad, general grant of authority to the DNR—WIS. STAT. §§ 281.11 and 281.12—and two statutes create specific rules for high capacity wells—WIS. STAT. §§ 281.34 and 281.35.[6] Since we are construing statutes involving the scope of an agency's power, we give no deference to the agency's opinion. ***Grafft v. DNR***, 2000 WI App 187, ¶4, 238 Wis. 2d 750, 618 N.W.2d 897. Nor do we defer to the circuit court. *See* ***Moonlight v. Boyce***, 125 Wis. 2d 298, 303, 372 N.W.2d 479 (Ct. App. 1985). Instead, we interpret these statutes de novo. ***Grafft***, 238 Wis. 2d 750, ¶4.

[6] These are the statutes that the legislature created or updated in 2003 Wis. Act 310, §§ 5-12, which comprise the new groundwater protection law that became effective in 2004.

¶18 The general statutes explain, inter alia, that the DNR "shall have general supervision and control over the waters of the state"[7] and "shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of [WIS. STAT. ch. 281]." WIS. STAT. § 281.12(1). The policy and purpose section states that the DNR

> *shall* serve as the central unit of state government to *protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private....* The purpose of this subchapter is to *grant necessary powers* and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, this subchapter ... shall be *liberally construed in favor of the policy objectives set forth* in this subchapter.

WIS. STAT. § 281.11 (emphasis added).

¶19 We interpret these general statutes as expressly delegating regulatory authority to the DNR necessary to fulfill its mandatory duty "to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private." *See* ***id***; *see also* ***Karow v. Milwaukee County Civil Serv. Comm'n***, 82 Wis. 2d 565, 570, 263 N.W.2d 214 (1978) (the word "shall" is

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[7] "Waters of the state" means

> those portions of Lake Michigan and Lake Superior within the boundaries of this state, all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems *and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction.*

WIS. STAT. § 281.01(18) (emphasis added).

generally construed as imposing a mandatory duty). That these general statutes do not mention wells in particular does not mean that the statutes do not grant the DNR the authority to control or regulate wells by considering environmental factors relevant to protecting, maintaining and improving waters of the state. After all, wells have everything to do with waters of the state—they withdraw groundwater, one type of water which comprises the definition of waters of the state—therefore, the DNR necessarily has authority over them. *See* WIS. STAT. § 281.01(18) (defining waters of the state).

¶20 But we must construe statutes in the context in which they are used, considering surrounding and closely related statutes. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. The Village argues that the specific statutes relating to wells create a comprehensive statutory framework within which the DNR can protect waters of the state, and thus, the Village contends that WIS. STAT. §§ 281.11 and 281.12 are general grants of authority which are superseded by specific statutes regulating wells. The essence of the Village's assertions is that the specific statutes, WIS. STAT. §§ 281.34 and 281.35, represent the legislature's policy decision that the protections provided in §§ 281.34 and 281.35 are sufficient to satisfy the DNR's duties to protect the waters of the state, and so any authority the DNR might previously have had from §§ 281.11 and 281.12 to regulate wells was overridden by the legislature's enactment of §§ 281.34 and 281.35. We now consider §§ 281.34 and 281.35.

¶21 These specific statutes classify wells into three categories: (1) wells with a capacity of less than or equal to 100,000 gpd, (2) wells with a capacity of more than 100,000 gpd and less than or equal to 2,000,000 gpd in any thirty-day period, and (3) wells with a capacity of more than 2,000,000 gpd in any thirty-day

period. *See* WIS. STAT. § 281.34(1)(b) (defining a high capacity well as one with a capacity of more than 100,000 gpd); WIS. STAT. § 281.35(4)(b) (providing a second threshold level at more than 2,000,000 gpd in any thirty-day period and, therefore, creating three categories of wells).

¶22 WISCONSIN STAT. §§ 281.34 and 281.35 also provide the DNR with guidance about when environmental review[8] is required for certain wells within the second category and all wells within the third category. In the second category, which we have referred to above as the "middling wells," § 281.34(4) requires that the DNR conduct environmental review in only three instances. Those instances are if the proposed well will: (1) be located in a groundwater protection area, (2) result in a water loss of more than ninety-five percent of the amount of water withdrawn, or (3) potentially have a significant environmental impact on a spring. ***Id.*** For the third category, § 281.35(4)(b) and (5)(d) require the DNR to determine that the proposed well will not adversely affect public water rights in navigable waters and will not conflict with any applicable plan for future uses of the waters of the state.

¶23 For the remaining wells, WIS. STAT. §§ 281.34 and 281.35 are silent as to whether the DNR may review or consider the well's potential environmental effects. The only guidance given to the DNR is the mandate in § 281.34(2) that "[a]n owner shall apply to the department for approval before construction" of a

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[8] WISCONSIN STAT. §§ 281.34 and 281.35 require the DNR to use the environmental review process found in the Wisconsin Environmental Policy Act (WEPA), WIS. STAT. § 1.11. *See also* WIS. ADMIN. CODE ch. NR 150 (the DNR's procedures for implementing WEPA). These statutes also authorize the DNR to require an applicant for approval of a high capacity well to submit an environmental impact report. Secs. 281.34(5) and 281.35(4)(b).

well over 100,000 gpd (a high capacity well). The statute gives no specifics on what the application entails (except for a $500 fee) or what standards, if any, the DNR may or must use when deciding whether to approve or deny permits for wells between 100,000 and 2,000,000 gpd, such as the well here.[9] *See* ***id.***

¶24 As we alluded to earlier, the Village interprets this silence in the presence of a comprehensive scheme to regulate high capacity wells as tacitly revoking any other authority the DNR might have over other wells, including its general authority to protect waters of the state. Well #7 is one of those "other wells." The Village's position goes so far as to argue that WIS. STAT. §§ 281.34 and 281.35 limit the DNR's authority to consider *anything* not specifically listed in that scheme before approving a high capacity well permit. It interprets the statutes to prohibit the DNR from enacting any regulations that would constrict wells, including WIS. ADMIN. CODE ch. NR 812. As we interpret the Village's argument, if taken to its logical conclusion, the DNR would be prevented from, for example, requiring permit seekers to use certain construction methods when building a well, *see, e.g.*, WIS. ADMIN. CODE § NR 812.11, and preventing permit seekers from placing waste in a well, *see* WIS. ADMIN. CODE § NR 812.05.

¶25 The public trust doctrine is such an important and integral part of this state's constitution that, before we can accept the Village's argument, there should be some evidence that the legislature intended by these statutes to render nugatory the more general statutes bestowing the DNR with the general duty to

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[9] We also note that the statutes provide no guidance on whether the DNR has the authority to regulate wells under 100,000 gpd when necessary to protect, maintain or improve waters of the state. Though that exact issue is not before us, the conclusion we reach today is relevant to that issue.

manage the public trust doctrine. *See* ***Columbia Hosp. Ass'n v. City of Milwaukee***, 35 Wis. 2d 660, 668-69, 151 N.W.2d 750 (1967). Outside of what the Village considers to be the plain intent of the statutes, the only evidence of legislative intent is that, *in 2007*, the legislature rejected an advisory committee's recommendation to amend WIS. STAT. § 281.34 by adding to the list of enumerated circumstances always requiring the DNR to conduct a formal environmental review.[10] The immediate response to the Village's argument is that the legislature's actions after this permit was issued do not affect our analysis of the statutes and legislative history that existed at the time. *See* ***Schaul v. Kordell***, 2009 WI App 135, ¶23 n.12, 321 Wis. 2d 105, 773 N.W.2d 454. And we have not found any legislative history suggesting that 2003 Wis. Act 310 was meant to *revoke* the DNR's general authority. But the more measured response is that the rejection of the advisory committee's suggestion proves nothing. The action of rejecting the idea of requiring formal environmental review in every instance gives us no guidance as to whether the DNR could investigate a middling well at its discretion. We conclude that there is no evidence that the legislature intended to revoke the general grant of authority to the DNR regarding these other wells.

¶26 Moreover, we underscore the legislature's *explicit* command that the DNR's authority be "liberally construed" in favor of protecting, maintaining and improving waters of the state. WIS. STAT. § 281.11; *see also* ***Wisconsin's Envtl. Decade, Inc. v. DNR***, 85 Wis. 2d 518, 528-29, 271 N.W.2d 69 (1978)

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[10] *See* Wisconsin Groundwater Advisory Committee, *2007 Report to the Legislature*, § 2.2.4, available at http://dnr.wi.gov/org/water/dwg/gac/GACFinalReport1207.pdf (last visited June 1, 2010).

(interpreting the predecessor of § 281.11[11] and concluding that "in keeping with the broad authority conferred on the DNR and explicit legislative intent," the DNR's statutory authority should be broadly construed).

¶27 We therefore conclude that, just because the legislature was silent about the DNR's role with regard to some of the middling wells, this does not mean that the legislature meant to abrogate the DNR's authority to intercede where the public trust doctrine is affected. We are even more confident in our conclusion when we consider that the DNR must grant a permit for construction of all middling wells. Why would an agency have to grant a permit if it did not have any reviewing authority over a well? The permit process has to be, as a matter of common sense, more than a mechanical, rubber-stamp transaction. It must mean that the DNR has authority to become involved whenever it sees a public trust doctrine problem. In fact, the Village's own well application included its engineer's well pump test data and conclusion that the well "would avoid any serious disruption to the groundwater discharge at Lake Beulah." We question why the Village thought it necessary to provide this data if it did not think the DNR could consider the public trust doctrine.

¶28 We are convinced that we have harmonized the statutes to avoid conflict and ensured that no statute is surplusage. *See* ***Jones v. State***, 226 Wis. 2d 565, 575-76, 594 N.W.2d 738 (1999) (holding that specific statutes control general ones only when there is truly a conflict and courts are to harmonize statutes to avoid conflicts when a reasonable construction of the statutes permits that). We

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[11] The legislature renumbered WIS. STAT. § 144.025 (1975-76) to WIS. STAT. § 281.11 in 1995 Wis. Act 227.

agree with the conservancies and the DNR and hold that the legislature's mandate that the DNR complete a formal environmental review for only certain wells does not prohibit or rescind the DNR's authority to review other middling wells under WIS. STAT. §§ 281.11 and 281.12. The DNR's mission must be to protect waters of the state from potential threats caused by unsustainable levels of groundwater being withdrawn by a well, whatever type of well that may be.[12]

Whether the DNR's Duty is Absolute

¶29 We have rejected the Village's contention that the DNR has no authority to act in this case. We likewise now reject the conservancies' completely opposite contention that the DNR was *required* to conduct a full and thorough environmental review. As our foregoing discussion makes plain, the fact that the DNR had the authority to consider environmental factors with regard to Well #7 does not mean that it was required to do so. We disagree with the conservancies' contention that the DNR *always* has a sua sponte *affirmative obligation* to consider a well's effect on the waters of the state regardless of whether the DNR is presented with any information suggesting that the well might have a negative effect. We agree with the DNR that this would present it with an impossible and costly burden were we to adopt the conservancies' reasoning. We

[12] We can envision, however, circumstances where the DNR could exercise its authority under WIS. STAT. §§ 281.11 and 281.12 in a way that would conflict with the high capacity well statutes. For example, if the DNR were to ban all wells or require the same kind of environmental review for all wells, that action would seem to conflict with the high capacity well statutes for the same reason that we held the DNR's ban of sulfide mineral mining conflicted with the Mining Act. *See* ***Rusk County Citizen Action Group, Inc. v. DNR***, 203 Wis. 2d 1, 552 N.W.2d 110 (Ct. App. 1996). But, for the reasons already stated, we conclude that there is no conflict between the statutes in interpreting the general statutes to provide the DNR the flexibility to consider the environmental effect of a well on waters of the state when deciding whether to approve or deny a well permit.

further agree with the DNR that its public trust duty arises only when it has evidence suggesting that waters of the state may be affected by a well. If the law were that the DNR always has a duty to conduct environmental review for every well application, even if it had no information that the waters of this state would possibly be adversely affected by a well, then the legislature would have had little reason to have enacted the specific high capacity well statutes. Such a duty would render WIS. STAT. §§ 281.34 and 281.35 largely surplusage, and we are to avoid interpreting statutes in such a way. *See* ***Randy A.J. v. Norma I.J.***, 2004 WI 41, ¶22, 270 Wis. 2d 384, 677 N.W.2d 630.

¶30 The conservancies contend that, in spite of what the statutes say about high capacity wells, there is common law authority mandating that the DNR, as the trustee of our state's waterways, has an absolute sua sponte duty to investigate every high capacity well proposal to see whether it will harm waters of the state. This is incorrect. The DNR is not an independent arm or a fourth branch of government; it is a legislatively created agency. ***Kegonsa Joint Sanitary Dist. v. City of Stoughton***, 87 Wis. 2d 131, 143-44, 274 N.W.2d 598 (1979). As such, the DNR has only those powers which are expressly conferred by or which are necessarily implied from the *statutes* under which it operates. *See* ***Oneida County v. Converse***, 180 Wis. 2d 120, 125, 508 N.W.2d 416 (1993). The public trust doctrine found in our state constitution does not have any self-executing language authorizing the DNR to do anything—the statutes do that. So the authority and duty that the conservancies claim the DNR has ("to investigate and determine whether the operation of [Well # 7] will have a significant negative

impact on Lake Beulah") must come from state statutes.[13] We conclude that there is no requirement mandating the DNR to do a full examination of every well to see if the public trust doctrine is affected.

How this Duty is Triggered

¶31 The DNR asserts that the type of evidence necessary to trigger the DNR's duty to investigate public trust concerns with regard to wells like Well #7 is what the ALJ presiding over the June 2004 contested case termed as "scientific evidence" of a likely adverse impact to Lake Beulah from the Village's well. We do not have the expertise to say exactly what kind of evidence will prompt the DNR to further investigate a well's adverse environmental impacts or to condition or deny a well permit. There is no standard set by statute or case law. But we do have case law which recognizes that the DNR has particular expertise when it comes to water quality and management issues. *See* ***Wisconsin's Envtl. Decade, Inc.***, 85 Wis. 2d at 529-30. The DNR is the central unit of state government in charge of water quality and management matters. ***Id.*** We will leave it to the DNR to determine the type and quantum that it deems enough to investigate. But, certainly, "scientific evidence" suggesting an adverse affect to waters of the state should be enough to warrant further, independent investigation.

[13] We are not suggesting that the DNR can ignore common law interpreting the agency's authority, nor that the public trust doctrine has no bearing on the interpretation of its statutory authority.

How Citizens Can Present Evidence to the DNR Regarding the Environmental Impact of a Well

¶32 The DNR posits that concerned citizens who want to affect the decisions of DNR permit decision makers have three options. Two options allow citizens to submit information in a way that requires consideration of the new information: (1) presenting the information to the permit decision makers while the permit process is ongoing or (2) if the permit has already been granted, requesting a contested case hearing and, at this hearing, present the information. The third option is to petition for judicial review after the DNR has issued the permit. However, under this option, the concerned citizen may not be able to submit new information.[14] The DNR suggests that a contested case is the proper way to present information after it has issued a permit because a contested case hearing provides an opportunity for every party, including concerned citizens, to rebut or offer countervailing evidence.[15] At the conclusion of the testimony, the

[14] A concerned citizen may be able to use WIS. STAT. § 227.56 during a petition for judicial review to present evidence that the court would use to determine whether to remand to the agency for further fact-finding. *See* ***State Public Intervenor v. DNR***, 171 Wis. 2d 243, 245-46, 490 N.W.2d 770 (Ct. App. 1992). Under this statute, a citizen can apply "to the circuit court for leave to present additional evidence on the issues in the case," and the circuit court has the discretion to admit the additional evidence upon such terms as it may deem proper if the person presenting the evidence shows to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceedings before the agency. Sec. 227.56(1). The conservancies, however, did not use § 227.56 to get their information to the DNR.

[15] The DNR did not explain or cite any authority at oral argument about how exactly concerned citizens would go about submitting information at a contested case hearing which was not before the permit decision makers at the time the permit decision was made. We note that WIS. STAT. § 227.45 discusses evidence in contested cases and mandates that the "agency or hearing examiner shall admit all testimony having reasonable probative value" and is specifically required to exclude only evidence that is "immaterial, irrelevant or unduly repetitious testimony" or evidence that is inadmissible under a statute relating to HIV testing. ***Rutherford v. LIRC***, 2008 WI App 66, ¶¶21-22, 309 Wis. 2d 498, 752 N.W.2d 897. WISCONSIN STAT. § 227.44(3) also mandates that all parties shall be afforded the opportunity "to present evidence and to rebut or offer countervailing evidence."

hearing examiner may then decide whether there is sufficient evidence of a potential adverse impact and, if so, may issue specific orders to the DNR.

¶33 The DNR is further of the view that, if the permit is not challenged under any of the three foregoing options, then a concerned citizen's only remaining option, if he or she has information that a well is adversely impacting the public trust, is to bring a nuisance action against the permit holder under ***State v. Deetz***, 66 Wis. 2d 1, 13, 224 N.W.2d 407 (1974). *See also* WIS. STAT. § 30.294. Or, once the permit has been granted, if the agency itself decides that the well is adversely affecting waters of the state, then it can bring a WIS. STAT. § 30.03 action to alter the permit approval.

¶34 We generally agree with the DNR and hold that these are the procedures commonly used to give information to the DNR decision makers and to challenge the ultimate decision. We also agree with the DNR that the conservancies did not use these procedures to submit their information. The conservancies did not present information *to* the permit decision makers that would have flagged Well #7 as possibly affecting a navigable waterway, either before issuance of the 2005 permit, at a contested case hearing on the 2005 permit, or by using WIS. STAT. § 227.56 to supplement the record during the 2005 petition for judicial review, as we described in the footnote. So, all things being equal, the conservancies would be out of court.

How the Attorney-Client Relationship Applies to this Case

¶35 But all things are not equal here. The facts show that the DNR did have the conservancies' information, albeit not presented in the way described above. The conservancies presented the Nauta affidavit to the DNR's attorney on August 4, 2005, as part of the litigation on the 2003 permit. This was little more than one month before the DNR issued the 2005 approval. The affidavit directly challenged the Village consultant's conclusion and the DNR's resultant decision that Well #7 would not seriously disrupt groundwater flow to Lake Beulah. However, the DNR argues that since the evidence was presented to its attorney during litigation on a prior permit and was not provided to its decision makers regarding the instant permit, the Nauta affidavit was not part of the "agency record" and therefore did not require its consideration. Thus, even though the attorney represented the decision makers on both the 2003 and 2005 permit challenges and therefore knew there was an affidavit calling into question the efficacy of Well #7, the attorney contends that the decision makers did not have the information since it was not in the right file. Because the decision makers did not consider the affidavit, they were able to conclude when issuing the 2005 permit that there had been no change since 2003.

¶36 As a general rule, however, the knowledge of an attorney acquired while acting within the scope of the client's authority is imputed to the client. *See* ***Suburban Motors of Grafton, Inc. v. Forester***, 134 Wis. 2d 183, 192-93, 396 N.W.2d 351 (Ct. App. 1986). "In the context of an enduring attorney-client relationship, knowledge acquired by the attorney is imputed to the client as a matter of law." 7 AM. JUR. 2D *Attorneys at Law* § 153 (2010) (footnote omitted); *see also* ***Wauwatosa Realty Co. v. Bishop***, 6 Wis. 2d 230, 236, 94 N.W.2d 562 (1959). The presumption is that the attorney will communicate the information to

the client; the fact that the attorney has not actually communicated his or her knowledge to the client is immaterial. 7 AM. JUR. 2D *Attorneys at Law* § 153 (2010); ***Wauwatosa Realty Co.***, 6 Wis. 2d at 236-37.

¶37 For the purposes of the imputation rule, the DNR attorney's clients were the DNR employees making the permit decisions. The attorney was an "in-house" attorney employed by the state and assigned to handle legal matters for the litigation over the 2003 and 2005 Well #7 permits. At oral argument, the attorney stated that everything in the 2003 application file would also be in the 2005 file; she had to have known that the 2003 case was linked to the 2005 permit decision and that any information submitted during litigation over the 2003 permit was relevant to the decision makers' consideration of the 2005 permit application. We thus rule that anything in the DNR's attorney file for the litigation concerning Well #7 is imputed to the DNR employees making the decisions regarding the permit for Well #7. It follows, therefore, that the attorney file is part of the agency record for the 2005 permit approval, regardless of whether the DNR's attorney actually gave the Nauta affidavit to the decision makers, because it concerns the same parties and the same precise contested issue.

¶38 And frankly, we are a bit perplexed as to why the DNR attorney did not show the affidavit to the decision makers when she presumably consulted with them after the conservancies filed their motion for reconsideration. The conservancies gave *her* the affidavit a mere day after the Village applied to *her* to extend its permit. And the affidavit directly contradicted the previous evidence before the DNR about Well #7's environmental impacts. It should have occurred to her that the Nauta affidavit was relevant to the Village's request and that the affidavit was a factual change requiring the consideration of the DNR's decision makers. Attorneys are supposed to share information with their clients. *See* SCR

20:1.4(1). One of the benefits of having people with different expertise in an agency is that they can *communicate* and *pool information* and thus be more efficient and responsive to the general public for whom they ultimately work. The DNR provides no reason why the decision makers did not have that Nauta affidavit in the formal "agency record" when its attorney had it in a legal file on the same underlying matter.[16]

¶39 Since we have concluded that the DNR had a duty to consider the information from a scientist that the proposed well "would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah," we reverse and remand to the circuit court with directions to, in turn, remand this case to the DNR so that it may consider the Nauta affidavit and any other information the agency had pertinent to Well #7 before it issued the 2005 approval.

¶40 No costs to either party on appeal.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Recommended for publication in the official reports.

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[16] As a practical matter, the situation whereby the DNR's own attorney represents the agency in a case such as this is unique. Normally, the Department of Justice has the duty to represent the DNR pursuant to WIS. STAT. § 165.25. However, the DOJ refused to represent the DNR in the instant case because it disagreed with the DNR's grant of both the 2003 and 2005 permits. Thus, the agency's own attorney was the attorney of record for the DNR. The attorney-client discussion here, therefore, may be limited to the facts of this case. This is not to say that it cannot be applied in future cases. It is only to say that courts will have to look closely at the facts and circumstances in each case.

STATE OF WISCONSIN CIRCUIT COURT WALWORTH COUNTY

LAKE BEULAH MANAGEMENT DISTRICT,

Petitioner,

and

Case No: 04-CV-683
Case No: 04-CV-687

LAKE BEULAH PROTECTIVE and IMPROVEMENT ASSOCIATION,

Petitioner-Intervener,

v.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

and

VILLAGE OF EAST TROY,

Respondents.

BRIEF OF PETITIONERS IN SUPPORT OF MOTION FOR RECONSIDERATION AND RELIEF FROM JUDGMENT

INTRODUCTION

On June 24, 2005, this Court issued a Decision (the "Decision") affirming the Amended Ruling, dated June 16, 2004, of Wisconsin Division of Hearings and Appeals Administrative Law Judge Jeffrey D. Boldt ("ALJ") in favor of the respondents, the Wisconsin Department of Natural Resources and the Village of East Troy. On July 15, 2005 the Court entered an Order for Judgment adopting the reasons stated in the Decision and entered Judgment affirming the Amended Ruling of Administrative Law Judge Jeffrey D. Boldt.

Petitioners Lake Beulah Management District ("LBMD") and Lake Beulah Protective and Improvement Association ("LBPIA") have moved the Court for reconsideration of the

Decision, pursuant to § 805.17(3), and for relief from the Judgment entered on July 15, 2005, pursuant to §806.07(g) and (h), Wis. Stat. LBMD and LBPIA have filed this motion because the Court erred as a matter of law in determining that the ALJ, after issuing the Amended Ruling "did give the parties a reasonable time to respond and that petitioner did assert its right to respond with its affidavit." (Decision, p. 7). The "reasonable time to respond" cited by the Court was the time period between June 22, 2004, the date of the ALJ's notice to the parties that evidentiary material could be submitted, and June 25, 2004, the deadline for those submissions set by the ALJ. The Amended Ruling was the first explicit notice to LBMD and LBPIA that the ALJ had converted respondent Village of East Troy's (the "Village") Motion for Summary Disposition to a summary judgment motion.

The present motion is also based on the attached affidavits of Robert Nauta, a Senior Hydrogeologist and Registered Professional Geologist in Wisconsin, and Ann M. Michalski, a professional wetland scientist and professional soil scientist. As these affidavits make clear, the expert reports that LBMD and LBPIA would have submitted in opposition to a summary judgment motion, if the ALJ had permitted a reasonable time, are complex and required substantial work. Just as important, the affidavits highlight the types of damages to public resources and the public interest in those resources that the ALJ and this Court recognized as relevant to the high capacity well permit issue before the ALJ. Simply put, the affidavits demonstrate, at the minimum, the preliminary evidence that would have been submitted to the ALJ for consideration if Petitioners had been provided sufficient time.

ARGUMENT

1. LBMD and LBPIA did not have a reasonable time to provide evidence in opposition to the Village's converted motion for summary judgment.

After the Amended Ruling was issued by the ALJ on June 16, 2004, counsel for LBMD moved the ALJ for reconsideration on the ground that the ALJ had not provided proper notice of the conversion of the Village's Motion for Summary Disposition to a motion for summary

judgment. In response, the ALJ ordered the parties on June 22, 2004, to "submit any supporting materials, including any additional affidavits . . ." by Friday, June 25, 2004. In concluding that the Petitioners had been provided with adequate time to supplement the record with evidentiary affidavits, the Court relied in part upon that three-day period of additional time, which purportedly gave LBMD and LBPIA time to gather, interpret, synthesize and submit complex scientific evidence. While the ALJ and the Court's Decision state that LBMD and LBPIA had constructive notice that the Village's Motion for Summary Disposition would be treated as a summary judgment motion (which is disputed by Petitioners), it is not disputed that the Amended Ruling is the first *explicit* notice that the ALJ would conclude that Petitioners had failed to meet an *evidentiary* burden in responding to a motion that sought judgment on the pleadings.

The three-day period between June 22 and June 25 was unreasonable and woefully inadequate to allow an expert consultant or consultants retained by LBMD or LBPIA to gather and analyze data and prepare a report or reports to demonstrate the existence of the factual controversy regarding potential negative impacts on a navigable waterway, namely Lake Beulah and its adjacent sensitive shore land wetlands and downstream environs. As the attached affidavits demonstrate, the issues involved in the analysis of the likely effects of the proposed well on a navigable body of water, Lake Beulah, and other natural resources dependent upon or critical to Lake Beulah, are complex. It was therefore improper under Wisconsin's civil procedure rules for the ALJ to rule that Petitioners had not met an evidentiary burden in the contested case hearing.

Thus the affidavits filed by counsel for LBMD and LBPIA in support of motions for reconsideration submitted to the ALJ only contained facts pertaining to the chronology of events in the briefing of the Village's Motion for Summary Dismissal and could not have contained the type of expert opinions with scientific and engineering analyses needed to establish a genuine

issue of material fact on the issue of damage to a navigable waterway or other resources subject to Wisconsin's Public Trust doctrine.

Pursuant to §802.06(2)(b), Wis. Stat., when a motion for dismissal is being treated by the Court as one for summary judgment "all parties shall be given reasonable opportunity to present all material made pertinent to such motion by S. 802.08." In CTI of Northeast Wisconsin, LLC v. Herrell, 2003 WI App. 19, 259 Wis.2d 756, the Court of Appeals held that before a court makes a ruling involving conversion of a motion to dismiss to one for summary judgment, notice should be given to the parties which allows a reasonable time to file countervailing affidavits. Petitioners briefed this issue for the Court prior to its decision, but it appears that the Court may not have considered the amount of time provided by the ALJ to submit additional evidence in light of the complexity of the scientific issues involved and the time needed to prepare expert reports.

In the Amended Ruling, at page 6, the ALJ recognized the relevance of the type of scientific evidence that Petitioners were precluded from presenting:

> As the grant of the hearing request indicates, it is not impossible to imagine the situation where the granting of a high-capacity well permit results in secondary impacts to public trust waters. Hypothetically, this could implicate the Public Trust Doctrine or have a detrimental impact on another private well. The granting of a permit is inherently conditional and under certain demonstrable conditions may be subject to further consideration under public nuisance law and the Public Trust Doctrine.

However, the ALJ further stated that, "any potential damages purely speculative because there has been no factual record developed to support the allegations made in the Petition." Thus the ALJ concluded that the Wisconsin Department of Natural Resource ("WDNR") could consider

evidence suggesting that a high capacity well would damage surface waters protected by the Public Trust Doctrine. But, the ALJ concluded that the Petitioners had failed to provide any evidence to support such allegations.

As stated above, the evidence necessary to demonstrate that a factual issue exists regarding the threat of harm to the navigable waters of Lake Beulah and its environs would of necessity include expert testimony from scientists and/or engineers. Petitioners have obtained and submitted with this brief such evidence so that the Court might properly evaluate the unreasonable amount of time previously provided by the ALJ to submit similar reports.

The Affidavit of Robert Nauta submitted with this Motion on Exhibit "A" attests to the availability of geological and hydrogeological data from historical studies, the results of the recent 72-hour pump test required by DNR and collection of additional data from sampling conducted by the LBMD during 2003. Mr. Nauta further opines that analyses of that data, together with modeling and other projections, could reasonably demonstrate the existence of a factual issue on the subject of damage to the adjacent navigable waterway.

The Village's consultant either failed to perform or did not supply customary technical records in the form of well logs or boring logs. Consequently, for purposes of his Affidavit, Mr. Nauta was forced to produce well logs by reviewing and compiling Layne-Northwest's raw data. Based on his well logs and other diagrams so constructed, and upon compilation and review of ancillary data, Mr. Nauta concludes that two of the Village's key assertions are false. It is Mr. Nauta's professional opinion that there is only a single aquifer, not a two-aquifer system separated by a protected confining layer as the Village asserts. Secondarily, it is Mr. Nauta's professional opinion that any water pumped from the proposed Well No. 7 will deplete water

from the shallow depths of the aquifer and thus significantly reduce the natural northward flow of groundwater that now supplies the majority of the water to Lake Beulah. Mr. Nauta has deduced that evidence from an observation well located at the confluence of Lake Beulah and a shoreland wetland adjacent to Lake Beulah, which demonstrates pumping by the test well for 72 hours caused a reduction of groundwater levels of nearly 0.2 foot in the wetland area. Mr. Nauta further opines that under the proposed pumping conditions, a reversal in groundwater flow at the shore of Lake Beulah, would result in surface water flowing out of Lake Beulah and the adjacent shoreland wetland, downwards, into the ground and away from the Lake as a result of the southward pull of the test well.

The second Affidavit supporting this motion (attached as Exhibit "B") is by Ann Michalski, a professional wetland scientist and professional soil scientist. Ms. Michalski's analysis was not possible without the prior work of Mr. Nauta to identify crucial hydrologic conditions that would reasonably be anticipated if the Well No. 7 were constructed. Ms. Michalski reviewed documents pertaining to the approximately 0.2 feet of change in elevation of the water table that was observed in the observation well located at the confluence of the shoreland wetland and Lake Beulah. Based on her knowledge of wetland hydrology and soil science, and her knowledge of the shoreland wetland based on a published report of the Wisconsin Department of Natural Resources identifying it as a sensitive area, Ms. Michalski concludes that any decreased water level in the wetland area could result in detrimental effects to fish, wildlife, amphibians and vegetation in the wetland. Ms. Michalski further concludes that the increased water temperatures and lowered oxygen levels in the wetland could adversely effect fish, amphibians, wildlife and vegetation in the adjacent navigable waters of Lake Beulah.

Ms. Michalski opines that the severity and likelihood of all of the adverse effects would increase if the actual groundwater draw down exceeds 0.2 feet, such as Mr. Nauta believes would be likely under actual production pumping conditions. Finally, Ms. Michalski opines that prior to authorizing construction of a permanent pumping well, additional well points should have been constructed to monitor the existing hydro period of the wetland and the existing wetland should have been thoroughly studied to delineate the wetland, and inventory all plants species within the wetland and adjacent upland.

Furthermore, the Affidavit of Mr. Nauta indicates that a reasonable time in which to complete such analyses and preparation of an expert report from which the ALJ or the Court could determine the existence of a genuine issue of material fact on the subject of damage to Lake Beulah would be expected to take approximately thirty (30) days.

The three-day period allowed by the ALJ between the notice of June 22, 2004 and the date by which he requested that all additional affidavits be filed, June 25, 2004, was totally inadequate to permit the type of evidence necessary in this case to demonstrate the existence of a genuine issue of material fact.

II. The Court should reconsider its Decision and provide relief from the July 15, 2005 Judgment.

Section 805.17(3), Wis. Stat., provides that upon the motion of a party, the court may amend its findings or conclusions. In addition, §806.07 (g) and (h), Wis. Stats., provide that upon a motion and upon such terms that are just, a court may relieve a party from a judgment or order if it "is no longer equitable that the judgment should have prospective application" or for any "other reasons justifying relief from the operation of the judgment." Thus, a court may

entertain a motion to reconsider under its inherent powers when new arguments or information are provided that demonstrate an error in a prior ruling. Fritsche v. Ford Motor Credit Co., 171 Wis.2d 280, 292-95, 491 N.W.2d 119 (Ct. App. 1992).

Section 806.07(h) permits the Court to grant relief from a judgment if "extraordinary circumstances" justify relief. State ex. rel M.L.B., 122 Wis.2d 536, 552, 363 N.W.2d 419, 427 (1985). While this provision cannot be construed "so broadly as to erode the concept of finality, nor should it interpret extraordinary circumstances so narrowly that subsection (h) does not provide a means for relief for truly deserving claimants. A final judgment shouldnot be hastily disturbed, but subsection (h) should be construed to do substantial justice." Id.

These circumstances of this motion qualify as "extraordinary circumstances." Two of the factors recognized in State ex. rel M.L.B. are whether relief is being sought from a judgment in which there has been no judicial consideration of the merits and whether "the interest of deciding the particular case on the merits outweighs the finality of judgments." Id. Based on the short time afforded by the ALJ to provide additional evidentiary material in the contested case hearing, Petitioners were unable to provide expert reports and the ALJ therefore ultimately decided the case below without the benefit of that evidence. Petitioners deserve a meaningful opportunity to present in the contested case hearing evidence of the nature presented in the affidavits submitted with this motion.

The affidavits of Robert Nauta and Ann Michalski submitted by LBMD and LBPIA in support of this motion present the type of evidence the ALJ and the Court deemed relevant to the WDNR's consideration of the Village's high-capacity well permit application. Moreover, the WDNR has stated in its submissions in this action that it has the authority to consider such

evidence in the process of reviewing the Village's application, or any other application for a high-capacity well permit. Given the short period of only three-days allowed by the ALJ for the submission of such evidence, after Petitioners received explicit notice of the ALJ's decision to convert the Village's motion on the pleadings to a summary judgment motion, Petitioners were simply unable to supply that relevant evidence to the ALJ in June 2004. These circumstances demonstrate the inherent unfairness of the procedures imposed by the ALJ, and support this Court's reconsideration of its Decision.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to reconsider its Decision, and remand this action to the ALJ to permit Petitioners an appropriate time to prepare and submit evidentiary material in response to the Village's converted summary judgment motion and to brief those issues raised by the evidentiary material.

Dated this 4th day of August 2005.

DEWITT, ROSS & STEVENS S.C.

By: David V. Meany

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STATE OF WISCONSIN: CIRCUIT COURT: WALWORTH COUNTY

Lake Beulah Management District,
Petitioner,
and

Lake Beulah Protective and
Improvement Association,
Petitioner/Intervener,
vs.

Case No. 04-CV-683
Case No. 04-CV-687

State of Wisconsin Department of
Natural Resources,
and
Village of East Troy,
Respondents.

AFFIDAVIT OF ROBERT J. NAUTA

I, Robert J. Nauta, do hereby attest that:

1. I am a licensed professional geologist in the State of Wisconsin, (Lic. No. G-035), currently employed by RSV Engineering, Inc.

2. I have more than 18 years experience performing and interpreting hydrogeological studies.

3. I have been retained by the Lake Beulah Management District ("LBMD") to provide hydrogeological consulting services related to assessing the probable impacts the proposed Village of East Troy high capacity Well No.7 will have on the environment.

4. I have reviewed the following technical reports relating to the application of the Village of East Troy (the "Village") for a high capacity well permit for proposed Well No. 7 (the "Well" or "Well No. 7").

EXHIBIT
A

a. *Report on the Task 1.0 Geologic Reconnaissance Study to Identify Potential Municipal Well Sites for the Village of East Troy, Wisconsin*, by Layne-GeoSciences, dated March 2001.

b. *Pumping Test Analysis, Safe-Yield Projections and Recommended Well Design for Village Well No. 7, East Troy, Wisconsin*, by Layne-Northwest, dated April 2003.

c. *Lake Beulah Sensitive Area Assessment*, by the Southeast District Water Resources staff of the Wisconsin Department of Natural Resources, dated May 1994.

5. In addition to my review of the documents identified in paragraph 4 above, I have installed test wells and conducting groundwater and surface water studies relating to the hydrology of Lake Beulah, Wisconsin (the "Lake").

6. I make this declaration in support of the LBMD's Motion For Reconsideration and Relief From Judgment based on my personal knowledge and the specific references cited.

7. The short time period allowed by the court to file technical documentation of adverse environmental impacts from the proposed well was insufficient due to the complex nature of the technical hydrogeological issues involved in this project. Typically, proper groundwater studies require months of planning and years of data collection over seasonal weather changes, followed by weeks of computer modeling, before factual conclusions can be confidently drawn.

8. The Layne-GeoSciences screening study identified two locations where the shallow sand and gravel aquifer showed potential for providing adequate water to

satisfy the Village's needs. The two locations were: An area south of the East Troy municipal airport (the "Airport Site") and the area where the test well was installed by Layne-Northwest to the south of Lake Beulah (the "Proposed Well Site").

9. The Airport site was rejected by the Village due to a potential for the shallow sand and gravel aquifer to be contaminated by a nearby landfill.

10. The Proposed Well Site south of Lake Beulah was recommended and chosen by the Village as their primary study site. The test well that Layne-Northwest installed at the Proposed Well Site by is within 1,200 feet of a shoreland wetland adjacent to the south shore of Lake Beulah (the "Sensitive Wetland").

11. The Sensitive Wetland identified in paragraph 10 above has been classified by the Wisconsin Department of Natural Resources as "Sensitive Area #8" in a published Water Resources publication dated May 1994 (See document excerpt Exhibit "1").

12. The Village has distributed at least two publications informing the public that the proposed Well No. 7 would protect the Lake from any negative impacts based on the existence of "over 50 feet of clay and 150 feet of fine silty sand" that would serve to limit the migration of water between the upper and the lower portions of the aquifer.

13. Data from borings performed by Layne-Northwest do not indicate the presence of such a clay layer or a continuous confining layer of fine silty sand. Consequently, it is my professional opinion that there is only one aquifer in the sand and gravel penetrated by the test well, that there is only one water table in the aquifer and

that any silty sand or clay in the aquifer would not limit the migration of groundwater between the upper and lower portions of the aquifer.

14. Assuming the Village's position of the existence of a clay layer separating the upper aquifer from the lower aquifer were present and also assuming said clay layer were continuous from the Lake to the Well No. 7 site, the Lake bed would likely lie below the clay layer, resulting in any draw down of the aquifer by the pumping at Well No. 7 being directly connected to and influencing water levels in the Lake.

15. I began working with the Lake Beulah Management District ("LBMD") in the summer of 2003 to collect hydrogeologic and hydrologic data to study the Lake Beulah watershed. In 2003, RSV began recording stream flow data from immediately below the dam, which controls the lake level.

16. In the summer of 2004, RSV installed a series of ten wells at five locations around the lake, and measured water levels in these wells twice per week during warm weather months. The data collected are being used to estimate the water budget for the Lake, which includes a record of inflow to and outflow from the Lake.

17. From my work at RSV I have concluded that groundwater appears to be the primary source of water for the Lake. Lesser amounts of water are contributed to the Lake from precipitation and surface flow.

18. The LBMD study has shown that the Lake is a "flow-through" lake, meaning that groundwater enters the Lake at one end (the south end), and the Lake water discharges to the groundwater system at the other end (north end) (see Figure 1).

19. The LBMD is also providing funding for the completion of a three-dimensional groundwater flow model, to be used to assist in the water budget calculations, and to simulate the impacts of stresses to the aquifer (e.g., pumping). This model is estimated for completion in the fall of 2005.

20. Layne-Northwest performed an aquifer test at the approximate site of proposed Well No. 7 in February 2003. The test well was test pumped at a rate of 400 gpm, which is less than one-half the requested Well No. 7 permit capacity of 1,000 gpm, for a period of only 72 hours. Several wells were monitored for changes in the groundwater elevation in the area surrounding the test well during the pump test. One of those wells was a shallow well point installed in the Sensitive Wetland on the south shore of Lake Beulah and mentioned in paragraph 10 above. Additionally, two shallow wells were also monitored.

21. The documentation presented in the Layne-Northwest April 2003 report identified in paragraph 4 above confirmed that the groundwater level beneath the referenced wetland was lowered nearly 0.2 foot during the relatively short duration of the test pump period. In addition, the same documentation disclosed that the aquifer had not yet reached steady state before the test pump was terminated, indicating that, water levels were still dropping when the pump was turned off.

22. The documentation presented in the Layne-Northwest April 2003 report proving a loss of nearly 0.2 foot of water in the wetland along the shore of Lake Beulah, along with substantial lowering of groundwater levels in the shallow monitoring wells during the test, proves that the Village's claims that the upper and lower

water depths were confined from each other to prevent migration of water between them, are false.

23. Based on the results of the Layne-Northwest pumping test and the proposed pumping rate for Well No. 7, I believe that the actual drawdown of shallow groundwater in the wetland area will be greater than 0.2 foot, if the well is constructed and put into operation.

24. The documentation presented in the Layne-Northwest April 2003 report proves the proposed high capacity Well No. 7 will intercept groundwater that would otherwise flow northward and discharge into the lake, a condition which potentially could result in reversing the groundwater flow direction beneath the south end of Lake Beulah. If groundwater flow were reversed, surface water in the Lake would flow out of the Lake and toward the pumping well to the south.

25. As part of RSV's groundwater monitoring around the Lake, I have observed an upward groundwater flow gradient present around the southern perimeter of the Lake, except during the 72-hour pump test. An upward groundwater flow gradient means that groundwater flows into the Lake from the aquifer in this area. Based on the magnitude of the observed gradient and the results of the pumping test completed by Layne-Northwest, I believe that a significant reduction or reversal of this gradient could be caused by the proposed Well No. 7, resulting in the reduction or elimination of groundwater flow into this portion of the Lake.

26. The land area surrounding the site of the proposed Well No. 7 is proposed as a planned residential development. Such a change in land use will add roofs, paved roadways and paved driveways that will intercept and direct precipitation in a

very different pattern to that which exists today, thus reducing the amount of storm water that now recharges to groundwater and eliminates that flow to Lake Beulah.

27. The planned development will reduce groundwater recharge in the area, thereby further reducing the water available for discharge to the wetland and Lake Beulah.

28. Groundwater removed from proposed Well No. 7 will be used by the Village and discharged by means of sanitary sewer to a watershed other than that of Lake Beulah. Consequently, the water removed by Well No. 7 will be permanently taken from the Lake Beulah watershed, thereby reducing the water available for discharge to the Sensitive Wetland and to Lake Beulah.

29. It is my opinion that the aquifer test performed by Layne-Northwest was inadequately designed and improperly conducted for the purposes of evaluating environmental impacts and therefore did not properly evaluate the potential impacts to sensitive environmental features and navigable surface water. Nevertheless, the brief aquifer test performed did confirm a lowering of groundwater levels in and adjacent to the Sensitive Wetland and Lake Beulah. Such results clearly demonstrate potential for adverse impacts to Lake Beulah and to an environment already classified by the WDNR as a sensitive environmental feature. Moreover, the aquifer test results clearly demonstrate interruption or disruption of groundwater supply to Lake Beulah and a diversion of surface water from Lake Beulah, which are likely to cause adverse effects to the Lake and wildlife dependent upon the Lake.

30. I shared the concerns state in the paragraphs above with hydrogeology experts at the United States Geological Survey ("USGS") and the Southeastern Wisconsin Regional Planning Commission ("SEWRPC"). Both the USGS and SEWRPC experts concurred with our conclusions in written statements (Exhibit "2").

31. It is my opinion that the existing data can only support the conclusion that pumping of proposed Well No. 7 would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah.

32. It is my opinion there is no "protective layer" hydraulically separating the deeper groundwater the Village proposes to pump from the shallow groundwater that feeds Lake Beulah and the Sensitive Wetland.

33. It is my opinion that the scientific data from the tests conducted do not support the Village's claim that proposed Well No. 7 will not cause adverse environmental impacts or adverse effects to the navigable waters of Lake Beulah.

34. If the court had provided adequate time for the LBMD to present technical documentation, the following work would have been completed:

a. A detailed summary and analysis of the aquifer test data, providing documentation of the uncertainties of the report is conclusions.

b. A discussion of the testing necessary (and deficient in the Layne-Northwest study) to adequately evaluate the potential impacts on environmental features, including reduction in groundwater discharge to wetlands and Lake Beulah and effects on lakebed temperature and chemistry caused by a reduced influx of groundwater.

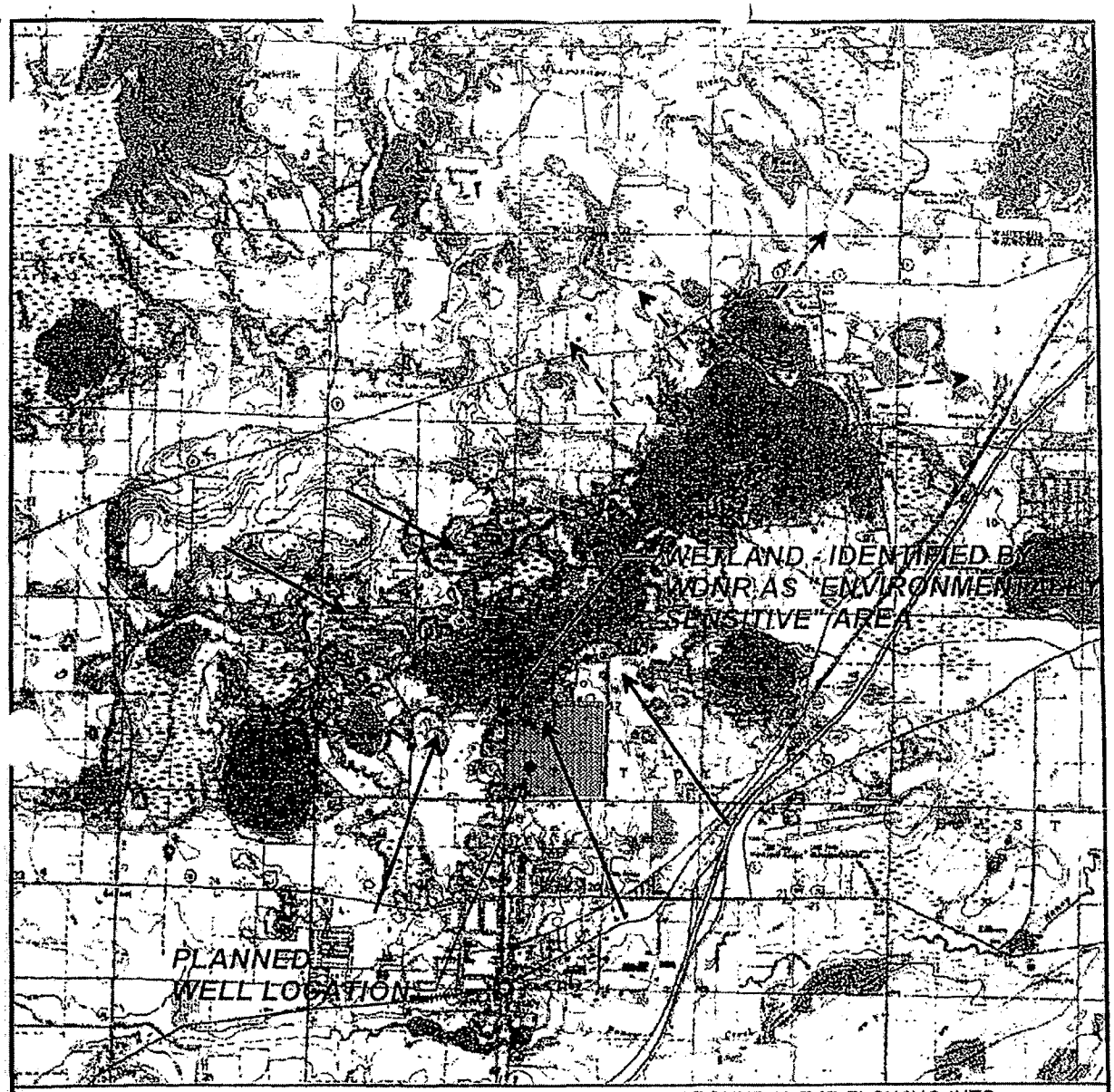
c. Computer simulation showing the potential extent of impacts when pumping continues beyond the 72 hours that the well was tested, as would be the case if proposed municipal Well No. 7 is placed in operation. This computer simulation would have combined data obtained by Layne-Northwest with data collected by the LBMD, which has shown the sensitivity of Lake Beulah to changes in its hydrology.

Dated this 4th day of August 2005.

Robert J. Nauta

Subscribed and Sworn to me
this 4th day of August 2005.

Notary Public
My commission expires: 1-11-2008



BASE MAP SOURCE: USGS 7.5 MINUTE TOPOGRAPHIC QUADRANGLES, MUKWONAGO, WISCONSIN (1960, REV. 1994) AND EAST TROY, WISCONSIN, (1960, REV. 1994).

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LAKE BEULAH MANAGEMENT DISTRICT
LAKE BEULAH, WISCONSIN
LAKE MAP

FIGURE 1

DRAWN BY	PROJ. No.	DATE	FILE NAME
RN	02-368	18 JUL 05	BEULAH MAP

Lake Beulah
Sensitive Area Assessment

Final Report
May 1994

Prepared By
Kathi Dionne
Water Resources Specialist
Dan Helsel
Water Resources Management Specialist
Southeast District
Wisconsin Department of Natural Resources

EXHIBIT
1

Provided by:
Lake Beulah Protective and Improvement Association

Lynn Carlson

LAKE BEULAH SENSITIVE AREA STUDY

DNR WATER RESOURCES
MAY, 1994

INTRODUCTION

Lake Beulah is a valuable resource of the state of Wisconsin held in trust for the general public. The lake provides recreation, aesthetic enjoyment, opportunities for fishing and wildlife observation, boating and swimming. Lake Beulah has offered enjoyable conditions such as good water quality, abundant fisheries of good sized game fish and areas of aesthetic beauty.

The aquatic plants in this lake are a diverse community which has served the lake well, keeping nutrients and sediments to a minimum and providing valuable food and habitat for many desirable animals such as game fish and waterfowl.

In July of 1993, Department of Natural Resources staff visited Lake Beulah for the purpose of identifying areas which are sensitive and therefor in need of extra protection. Areas are considered sensitive if they fall under the following definition:

> "... areas of aquatic vegetation identified by the department as offering critical or unique fish and wildlife habitat, including seasonal or lifestage requirements, or offering water quality or erosion control benefits to the body of water." (NR 107, 1989)

These might include:

- Diverse stands of high quality native aquatic plants which help provide a buffer against invasion of Eurasian water milfoil, a very aggressive non native aquatic plant which is increasingly becoming a nuisance in Wisconsin's lakes.
- Areas of vegetation which trap sediments and nutrients flowing into the lake thereby improving water clarity and reducing available nutrients for undesirable plant growth.
- Areas of vegetation which offer spawning nesting or feeding habitat for fish or wildlife.
- Areas of vegetation whose species composition or hydrology make it an ecologically unique community.

Lake Beulah is an 834 acre drainage lake; with a maximum depth of 58 feet and an average depth of 17 feet. The water clarity at Lake Beulah typically ranges between 6 and 11 feet during the summer. There are eight areas in Lake Beulah identified as sensitive. Each of these areas possesses characteristics which are beneficial to the lake as a whole. Their protection will help to preserve the quality of the water in Lake Beulah. A brief description of the eight identified sensitive areas follows:

- Sensitive Area 1 is located along the eastern shore of Jesuit island in the northeastern part of the lake.
- Sensitive area 2 is a small cove located across from Jesuit island.
- Sensitive area 3 is located around a small island along the northeastern shore of the lake.
- Sensitive area 4 is located along the southern shore of the lake in the area also know as Mueller's Cove.
- Sensitive area 5 is in the south shore cove area, located on the southern shore of the eastern end of the lake.
- Sensitive area 6 is located in the narrows between the two basins of the lake.
- Sensitive area 7 is located in the bay near the inlet form Pickerel Lake in the southwestern part of the lake.
- Sensitive area 8 is located just southeast of the East Troy boat launch on the southwestern shore of the lake.

In general, these areas support a diverse community of native aquatic plants with limited areas of Eurasian water milfoil. They offer spawning and nursery areas for several fish species, nesting habitat for animals, act as a sediment and nutrient trap, as well as helping protect the shoreline from erosion.

Sensitive areas are determined by assessment of a team of scientists from the Wisconsin Department of Natural Resources, including fisheries, wildlife, water resources and water regulation and zoning staff. Each team member has expertise in areas relating to water quality and fish or wildlife biology and the ecological value of the area being assessed. The members of the team which investigated this area are:

Doug Welch (Fish Management) Mark Anderson (Wildlife Management)
Dan Helsel (Water Resources) Liesa Nesta (Water Regulation and Zoning)

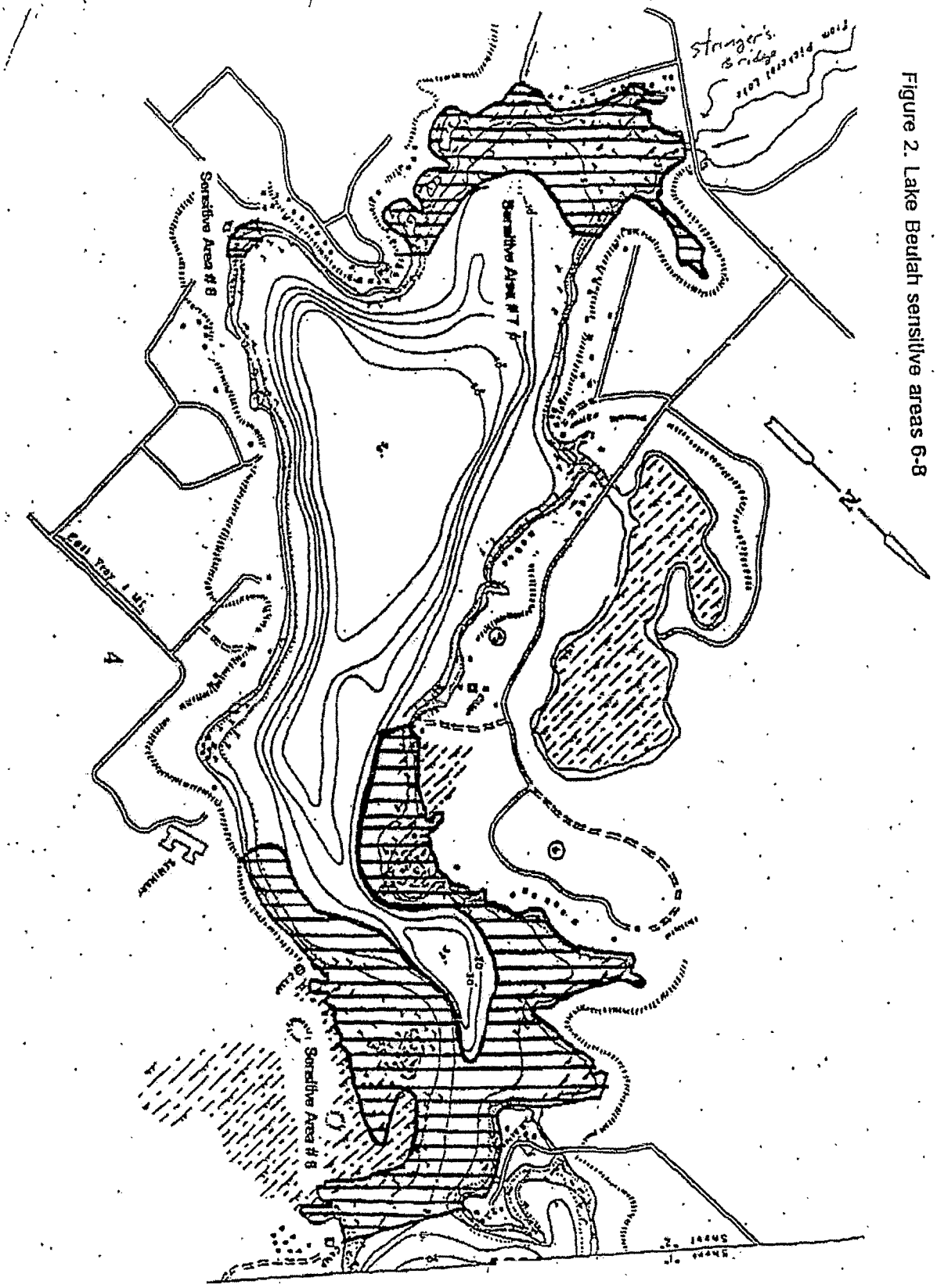

Figure 2. Lake Beulah sensitive areas 6-8

Sensitive Area # 8

SENSITIVE AREA SITE DESCRIPTION

Sensitive area #8 is located just southeast of the East Troy boat launch on the southwestern shore of Lake Beulah. (Figure 2 and 3)

RESOURCE ASSETS OF SENSITIVE AREA #8

Sensitive area #8 supports an diverse reservoir of native aquatic plants, both submergent and emergent, and only limited areas of Eurasian water milfoil (*Myriophyllum spicatum*). (Table 1) The emergent and floating leaved community includes swamp loosestrife (*Decodon verticillatus*), bulrushes (*Scirpus sp.*), white water lily (*Nymphaea tuberosa*) and yellow water lily (*Nuphar variegatum*). The submergent community includes native water milfoil, (*Myriophyllum heterophyllum*), and a variety of pondweed species (*Potamogeton spp.*).

Fish utilize this community in a variety of ways. The diverse community of emergent and submerged aquatic plants provide excellent spawning habitat for northern pike, and very good spawning habitat for largemouth bass and bluegills. The less heavily vegetated areas provide spawning areas for crappie and walleye. The vegetated areas also provide high quality nursery areas for northern pike, largemouth bass, walleye, crappie and bluegill. All these species will also find ideal feeding habitat in these areas.

Wildlife also depends on the resources provided by sensitive area #8. This area offers high quality habitat for a variety of wetland species. Ducks such as mallards and wood ducks will nest, feed, and rear their young here. Wading birds such as the great blue heron, smaller herons and bitterns feed here, and stop here during migration. Shorebirds such as sandpipers will be found feeding here, and songbirds will find nesting habitat, and will feed and rear their young in the trees and shrubs along the wetlands. Muskrats, opossum and raccoons can be found here year round, feeding, nesting and raising their young.

The plant community in sensitive area #8 acts as a sediment and nutrient trap, as well as protecting the shoreline from erosion. It also stabilizes the bottom sediments. These functions benefit the entire lake in that they reduce nutrients available in the water to support the growth of nuisance aquatic plants, and improve the clarity of the water. (Table 2)

Sensitive area #8 is ecologically important to the lake for several reasons. The excellent native species reservoir will act as a buffer against invasion by exotic plant species, as well as a refuge where native species have established and can continue to spread. The emergent, floating leaved and submergent plant community and the

spawning grounds that provide for fish are unique to the lake. (Table 2)

MANAGEMENT RECOMMENDATIONS FOR SENSITIVE AREA #8 (Table 4)

In-lake activities:

Aquatic plant control:

1. Chemical: chemical treatment of aquatic plants will be permitted in this area, but is limited to control of Eurasian Water Milfoil. These chemical applications should be as selective as possible to reduce impacts on the native aquatic plant community and be part of a lake wide Eurasian water milfoil control plan.

2. Mechanical: mechanical control of any type is not recommended.

Water Regulation and Zoning:

1. Dredging will not be permitted.

2. Filling will not be permitted.

3. Pea gravel/sand blanket will not be permitted.

4. Aquatic plant screens will not be permitted.

5. Special permitted piers/boardwalks for water access will be considered on a case by case basis.

Riparian Activities:

1. Wetland alterations of any type will not be allowed without the proper DNR and Army Corp of Engineers permits.

2. Boardwalks will be considered on a case by case basis for the purposes of limited riparian access and public education.

3. Shoreland zoning standards do not allow new homes or other structures such as gazebo's and decks to be built in wetlands. All other construction must comply with all Walworth County requirements, especially the 75 foot setback from the shoreline.

4. Shoreline protection will not be permitted as it is unnecessary in this area.

Common Name	Scientific Name	Sensitive Area Occurrence
Eurasian water milfoil	*Myriophyllum spicatum*	1,2,3,4,5,6,8
Swamp loosestrife	*Decodon verticillatus*	1,5,6,7,8
White water lily	*Nymphaea tuberosa*	1,2,3,4,5,6,7,8
Yellow water lily	*Nuphar variegatum*	1,2,3,4,5,6,7,8
Variable leaved water milfoil (native)	*Myriophyllum heterophyllum*	1,2,4,5,6,7,8
Sago pondweed	*Potamogeton pectinatus*	1,5,6,7
Clasping leaved pondweed	*P. richardsonii*	1,4,6,7
Floating leaved pondweed	*P. natans*	1,6,7
Large leaved pondweed	*P. amplifolius*	1,5,6,7
Narrow leaved pondweed	*P. spp.*	2
White stemmed pondweed	*P. praelongus*	4
Curly leaved pondweed	*P. crispus*	2
Bladderwort	*Utricularia sp.*	1,2,6
Wild celery	*Valisneria americana*	1,2,5,6,7
Musk grass	*Chara sp.*	1,2,4,5,6,7
Duckweed	*Lemna sp.*	5
Narrow leaved cattail	*Typha angustifolia*	6
Large leaved elodea	*Elodea canadensis*	6
Bulrushes	*Scirpus spp.*	4,6,7,8

Table 1. Aquatic plant species found in Lake Beulah sensitive areas and their locations

Resource Value	Area 1	Area 2	Area 3	Area 4	Area 5	Area 6	Area 7	Area 8
Diverse Native Plant Community	X	X	X	X	X	X	X	X
Sediment & Nutrient Trap- protects water quality	X	X	X	X	X	X	X	X
Wildlife & Fishery Value- spawning, nursery, feeding, etc.	X	X	limited by size	X	X	X	X	
Shoreline Erosion Protection	X	X	X	X	X		X	
Stabilization of Bottom Sediments- protects water quality	X		X			X	X	X
Ecological/ hydrological/other	spawning	buffer / refuge	fish cover		very diverse	traps incoming nutrients from Pickerel lake	buffer / refuge	

Table 2. Resource values of sensitive areas in Lake Beulah.

	Activity	Sensitive Area 1	Sensitive Area 2	Sensitive Area 3	Sensitive Area 4
In Lake Activities	Chemical control of aquatic plants	Allowed only as part of a Eurasian water milfoil control plan	Allowed only as part of Eurasian water milfoil control plan	Allowed only as part of Eurasian water milfoil control plan	Allowed only as part of Eurasian water milfoil control plan
	Mechanical harvesting of aquatic plants	Not recommended	Not recommended	Not recommended	Recommended only for Eurasian water milfoil
	Dredging	Navigational purposes only- native plantings required. Southern part only	May be permittable on a case by case basis - native planting required	Permit required - native planting required	Permit required - native planting required - not in shoreline area of bulrushes and willow
	Filling	Not permitted	Not permitted	Not permitted	Permit required
	Pea gravel / sand blanket	Not permitted	Not permitted	Permittable on a case by case basis	Permittable on a case by case basis
	Aquatic plant screens	Permittable	Permit required	NA	Permittable on a case by case basis
	Boardwalks and special permitted piers	Permittable on a case by case basis	Permittable - must meet local and DNR standards	NA	Permittable on a case by case basis
	Other - Seawall construction	Generally not permitted but possible if conditions warrant	Generally not permitted but possible if conditions warrant	NA	Generally not permitted but possible if conditions warrant
Riparian Activities	Wetland alterations	Permit required	NA	NA	NA
	Boardwalks	Permittable for limited riparian and educational uses	NA	NA	NA
	Shoreline protection	Riprap only- not in wetland- only in cases where erosion is occurring	Permit required	Permit required	Permit required
	Shoreline zoning	Must comply with local standards, 75 foot setback	Must comply with local standards	Must comply with local standards	Must comply with local standards

Table 3. Management recommendations and restrictions for Lake Beulah sensitive areas 1-4.

	Activity	Sensitive Area 5	Sensitive Area 6	Sensitive Area 7	Sensitive Area 8
In Lake Activities	Chemical control of aquatic plants	Allowed only as part of Eurasian water milfoil control plan	Allowed only as part of Eurasian water milfoil control plan	Not permitted	Allowed only as part of Eurasian water milfoil control plan.
	Mechanical harvesting of aquatic plants	Not recommended	Recommended for navigational channels only	Recommended for navigational channels only	Not recommended
	Dredging	Permittable but limited - native planting required	Not permitted	Not permitted	Not permitted
	Filling	Not permitted	Not permitted	Not permitted	Not permitted
	Pea gravel / sand blanket	Not permitted	Pea gravel possible- sand not permitted	Not permitted	Not permitted
	Aquatic plant screens	Permit required	Permit required	Not permitted	Not permitted
	Boardwalks and special permitted piers	NA	Permittable on a case by case basis	Permittable for limited water access only	Permittable on a case by case basis
	Other - Boating regulations	NA	Recommended to remain slow / no wake	NA	NA
	Other - Seawall construction	NA	NA	Generally not permitted but possible if conditions warrant	NA
Riparian Activities	Wetland alterations	NA	Not permitted	Permit required	Permit required
	Boardwalks	NA	Permittable for education and riparian access	Permittable for education and riparian access	Permittable for education and riparian access
	Shoreline protection	Riprap permittable - only in cases where erosion is occurring	Not permitted	Riprap permittable - only in cases where erosion is occurring	Not permitted
	Shoreline zoning	Must comply with local standards	Must comply with local and shoreline wetland zoning standards	Must comply with local and shoreline wetland zoning standards	Must comply with local and shoreline wetlands zoning standards

Table 4. Management recommendations and restrictions for Lake Beulah sensitive areas 5-8.

Bob Nauta

From: "Daniel T Feinstein" <dtfeinst@usgs.gov>
To: <whiskey@direcway.com>
Cc: <jtkrohel@usgs.gov>
Sent: Tuesday, June 03, 2003 3:05 PM
Subject: East Troy pumping test

Bob,

About two weeks ago you asked me to take a look at the pumping test analysis presented by Layne-Northwest of the East Troy, Wisconsin test well. After a quick, informal review of their report, I have the following comments:

1) The test appears to have been well designed and the analysis is generally well presented. The fact that the specific yield values from the analysis are reasonable suggests that the methodology has some merit.
2) It is difficult to interpret the transmissivity results. If the thickness of the coarse-grained material (about 80 ft) is applied to the results for MW2 and MW3, the derived hydraulic conductivity (K) is about 550 ft/day for the sand/gravel and the implied vertical conductivity of the overlying more fine-grained material is about 1 ft/day. These values seem high. If the well point is assumed to be far enough away so that its drawdown represents the response of the entire 260 ft thick system, then the average K is on the order of 45 ft/day. This estimate for the bundle of bedrock valley deposits also seems high.
3) One possibility not accounted for in the use of the Neumann solution is that Lake Beulah is acting as a head-dependent boundary that depresses drawdown and yields unreasonably high estimates of K when neglected. It would be interesting to take account of that boundary (using a numerical model and see if the K values decrease and if the specific yield values still remain reasonable. One difficulty would be the conductance value to assign the lakebed ? much would depend on its resistance.
4) Another possibility to explain the apparent high K results is that the underlying bedrock contributes transmissivity and should be included in the thickness (thereby reducing the overall K). Our databases show that the Silurian pinches out just in this area (with some islands further to the west). It also shows that the Maquoketa subcrop runs under this area. It is possible that remanants of these units plus weathred Sinnipee dolomite contributes transmissivity to the system, but it seems unlikely that the effect would be dominant.
5) There is no question that pumping from the test well has an effect on Lake Beulah. The period of pumping is not shown on Figure 9, but if it is between 4000 and 8320 minutes, then the drawdown at the lakeshore is on the order of 0.1 ft and is increasing at the end of the test. A longer pumping test would be valuable in this regard. It is interesting that Layne's predictive analysis also suggests an effect on the lake. It shows that after 2 years of pumping there would be 2 ft of drawdown adjacent to the lake if the aquifer properties from the well point are assumed.
6) I quickly looked for data from the staff gage, but didn't find any. I

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assume the lake level did not change during the test (??).
7) The predictive analysis conducted by Layne (Figure 13) doesn't really indicate equilibrium conditions after 2 years as assumed on p. 8 of text. Again, however, this analysis is suspect because the lake is not a head-dependent boundary.
8) It is unlikely that long-term pumping would reverse groundwater gradients into the lake, but clearly the magnitude of the gradients into the lake would be reduced and base flow into the lake would be affected.
9) Given the size of Lake Beulah, it is unclear if the reduction in base flow from long-term pumping at an average rate of 333 gpm would have significant effect on total base flow to the lake. However, it is likely that it would be the major source of water to the well, especially if the high K material is of limited extent. A more sophisticated modeling effort calibrated to the pumping test and then used in predictive mode could address that question.
10) One caveat ? The table on p 4 appears to indicate that well MW-2A experienced drawup of 0.26 ft during the test, but the plot in appendix C shows drawdown of 1 ft. I am missing something here.

Again I emphasize that these remarks are based on a very quick review and do not represent a thorough analysis of the problem.

Daniel

8/28/2003

SOUTHEASTERN WISCONSIN REGIONAL PLANNING COMMISSION
W239 N1812 ROCKWOOD DRIVE • PO BOX 1607 • WAUKESHA, WI 53187-1607 • TELEPHONE (262) 547-6721
FAX (262) 547-1103

Serving the Counties of: KENOSHA MILWAUKEE OZAUKEE RACINE WALWORTH WASHINGTON WAUKESHA

July 28, 2003

Mr. David Skotarzak
Chairman
Lake Beulah Management District
P.O. Box 71
East Troy, WI 53120-0071

Dear Mr. Skotarzak:

This is to acknowledge receipt of your June 21, 2003, letter requesting that the Regional Planning Commission review and comment on issues raised concerning, and further proposed evaluations relating to, the development of a high-capacity well in the southwest one-quarter of U.S. Public Land Survey Section 17, Township 4 North, Range 18 East, Town of East Troy. In addition to the well construction, a subdivision with about 110 lots is proposed to be constructed in the same area. However, the well capacity is such that it appears to be designed to provide a water supply to a much larger area than the subdivision itself. Your letter describes issues of concern related to the possible negative impacts of the well by reducing the groundwater flow to the wetland complex on the south end adjacent to Lake Beulah, the nearshore area to the wetland complex, and to the Lake itself. These impacts include a reduction in groundwater input and an associated reduction in water levels. You also note the potential impacts on the Lake of nutrients in runoff from the proposed development.

In your letter, you also suggest that several additional studies should be conducted, including:

- An additional well pumping test and groundwater level monitoring analysis to better estimate the expected changes in groundwater levels in the surrounding area after the pumping system is operating.
- A wetland delineation and characterization and an evaluation of the expected impact on the wetland complex resulting from the estimated changes in the groundwater regime.
- Groundwater elevation monitoring to define the natural, or pre-construction, groundwater conditions.
- Analysis using a groundwater model to estimate the impacts of the well pumpage on the wetland, Lake, and surrounding area.

Pursuant to your request, the Commission staff has reviewed the materials provided with your letter and Commission file data relating to groundwater conditions in the subject area and offers the following comments for your consideration:

1. The District's consultant reported that the well capacity is proposed to be 1,000 gallons per minute, or 1,440,000 gallons per day, with the anticipated typical use being about one-third of that capacity.

2. Review of the Commission groundwater inventory (see SEWRPC Technical Report No. 37, *Groundwater Resources of Southeastern Wisconsin*, June 2002) indicates that the groundwater elevation in the subject area is relatively flat, with little gradient. Thus, the Lake, wetland, and general area water table are all likely at a similar elevation.

3. The Commission staff agrees with the concerns raised in your letter relating to the potential for negative impacts on the wetland complex and the Lake itself, due to the pumping from the well. However, as you indicate, the current level of knowledge is not adequate to make reasonable estimates of the severity of impacts. In addition to the issues you have raised, the potential impacts on surrounding private wells is another concern. There are several private wells within 1,000 feet of the proposed well.

4. The four additional studies that you have suggested be conducted are logical steps in determining the potential impacts of the proposed well. However, these studies will be of little value if the proposed well siting is not deferred until the evaluations needed to better define the impacts are completed and the option of changing the proposal is left open should the negative impacts be estimated to be significant. Once the well and subdivision is constructed, there is little that can be done to mitigate any significant negative impacts. The wetland delineation and characterization, pumping test, and modeling would all be important in this regard. The groundwater level monitoring will be useful, but will take a considerable period in order to characterize the natural fluctuations. However, such a groundwater monitoring program could be initiated and used as part of the pumping test and as modeling input.

5. Groundwater impacts are an important factor in determining the quality of lake systems, such as Lake Beulah, given the clean and low temperature characteristics of groundwater inflow. The well construction being considered, as well as the subdivision construction itself, will have the effect of reducing the groundwater flow to the Lake. The significance of that effect is not known. Given the size of the Lake and tributary watershed, the loss of about 400,000 to 500,000 gallons per day of groundwater may not have a major impact. However, over the long-term, this is not yet known. In any case, it is important to minimize such impacts, since the cumulative impact of this and similar actions can be significant when taken in aggregate over a long period of time.

6. The concern you raise regarding nutrient runoff from the subdivision can be partially mitigated by installing a high level of stormwater management control measures. However, given the density of the proposed subdivision, there will be some increase in nonpoint source pollutant loadings to the Lake and a reduction in groundwater inputs due to the increase of imperviousness resulting from the subdivision. This location would be one where stormwater infiltration measures can be appropriate as part of a series of stormwater management measures. This could help, somewhat, to reduce the impact on groundwater levels due to increased impervious area development.

Based upon the foregoing, it is recommended that the studies you have outlined be undertaken. However, in order to be effective, it is recommended that the well construction be deferred until such a time as a reasonable estimate of the impacts of the proposed actions is determined and that, if appropriate, alternatives to the proposed action be considered. Thus, it is recommended that the studies be undertaken in a cooperative effort involving the Village of East Troy, the Town of East Troy, and the Lake Beulah

Management District. It is further recommended that the well development proposal be reevaluated on a cooperative basis by these parties once the impacts are properly known.

We trust this responds to your request. Should you have any questions on this response or need anything further, please do not hesitate to call.

Sincerely,

Philip C. Evenson
Executive Director

PCE/RPB/pk
#85009 V1 - SKOTARZAK LTR

cc: Ms. Judy A. Weter, Village of East Troy
Mr. Clayton O. Montez, Town of East Troy
Mr. Neal A. Frauenfelder, Walworth County
Mr. James D'Antuono, WDNR, Southeast Region

STATE OF WISCONSIN: CIRCUIT COURT: WALWORTH COUNTY

Lake Beulah Management District,
Petitioner,
and

Lake Beulah Protective and
Improvement Association,
Petitioner/Intervener,
vs.

Case No. 04-CV-683
Case No. 04-CV-687

State of Wisconsin Department of
Natural Resources,
and
Village of East Troy,
Respondents.

AFFIDAVIT OF ANN M. MICHALSKI

I, Ann M. Michalski, hereby attest that:

1. I am a Professional Wetland Scientist and Professional Soil Scientist (Lic. No. 198-112), currently employed by Northern Environmental Technologies, Incorporated.
2. I have worked for the consulting firm of Northern Environmental Technologies for 9 years and been a Professional Scientist for 3 years working in the monitoring, classifying, evaluating, delineating, assessing and reconstruction of wetland, aquatic and sensitive environments.
3. I have been retained by the law firm of DeWitt, Ross & Stevens, S.C. to provide expert testimony relative to the probable impacts and harm produced by a reduction of 0.2 feet in the groundwater table beneath the wetland located just southeast of the East Troy boat launch on the southwestern shore of Lake Beulah referred to by the Wisconsin Department of Natural Resources as sensitive area #8 and lying adjacent to proposed Well #7 for the Village of East Troy.
4. I have been provided and reviewed the following documents regarding a wetland adjacent to the south shore of Lake Beulah and the proposed Village of East Troy Municipal Well No. 7 in Walworth County, Wisconsin.
   a. A letter dated August 8, 2003 from Mr. Robert Nauta of RSV Engineering, Inc. addressed to Attorney Daniel P. Bach, Deputy Attorney General for the State of Wisconsin which summarizes the technical background surrounding the environmental issues associated with the proposed Well No. 7 for the Village of East Troy.

EXHIBIT
B

b. A graph of water level data obtained from a well point in the subject wetland by Layne Northwest during drawdown testing of the proposed Well No. 7.
c. A report from the Wisconsin Department of Natural Resources dated May 1994 titled Lake Beulah Sensitive Area Assessment.
d. A memo from Mr. Daniel T. Feinstein of the U.S. Geologic Survey to Mr. Bob Nauta dated June 3, 2003.
e. A letter from Mr. Philip C. Evenson, Executive Director of the Southeastern Wisconsin Regional Planning Commission to Mr. David Skotarzak, Chairman of the Lake Beulah Management District dated July 28, 2003.

5. The wetland is currently classified by the Wisconsin Department of Natural Resources as a "Sensitive area #8" in a Water Resources publication dated May, 1994. As such, decreased water level in this "Sensitive area" could result in detrimental effects to fish, wildlife, amphibians, and vegetation in the wetland.
6. If Well No. 7 results in lowered water levels in this wetland, there is potential for the hydroperiod of the wetland to be altered, potentially resulting in spring water levels decreasing sooner than usual.
7. Lower water levels may result in increased water temperatures and lowered oxygen levels, thereby potentially impacting fish, amphibians, wildlife, and vegetation in the wetland and adjacent waters of Lake Beulah.
8. There is potential for lowered water levels to impact various fish species that use this area for spawning, habitat, and feeding activities. Certain fish species are very sensitive to changes in water levels, water temperature, and oxygen levels and may no longer be able to utilize this area.
9. Lower water levels could result in changes in vegetation over time, potentially encouraging invasive species to inhabit the wetland. Many aquatic plants are very sensitive to water levels and may be affected by even slight changes in the water level in the environment.
10. Lower water levels in this wetland could result in loss of fish, wildlife and plant diversity over time due to possible introduction of invasive species, loss of quality habitat, changes in available food, changes in water temperature, and changes in water oxygen levels.
11. Lower water levels in a shoreline wetland could potentially impact wading birds, since some species of wading birds are very sensitive to water temperature, water depths, and the type of food present in wetlands for their breeding, nesting, feeding and shelter requirements.
12. The planned development proposed in the proximity of the high capacity well could further exacerbate the lowered water levels due to increases in impervious areas and the consequential reduced infiltration.
13. The planned development could result in degradation of the wetland due to increased erosion and runoff and increased use of pesticides, fertilizers, and herbicides, potentially leading to increased phosphorus levels in the

wetland and adjacent Lake Beulah. Increased phosphorus levels lead to increased algal blooms over time, reduction in water clarity, and reduced food sources for many species of fish and wildlife.

14. Increased levels of phosphorus and increased sedimentation into the wetland could result in increased likelihood of invasive species inhabiting the wetland. Increased phosphorus levels could also result in an increase in invasive species throughout Lake Beulah.
15. Based on the limited study of groundwater drawdown in the area of Well No.7, there is potential for some, or all of the above mentioned issues of concern to occur. If the groundwater drawdown exceeds 0.2 feet, as estimated by the study, the likelihood of the negative impacts mentioned above increases.
16. As a Professional Wetland Scientist, I feel that the current state of the existing, natural wetland should be thoroughly studied prior to authorizing construction of a permanent pumping well at Well No. 7. The study should include a wetland delineation, inventory of all plant species present within the wetland and adjacent upland, mapping and photographic documentation of all existing vegetation, and establishment of additional well points to monitor the existing hydroperiod of the wetland.
17. It is my recommendation that a contingency plan be developed to continuously monitor and establish the appropriate responses to mitigate impacts to the wetland once pumping of Well No. 7 commences.

Dated this 3rd day of August, 2005.

Signed: Ann M. Michalski

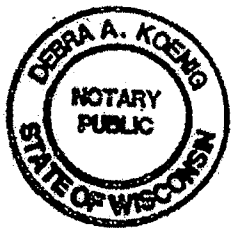
Ann M. Michalski

State of Wisconsin

County of Price

BEFORE ME, the undersigned authority, on this day personally appeared Ann M. Michalski, known to me to be the person whose name is subscribed to the foregoing document, who on oath stated to me that she executed the same for the purposes and consideration therein expressed, and acknowledged the same to be her free act and deed.

SUBSCRIBED AND SWORN TO BEFORE ME this the 3rd day of August, 2005.



Debra A. Koenig
Notary Public in and for the
State of Wisconsin

My Commission Expires:

06/15/08

STATE OF WISCONSIN
SUPREME COURT
Appeal No.: 2008 AP 3170

LAKE BEULAH MANAGEMENT DISTRICT,

Petitioner-Appellant-Cross-Respondent-Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT DISTRICT,

Co-Petitioner-Co-Appellant-Cross-Respondent,

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent.

VILLAGE OF EAST TROY,

Intervening Respondent-Respondent-Cross-Appellant-Petitioner.

BRIEF AND APPENDIX OF THE RESPONDENT-RESPONDENT WISCONSIN DEPARTMENT OF NATURAL RESOURCES

On Appeal from the Decision of the Court of Appeals, District II
Dated June 16, 2010

AXLEY BRYNELSON, LLP

Carl A. Sinderbrand
State Bar No. 1018593
Attorneys for Respondent-Respondent
Wisconsin Department of Natural Resources

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Judith M. Ohm
State Bar No. 1006612

December 27, 2010

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INTRODUCTION

Wisconsin's surface water resources are profoundly important to the health of the State. For over 100 years, this Court has recognized their critical importance to our economic and physical well-being. They support our manufacturing, agricultural and tourism industries. They provide the cooling water for our electric generating facilities. And they are a source of unquantifiable pleasure for the recreation of our citizens and visitors. The framers of the Wisconsin Constitution recognized the importance of our navigable surface waters when they adopted the Public Trust Doctrine in Wis. Const. Art. IX.

The fundamental issue before this Court is whether the Legislature has granted to the Wisconsin Department of Natural Resources ("DNR") the authority to protect Wisconsin's surface water resources in evaluating applications for high capacity well approvals, consistent with the constitutional Public Trust obligations. The Court of Appeals correctly answered that question "yes."

The Village of East Troy ("Village") would have this Court abrogate that constitutional and statutory responsibility. It asks the Court to hold that when DNR reviews applications for the vast majority of high capacity wells, it is precluded from considering impacts on streams and lakes, even if use of the well would devastate those resources. The Village reaches this illogical, unprecedented and dangerous conclusion only by contorting fundamental rules of statutory construction. It finds ambiguity where the law is clear; it seeks to create conflicts between statutes that are readily harmonized; it proposes narrow interpretations

that defy the Legislative mandate for liberal interpretation; and it justifies these deviations from basic legal principles by proffering flawed illustrations of absurd consequences.

This case provides the Court with the opportunity to reiterate and reinforce its long-standing appreciation of the Public Trust Doctrine and the importance of our public water resources. DNR therefore asks the Court to affirm the decision of the Court of Appeals as to DNR's authority to protect navigable waters.

STATEMENT OF ISSUES

1. Whether DNR can consider adverse impacts to waters of the state when evaluating applications for high capacity well approvals, pursuant to its authority under Wis. Stat. §§ 281.11 and 281.12.

The Court of Appeals correctly decided "yes." The court concluded that the authority granted in § 281.12 can be applied harmoniously and compatibly with the administration of § 281.34, *i.e.*, there is no conflict between the two statutes.

2. Whether a party contesting an administrative approval or permit must follow Chapter 227 of the Wisconsin Statutes and state agency regulations for submitting information in order for that information to be considered by the agency.

The Court of Appeals incorrectly decided "no." The court ruled that DNR erred by not considering information that was sent to a DNR attorney in a different

but related judicial proceeding, but which was not submitted either to DNR's decisionmakers for consideration in the permit proceeding, or to the circuit court pursuant to chapter 227.

STATEMENT OF THE CASE

DNR generally agrees with the statements of basic fact and procedural history in the Village's brief at 4-8. That is, DNR agrees that the Village submitted an application for a high capacity water supply well, and that the application was approved in 2003 and again in 2005. DNR also agrees that the design withdrawal capacity of the well is 1,440,000 gallons per day (gpd).[1] DNR further generally agrees with the Village's recitation of how the case worked its way through the court system. Since the issues here are entirely legal, those essential facts are sufficient.

However, the Village's Statement of the Case is tainted by significant mischaracterizations of the Court of Appeals decision. For example, the Village incorrectly asserts that the Court of Appeals determined that Wis. Stat. §§ 281.34 and 281.35 could be "disregarded" when considering high capacity well approval applications. Village Br. at 6. As discussed in Section II.B.3, below, the Court of

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[1] The Village correctly observes that the Well's daily groundwater withdrawal would equal 0.03% of the volume of Lake Beulah. Village Br. at 4. This translates into nearly 1% per month, or more than 10% of the volume of the lake over the course of a year. This comparison must be viewed cautiously, as the Village well withdraws from groundwater and not directly from the lake. However, it illustrates the importance of DNR using its statutory authority to protect surface waters when there is evidence of a hydraulic connection between the pertinent groundwater aquifer and potentially impacted surface waters.

Appeals correctly concluded that DNR's authority under Wis. Stat. §§ 281.11 and 281.12 to protect the waters of the state was harmonious and does not conflict with DNR's statutory authority under Wis. Stat. §§ 281.34 and 281.35.

The Village also repeatedly characterizes the Court of Appeals' decision as raising the issue whether DNR has "plenary" authority over well applications. *See, e.g.,* Village Br. at 1 (Issue 2), 3 and 9. The Village presumably uses this term to suggest that the issue is whether DNR has complete, full or unbridled authority.[2] As discussed immediately above and in our Argument, that is not the position advanced by DNR or determined by the Court of Appeals. Rather, DNR asserts and the Court of Appeals concluded that in those instances in which satisfaction of the minimum requirements of § 281.34 may not protect the waters of the state, DNR has authority to protect state waters under §§ 281.11 and 281.12, consistent with the constitutional Public Trust Doctrine.

Additionally, it is noteworthy that the Village repeatedly refers to the arguments advanced below by the Lake Beulah Management District ("LBMD"), but rarely even mentions the position taken by DNR and ultimately embraced by the Court of Appeals. *See, e.g.*, Village Br. at 3, 21, 24, and 28. LBMD's arguments below have little if any relevance. DNR's analysis, however, is significant, as: a) the standards of review encourage deference to DNR's

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[2] "Plenary" is defined as "Complete in all aspects or essentials; full …." *The American Heritage Dictionary* (Second Coll. Ed. 1985) at 952.

interpretation and application of its programmatic statutes and regulations; and b) the Court of Appeals adopted DNR's analysis. *See* Section I, below.

ARGUMENT

I. STANDARDS OF REVIEW

This case arose as an action for judicial review of an administrative decision. Under Wis. Stat. § 227.57(1), a court must affirm the agency's decision unless there is a basis to set aside, reverse, modify, or remand the decision. This Court's scope of review is the same as the court of appeals and circuit court, *i.e.*, the Court directly reviews the agency's decision without deference to the lower courts. *See, e.g., ABKA Ltd. Partnership v. DNR*, 2002 WI 106, ¶ 30, 255 Wis. 2d 486, 648 N.W.2d 854.

The issues in this case relate to: a) DNR's application of state statutes relating to ground and surface water protection; and b) DNR administrative procedures for considering applications for high capacity well approvals, specifically relating to what constitutes the record for appeal. Statutory interpretation "is ordinarily a question of law determined independently by a court …." *Racine Harley-Davidson, Inc. v. State*, 2006 WI 86, ¶ 11, 292 Wis. 2d 549, 717 N.W.2d 184. However, the Court may accord one of three levels of deference to an agency's interpretation of a statute or regulation: great weight, due weight, or *de novo* review. *See, e.g.*, *Id.*; *DaimlerChrysler c/o ESIS v. LIRC*, 2007 WI 1, ¶ 15, 299 Wis. 2d 1, 727 N.W.2d 311; *RURAL v. PSC*, 2000 WI 129 ¶ 21, 239 Wis. 2d 660, 619 N.W.2d 888.

A court gives great weight deference when the agency satisfies four conditions: 1) it is legislatively charged with administering the statute; 2) its interpretation is long-standing; 3) it employed specialized knowledge or expertise in forming the interpretation; and 4) its interpretation will provide uniformity and consistency in the statute's application. *DaimlerChrysler*¶ 16. Under that standard, a court will not substitute its views for that of the agency, and will sustain the agency's interpretation if it is reasonable, irrespective of whether there is a more reasonable interpretation. *Id.*[3]

The middle, due weight deference standard, applies where "an agency has some experience in the area, but has not yet developed the expertise that would place it in a better position than a court to make judgments regarding the interpretation of the statute." *Id.*, ¶ 17. *De novo* review applies when the issue is one of first impression, the agency has no particular expertise, or the agency's position is "so inconsistent that it provides no guidance." *Id.*, ¶ 18.

The issues here relate to DNR's operation of its high capacity well approval program and its unique statutory responsibilities to administer the public trust in Wisconsin. DNR acknowledges that its application of public trust considerations to high capacity wells has evolved over time, as has the sophistication of scientific analysis of hydraulic interconnectedness of groundwater and surface waters.

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[3] DNR's interpretation of its own regulations is entitled to "controlling weight," which is essentially the same as "great weight." *DaimlerChrysler*, ¶ 15.

Additionally, courts typically accord no deference to the agency's interpretation of its own statutory authority. *See Grafft v. DNR*, 2000 WI App 187, ¶ 4, 238 Wis. 2d 750, 618 N.W.2d 897.

In evaluating whether to accord any weight to DNR's decision here, the Court should recognize that DNR is the expert in evaluating and balancing impacts to public resources, including surface waters and groundwater. DNR has been managing public trust waters since its creation in 1967, and before that public trust waters were managed by its predecessor, the State Board of Health.[4] *See, e.g.*, sec. 144.02, Stats. (1965). As discussed below, this Court has frequently confirmed that DNR has been statutorily delegated broad and comprehensive authority to administer the public trust in state waters.

DNR believes that the Court should accord some weight to its analysis and administration of the public trust. However, "due weight" and "no deference" are similar, as the Court will adopt the more reasonable interpretation of an ambiguous statute. *See, e.g., Racine Harley-Davidson*, 2006 WI 86, ¶ 20. DNR asserts that under either standard, its interpretation and application of the high capacity well statutes, consistent with the decision of the Court of Appeals, must

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[4] Prior to creation of DNR, and since at least 1915, public trust responsibilities for certain activities, such as dam construction, were administered by the Public Service Commission or its predecessor, the Railroad Commission. *See Muench v. Public Service Comm.*, 261 Wis. 492, 506, 53 N.W.2d 514 (1952).

prevail as the more reasonable – indeed, the only reasonable – application of the statutes.

II. THE LEGISLATURE HAS DELEGATED TO DNR STATUTORY "PUBLIC TRUST" AUTHORITY TO CONSIDER IMPACTS TO NAVIGABLE WATERS WHEN REVIEWING APPLICATIONS FOR HIGH CAPACITY WELL APPROVALS.

A. The Legislature Has Expressly Granted DNR Broad, Superintendent Authority to Manage Waters of the State, Consistent with the Public Trust Doctrine.

The "Public Trust Doctrine" is a foundation of Wisconsin's long and noble stewardship of the environment. It is embodied in Article IX, Section 1 of the Wisconsin Constitution, which reads in pertinent part:

> [T]he river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

For nearly one hundred years, this Court has issued numerous decisions evaluating, defining, and refining the scope of the Public Trust Doctrine. These cases have recognized the historical lineage and importance of protecting public rights in navigable waters:

> It will thus be seen that ever since the organization of the Northwest territory in 1787 to the time of the adoption of our constitution the right to the free use of the navigable waters of the state has been jealously reserved not only to the citizens of the territory and state but to all citizens of the United States alike.

Diana Shooting Club v. Husting, 156 Wis. 261, 267, 145 N.W. 816 (1914). In *Diana Shooting Club*, the Court acknowledged the economic component of navigable waters protection:

> Navigability in fact for products of the forest, field or commerce for regularly recurrent annual periods has, in our state been held sufficient to constitute a stream navigable.

Id. at 268 (citations omitted). The Court expanded that scope of protection to include hunting (the issue in that case), considering recreation an incident to navigation. *Id.* at 269. The Court then elaborated on the need to interpret the Public Trust Doctrine broadly and liberally to achieve its paramount goals:

> The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters, cannot be questioned. Nor should it be limited or curtailed by narrow construction. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits. Navigable waters are public waters and as such they should inure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation. Only by so construing the provisions of our organic law can the people reap the full benefit of the grant secured to them therein….

Id. at 271-72.

Since *Diana Shooting Club*, this Court and the courts of appeals have frequently reiterated the importance of protecting the public trust, and of liberally applying those protections. *See, e.g.*, *Muench v. Public Service Comm.*, 261 Wis. at 512; *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983); *Hilton v. Dept. of Natural Resources*, 2006 WI 84, ¶¶ 18-20, 293 Wis. 2d 1, 717 N.W.2d 166; *State v. Town of Linn*, 205 Wis. 2d 426, 442-43, 556 N.W.2d 394 (Ct. App. 1996), *rev. den.* 207 Wis. 2d 287, 560 N.W.2d 275 (1996).

The courts have held that the Public Trust Doctrine is not an independent, self-executing basis for agency regulation or management of water resources. It is a constitutional duty placed upon the State and administered by the Legislature,

and it does not itself delegate regulatory authority to DNR absent legislative authorization. *See, e.g., Bleck*, 114 Wis. 2d at 465; *Hilton*, 2006 WI 84 at ¶ 19. However, the courts also have routinely found that the Legislature has delegated that regulatory authority to DNR through a variety of statutes. *See, e.g., Town of Linn*, 205 Wis. 2d at 444-45 (regarding §§ 23.09 and 23.11); *Borsellino v. DNR*, 2000 WI App 27, ¶ 18, 232 Wis. 2d 430, 443-44, 605 N.W.2d 255 (regarding § 30.12). Indeed, the court in *Borsellino* referred to DNR as "trustee under the public trust doctrine …." 2000 WI App 27, ¶ 19.

In addition to DNR's public trust responsibilities delegated under Wis. Stat. chs. 23 and 30, the Court of Appeals correctly recognized that the Legislature has delegated to DNR public trust responsibilities under Wis. Stat. §§ 281.11 and 281.12. This Court has also cited ch. 144, Stats., the predecessor to Wis. Stat. ch. 281, as one of several statutory chapters delegating comprehensive public trust responsibilities to DNR:

> In furtherance of the state's affirmative obligation as trustee of navigable waters, the legislature has delegated substantial authority over water management matters to the DNR. **The duties of the DNR are comprehensive**, and its role in protecting state waters is clearly dominant….

Wis. Environmental Decade, Inc. v. DNR, 85 Wis. 2d 518, 527, 271 N.W.2d 69 (1978) (emphasis added; footnote identifying relevant statutes, including ch. 144, omitted). This Court's repeated recognition of DNR's comprehensive duties is also pertinent to the authority for local regulation, the principal issue in the

companion case on review, *Lake Beulah Management District v. Village of East Troy*, Appeal No. 2009AP2021.

Section 281.11 establishes the purpose and policy of Chapter 281, as well as the principle of liberal construction in favor of protecting our water resources:

> The department shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private…. **The purpose of this subchapter is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private.** To the end that these vital purposes may be accomplished, **this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed** in favor of the policy objectives set forth in this subchapter….

(Emphasis added.) Section 281.12(1) constitutes a more specific grant of power to DNR to accomplish the policy and purpose set forth in § 281.11:

> The department shall have general supervision and control over the waters of the state. **It shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter**. The department also shall formulate plans and programs for the prevention and abatement of water pollution and for the maintenance and improvement of water quality.

(Emphasis added.)

The Village argues that §§ 281.11 and 281.12 contain implied powers, and that the courts must construe those statutes narrowly against the grant of implied powers. (*See* Village Br. at 31.) The Village is wrong for at least two reasons. First, § 281.11 specifically states that this subchapter (*i.e.*, including § 281.12) and associated rules and orders "shall be liberally construed in favor of the policy objectives …." That express legislative directive must trump any generic judicial rule of statutory construction.

More importantly, there can be no doubt that § 281.12(1) is an *express* legislative delegation of power, and the generic rule of construction for implied powers has no application. Indeed, § 281.12(1) is more specific than § 23.09(1)[5], which the court in *Town of Linn* relied upon as delegating public trust authority.

Both the Legislature and courts have recognized that § 281.12 is an express grant of authority to DNR. In Wis. Stat. § 281.34, the high capacity well statute cited by the Village, the Legislature expressly directed DNR to promulgate groundwater management rules "using its authority under ss. 281.12(1) and 281.35 …." Wis. Stat. § 281.34(9)(c).[6] In *Rusk County Citizen Action Group, Inc. v. DNR*, the court acknowledged that DNR has regulatory authority under § 281.12 (formerly § 144.025). 203 Wis. 2d 1, 9-10, 552 N.W.2d 110 (Ct. App. 1996).[7] DNR has promulgated regulations under its authority in § 281.12, including safe drinking water regulations and well construction standards, and those rules have

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[5] Wis. Stat. § 23.09(1) states: "The purpose of this section is to provide an adequate and flexible system for the protection, development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in this state."

[6] DNR was to promulgate such rules if a special groundwater advisory committee did not timely issue a groundwater management report.

[7] In *Rusk*, the court ruled that DNR had broad authority over the management of state waters, but that it could not exercise that regulatory authority to entirely ban facilities that are allowed by another statute. 203 Wis. 2d at 10-11. *Rusk* would be relevant here if DNR were seeking to ban all high capacity wells pursuant to § 281.12, as such wells are permissible under other statutes: it is not. The Court of Appeals specifically found that there was no conflict between DNR's broad authority under §§ 281.11 and 281.12 and its well-specific authority under §§ 281.34 and 281.35.

undergone required legislative review before being finalized. *See* Wis. Admin. Code § NR 809.01 and ch. NR 812.[8]

The Court of Appeals did not break new ground here. Both the Legislature and courts have recognized that § 281.12 is an express delegation of regulatory authority to DNR.[9] The Village cannot rely on general rules of statutory construction for implied powers to argue against the Legislature's express delegation of public trust authority to DNR.

B. Sections 281.34 and 281.35 Do Not Limit and Do Not Conflict with DNR's Authority to Consider Impacts to Waters of the State when Evaluating Applications for Well Approval.

The core of the Village's argument is that Wis. Stat. §§ 281.34 and 281.35 constitute a comprehensive, all-inclusive well program that leaves no room for application of other statutory authority. The Village has cited no statutory or case law authority for this proposition. The Village has cited no canon of statutory construction that compels or even warrants this conclusion. Its principal rationales for this unprecedented proposition are: (a) that those statutes create different

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[8] The well construction code was promulgated generally under Wis. Stat. chs. 280 and 281. Wis. Admin. Code § NR 812.01(1). *See also* Section II.B.3.c, below. The well statute that is the focus of this case, however, is not the source of this authority. *See* Wis. Stat. § 281.34.

[9] The Village, in its brief at 36, argues that "§ 281.12 was never intended to alter permit requirements of other programs", quoting from *Robinson v. Kunach*, 76 Wis. 2d 436, 450, 251 N.W.2d 449 (1977). The Village takes that quote out of context. It is dictum relating to an argument regarding permit requirements and enforcement under chapter 30. To DNR's knowledge, *Robinson* has never been cited elsewhere for this proposition. Additionally, *Robinson* pre-dates the cases and statutes cited herein regarding DNR's authority under § 281.12.

mandatory review requirements for high capacity wells over 100,000 gallons per day (gpd) and those with a water loss of greater than 2,000,000 gpd; and (b) that the Legislature has modified (or not) the statute over time. The Village also asserts that application of §§ 281.11 and 281.12 would conflict with §§ 281.34 and 281.35, but it does not develop that argument or even explain why that would be the case. The Village's arguments must be rejected for several additional reasons.

1. The Village's Argument Is Inconsistent with Applicable Canons of Statutory Construction

Several basic canons of statutory construction or interpretation undermine the Village's arguments. First, the purpose of statutory interpretation is to give a statute its full, proper, and intended effect, in accordance with the legislative purpose. *See, e.g.*, *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶ 27, 303 Wis. 2d 258, 735 N.W.2d 93; *see also, Sonnenburg v. Grohskopf*, 144 Wis. 2d 62, 65-66, 422 N.W.2d 925 (Ct. App. 1987):

> The cardinal rule in interpreting a statute is to favor a construction which will fulfill the purpose of the statute over a construction which defeats the manifest purpose of the act.

Even when the statute is unambiguous, the courts will consider statutory language that reflects the legislative purpose. *Kolupar,* ¶ 27.

Courts also must construe statutes in context and in conjunction with related statutes. *See, e.g., Id.; Sands v. Whitnall School Dist.*, 2008 WI 89, ¶ 15, 312 Wis. 2d 1, 754 N.W. 2d 439.

> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a

> whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

State ex rel. Kalal v. Circuit Court, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted).

Significantly, the canon that gives preference to specific statutes over general statutes only applies when the statutes are in conflict. *Wisconsin Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶ 32, 270 Wis. 2d 318, 677 N.W.2d 612, citing *State v. Maxey*, 2003 WI App 94, ¶ 22, 264 Wis. 2d 878, 663 N.W.2d 811. However, statutes are not presumed to be in conflict; and courts must make every effort to harmonize them. *See, e.g., State v. Fischer*, 2010 WI 6, ¶ 24, 322 Wis. 2d 265, 778 N.W.2d 629; *State Dept. of Corrections v. Schwarz*, 2005 WI 34, ¶ 28, 279 Wis. 2d 223, 693 N.W.2d 703.

When "confronted with an apparent conflict between statutes," courts must "construe sections on the same subject matter to harmonize the provisions and to give each full force and effect." *Fischer,* 2010 WI 6, ¶ 24; *see also Bingenheimer v. Wis. Dep't of Health & Soc. Servs.*, 129 Wis. 2d 100, 107-08, 383 N.W.2d 898 (1986).

> It is a cardinal rule that "conflicts between different statutes, by implication or otherwise, are not favored and will not be held to exist if they may otherwise be reasonably construed" in a manner that serves each statute's purpose.

Town of Clayton v. Cardinal Const. Co., Inc., 2009 WI App 54, ¶ 14, 317 Wis. 2d 424, 767 N.W. 2d 605, quoting *Jones v. State*, 226 Wis. 2d 565, 576, 594 N.W.2d 738 (1999) (internal citations omitted). Unless "legislative provisions are

contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of mere lack of uniformity in detail." *Fox v. City of Racine*, 225 Wis. 542, 547, 275 N.W. 513 (1937).

2. The Court of Appeals' Decision Promotes the Express Intent of the Legislature.

The Court of Appeals' decision, adopting the position of the DNR, satisfies these basic principles of statutory interpretation. First, the Court of Appeals' decision is consistent with the legislative purpose underlying ch. 281. The express purpose of that chapter is "to grant necessary powers … for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private…." Wis. Stat. § 281.11.

The Village's argument that DNR may not regulate high capacity wells when state waters are adversely impacted ignores and undermines that express purpose. The Village argues that the Legislature left DNR helpless to protect waters that would be impaired by excessive groundwater extraction. That is, the Village would have this Court interpret state law to conclude that the Legislature shirked its constitutional obligation to protect state waters.

The Village's argument is not only counter-intuitive: it is unsustainable. Statutes are presumed to be constitutional, and "every presumption must be indulged to uphold the law if at all possible." *Kenosha County D.H.S. v. Jodie W.*, 2006 WI 93, ¶ 20, 293 Wis. 2d 530, 716 N.W.2d 845, quoting *Norquist v. Zeuske*, 211 Wis. 2d 241, 250, 564 N.W.2d 748 (1997). This Court has long held that it is

its duty, "if possible, to so construe the statute as to find it in harmony with accepted constitutional principles." *State ex rel. Harvey v. Morgan*, 30 Wis. 2d 1, 13, 139 N.W.2d 585 (1965). This Court must not adopt the Village's interpretation, which is at variance with the Legislature's constitutional responsibility to protect public trust resources.

3. The Court of Appeals' Decision Correctly Harmonizes and Gives Full Force and Effect to Each Statute.

The Court of Appeals reasonably construed the applicable statutes to "harmonize the provisions," thereby giving "each full force and effect." *See Fischer*, 2010 WI 6, ¶ 24. The Court of Appeals correctly concluded that the two sets of statutes can coexist, and therefore there is no conflict. *See Fox*, 225 Wis. at 547.

a. Sections 281.34 and 281.35 establish minimum requirements that do not preclude DNR's exercise of other statutory authority.

The two sets of statutes are readily harmonized. Sections 281.34 and 281.35 establish minimum required evaluations by DNR. Wells below 100,000 gpd are outside the definition of "high capacity" and therefore are exempt from review under that statute. Wis. Stat. § 281.34(1)(b). For most high-capacity wells (greater than 100,000 gpd capacity but less than 2,000,000 gpd water loss), the minimum required evaluations are modest. *See* discussion of § 281.34 in Section II.B.3.b., immediately below. For large water loss wells, the minimum requirements are more significant. Wis. Stat. § 281.35. That is, the Legislature

determined that the **minimum** evaluations that DNR must conduct should be more comprehensive for the largest wells that have the greatest potential for environmental harm or competing use of resources. There is nothing in the language of §§ 281.34 or 281.35, however, designating those two statutes as the sole basis for regulating high capacity wells, or as establishing the **maximum** permissible evaluation of environmental impacts.

b. The language of § 281.34 does not reflect comprehensiveness and exclusivity that precludes application of other statutes.

When the Legislature intends to limit DNR's authority to criteria listed in a statute, it requires DNR to approve the action when the referenced standards have been met. For example, in Wis. Stat. § 30.025(3), relating to permits for public utility facilities, the Legislature dictates: "The department shall issue, or authorize proceeding under, the necessary permits if it finds that the applicant has shown that the proposal …." Section 30.12(3m)(ar), relating to permits for older piers and wharves, states: "The department shall issue an individual permit under this subsection … unless the department demonstrates that one or more of the conditions under s. 30.13(1)(a) to (e) has not been met…." Similarly, § 285.62(7)(a), relating to air pollution control permits for existing sources, provides: "The department shall issue the operation permit for an existing source if the criteria established under ss. 285.63 and 285.64 are met."

The Legislature took a different approach when enacting § 281.34. That statute provides, in pertinent part: "No person may construct or withdraw water

from a high capacity well without the approval of the department under this section…." Wis. Stat. § 281.34(2). The statute goes on to identify specific sensitive conditions for which DNR must conduct additional environmental review, including wells in a "groundwater protection area," wells with a high percentage of water loss, and wells having a significant impact on a spring. Wis. Stat. §§ 281.34(4) and (5)(b)-(d). The statute also provides that DNR may not approve a well that may impact a public water supply unless DNR can include conditions of approval to ensure that the public water supply will not be impaired. Wis. Stat. § 281.34(5)(a).

Notably, and unlike the illustrative statutes cited immediately above, there is nothing in § 281.34 that requires DNR to approve a well. This statute contains a set of minimum requirements, and it does not mandate approval or limit DNR's authority or discretion under other statutes.

c. Multiple other statutes apply to water supply wells.

The Court of Appeals decision illustrates another flaw in the Village's argument that §§ 281.34 and 281.35 constitute an all-inclusive program: there are other statutes that expressly relate to well approvals, design, construction, and use. The Court of Appeals correctly observes that the well construction code was not adopted pursuant to § 281.34 or 281.35, and that neither of those statutes authorizes DNR to establish a well construction code. App-15, ¶ 24. Rather, the well code was promulgated under Wis. Stat. § 280.11 and DNR's general authority under ch. 281. *See* Wis. Admin. Code, § NR 809.01. Other

requirements relating to wells are found in, *inter alia*, ch. 280 (drinking water), §§ 281.343 to 281.348 (Great Lakes basin) and § 281.41 (water supplies). Plainly, the Legislature does not consider §§ 281.34 and 281.35 to be comprehensive or exclusive.

The statutes can and therefore must be read harmoniously. Under most circumstances, DNR will limit its review of applications for high capacity well approvals to the specific, mandatory criteria in § 281.34 or § 281.35, as applicable.[10] If DNR has reason to believe that construction and use of a well may adversely affect state waters, however, DNR has the authority under § 281.12 to augment its minimally required evaluation. Because the statutes do not conflict, the general/specific rule is inapplicable.

d. The Court of Appeals' decision raises no separation of powers issue.

The Village argues that the harmonious, compatible application of these two sets of statutes by the Court of Appeals raises separation of powers issues. Village Br. at 44-45. It cites several cases for the boilerplate, definitional

[10] As the Court of Appeals observed, it would present DNR with "an impossible and costly burden" if DNR were required to consider the environmental impacts of every high capacity well. App-18.

proposition.[11] The Village then appears to argue that the Court of Appeals has effectively added words to a statute. However, the Village does not identify which statute it is referring to; nor does it identify how the Court of Appeals' decision changes the statute or the words that the Court allegedly added. The vagueness of the Village's argument makes substantive evaluation and response impossible.

The courts do not seek out constitutional issues. *See, e.g.*, *State v. Hall*, 207 Wis. 2d 54, 83, 557 N.W.2d 778 (1997) (statutes "construed to avoid constitutional questions …."). Nor do they address issues that have not been adequately developed. *See, e.g., Truttschel v. Martin*, 208 Wis. 2d 361, 369, 560 N.W.2d 315 (Ct. App. 1997). This is particularly true when the undeveloped argument raises a constitutional issue:

> Defendant does not explain why any of the individual sentences violates the constitutional prohibition. He merely asserts that this is the case…. Simply to label a claimed error as constitutional does not make it so, … and we need not decide the validity of constitutional claims broadly stated but never specifically argued ….

State v. Scherreiks, 153 Wis. 2d 510, 520, 451 N.W.2d 759 (Ct. App. 1989) (citations omitted), quoted with approval in *German v. DOT*, 2000 WI 62, ¶ 30, 235 Wis. 2d 576, 612 N.W.2d 50.

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[11] The first case the Village cites is interesting for its recognition that the Wisconsin Constitution requires "shared and merged powers" of the three branches rather than "an absolute, rigid and segregated political design." *Martinez v. DILHR*, 165 Wis. 2d 687, 696, 478 N.W.2d 582 (1992) (citation omitted). That is, one branch can exercise the powers of another branch as long it does not "'unduly burden or substantially interfere with the other branch's role and powers.'" *Id.*, quoting *State v. Unnamed Defendant*, 150 Wis. 2d 352, 360, 441 N.W.2d 696 (1989).

The Village has not adequately developed a separation of powers issue, and the Court should not create one.

C. The Village's Other Arguments Regarding DNR's Public Trust Authority for Review of High Capacity Well Applications Are Based on Flawed Legal Premises.

1. The Village's Recitation of Legislative History is Unavailable, Inaccurate, and Does Not Support Its Arguments on the Merits.

The Village selectively cites alleged legislative history to create the impression that the Legislature has rejected the Court of Appeals' and DNR's application of §§ 281.11 and 281.12, as it relates to DNR review of high capacity well applications. The Village's argument is inappropriate for at least two reasons. First, a court will only consider "extrinsic" aids, such as legislative history, if the statute's meaning cannot be discerned from "intrinsic" aids, *e.g.*, context and language in related statutes. *See, e.g., Kalal*, 2004 WI 58, ¶ 46; *In re Marriage of Guelig v. Guelig*, 2005 WI App 212, ¶ 24, 287 Wis. 2d 472, 704 N.W.2d 916 ("Where we can discern a plain meaning from these intrinsic sources, we go not further and apply the statute as written."). Additionally, when a court considers legislative history, it considers, the statute's "history," *i.e.*, "**previously** enacted and repealed provisions of the statute." *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581 (emphasis added); *see also, State v. Rachel*, 2010 WI App 60, ¶ 7, 324 Wis. 2d 465, 782 N.W.2d 443 ("… the history of the statute revealed in **prior** versions of the statute and legislative amendments to the statute." (emphasis added)). The Village's resort to any legislative history is unnecessary where, as here, the meaning of the statute can be ascertained from a review of its terms and intrinsic evidence of legislative intent;

and its resort to alleged legislative activity that post-dates the 2003 statute is wholly inappropriate.

The Village also overstates and distorts the historical record, leading to a flawed conclusion.

The Village asserts that in 2003 Wis. Act 310, the Legislature acted deliberately to expand DNR's authority to regulate high capacity wells; and that since then, the Legislature has rejected proposals to expand DNR's authority in certain circumstances. Village Br. at 16-20. It is true that Act 310 expanded DNR's specific statutory duties to regulate high capacity wells. Indeed, the modifications to Wis. Stat. § 281.34 established specific circumstances in which DNR is required to conduct environmental reviews for high capacity wells. However, there is nothing in Act 310, and the Village cites to no legislative history, that limited DNR's authority to conduct environmental review to those specific circumstances. It is not contradictory to the legislative scheme for DNR to consider the environmental impact of high capacity wells in situations beyond those for which DNR is required to conduct an environmental review. *See Wisconsin Builders Ass'n v. State Dep't of Commerce*, 2009 WI App 20, ¶ 11, 316 Wis. 2d 301, 762 N.W.2d 845, *rev. den.* 2009 WI 34.

The Village also asserts that recent legislative activity (after DNR issued the 2005 Approval) demonstrates that the Legislature has rejected efforts to expand DNR's authority to regulate high capacity wells, such that it was an error

for the Court of Appeals to "grant[] DNR authority that the Legislature has refused to provide." Village Br. at 15-17. The Village's arguments are misleading and inaccurate, as the Legislature neither considered nor rejected any such proposal. A "failure to pass legislation is so equivocal as to be meaningless." *Sorensen v. Jarvis*, 119 Wis. 2d 627, 634, 350 N.W.2d 108 (1984). *See also, Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 372, 243 N.W.2d 422 (1976).

The Village's argument is based on a 2007 Report of a Groundwater Advisory Committee. Village Br. at 16. That advisory committee rejected a proposed recommendation to expand DNR's duty to conduct environmental reviews for high capacity wells affecting surface waters beyond those circumstances specified in § 281.34. That committee submitted extensive reports on multiple groundwater management issues to two legislative standing committees, both in 2006 and 2007, and made numerous recommendations. *See* http://dnr.wi.gov/org/water/dwg/gac. However, there were no legislators on the committee, no legislation was drafted in response to those reports, and the Legislature took no action on the reports or recommendations. The Village's statement that the Legislature rejected that specific recommendation is incorrect.

The Village also incorrectly states that the Legislature rejected 2009 Senate Bill 620, which proposed to expand groundwater regulation by DNR. Village Br. at 19-20. The "Groundwater Workgroup" referred to in the Village's brief was not a formally recognized legislative committee, and its actions cannot be interpreted

as indicative of legislative intent. *See* Groundwater Workgroup information at http://legis.wisconsin.gov/senate/sen16/news/Issues/GroundwaterWorkgroup.asp ("Groundwater Workgroup Site"). Additionally, S.B. 620 was not rejected by the Legislature. Rather, it was introduced very late in the legislative session and the Legislature simply ran out of time to consider it. The Senate "adversely disposed" of that bill, along with hundreds of other bills, by Senate Joint Resolution 1 on April 26, 2010.[12] To state that the Legislature "refused to provide" DNR with additional specific statutory authority to regulate high capacity wells, as the Village does, is simply wrong.

The Village's citations to selective and incomplete testimony are also out of context and misleading. Village Br. at 19. This Court has cautioned against reliance on selective statements to divine legislative intent:

> When examining a particular phrase in a statute, a court must look at the phrase in light of the entire statute…. Likewise, it only follows that a particular statement in prepared testimony should be examined in the light of the entire prepared statement.

Czapinski v. St. Francis Hospital, Inc., 2000 WI 80, ¶ 25, 236 Wis. 2d 316, 613 N.W.2d 120. Similarly, the Court has not considered views expressed in documents in the legislative file from non-legislative sources, especially when

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[12] *See* http://legis.state.wi.us for Legislative History of 2009 Senate Bill 620. Thousands of bills are introduced in each legislative session that do not become law. *See* Wisconsin Blue Book at 306, which states that 15.3% of all introduced bills were enacted in the 2007-08 legislative session. This cannot be construed as legislative intent to substantively reject all the proposals that were not enacted.

there is no evidence that the Legislature adopted that view. *See Brauneis v. State*, 2000 WI 69, fn. 11, 236 Wis. 2d 27, 612 N.W.2d 635; *State v. Consolidated Freightways Corp.*, 72 Wis. 2d 727, 738, 242 N.W.2d 192 (1976) ("neither a legislator, nor a private citizen, is permitted to testify as to what the intent of the legislature was in the passage of a particular statute.").

The testimony cited by the Village was offered by a DNR administrator and on behalf of a public interest group, urging additional technical tools and minimum standards for conducting environmental review of high capacity well applications. It was not intended to suggest and does not state that DNR lacks broad statutory authority to regulate groundwater and surface water. Indeed, the first two examples of "regulatory tools" that Water Division Administrator Todd Ambs listed were: "Better tools to assess cumulative impacts" and "Look at how to assess impacts beyond 1200 feet from certain high quality waters." *See* Groundwater WorkGroup Site at 8.

Selective, out-of-context citations to comments before a working group, whose recommendations were never considered by the Legislature, is not legislative history; and the Village's selective citations here illustrate the potential to distort the record. The Village has offered no information that undermines the express and obvious Legislative intent, repeated in numerous decisions of this Court, to delegate to DNR the authority necessary to serve as "trustee" under the Public Trust Doctrine.

2. The Court of Appeals' Decision Will Not Impact Regulation Under Other Chapters of the Statutes.

The Village suggests that the literal application of the statutes, as described by the Court of Appeals and in this brief, will lead to confusion or uncertainty, potentially infusing public trust evaluations into chapter 30. Village Br. at 41-44. This perceived risk does not exist, as § 281.12(1) only applies to "this chapter." The Village's argument, on its face, is a red herring.

Additionally, programs established under chapter 30, as well as chapter 283, already incorporate public trust evaluation among their minimum review requirements. For example, under § 30.025(3)(b), relating to utility facilities, DNR must issue a permit if the proposal "[d]oes not unduly affect: 1. Public rights and interests in navigable waterways." This is the heart of the public trust analysis. A public trust analysis is also required for deposits and structures in navigable waters:

> (c) The department shall issue an individual permit to a riparian owner for a structure or a deposit pursuant to an application under par. (a) if the department finds that all of the following apply:
>
> 1. The structure or deposit will not materially obstruct navigation.
>
> 2. The structure or deposit **will not be detrimental to the public interest.**
>
> 3. The structure or deposit will not materially reduce the flood flow capacity of a stream.

Wis. Stat. § 30.12(3m)(c) (emphasis added). Similar requirements are included elsewhere in ch. 30. *See, e.g.*, § 30.123(6m)(a) (culverts); § 30.13(1) (wharves and piers); and § 30.18(5)(a) (water withdrawal).

Under Chapter 283, these same public trust policies are incorporated into water pollution discharge planning and approvals through the areawide waste treatment or water quality management plans. *See* Wis. Stat. §§ 283.31(3)(e) and 283.83; Wis. Admin. Code § NR 121.01. And the Village must concede that public trust evaluations are specifically required under ch. 281, including the minimum required evaluation for high capacity wells with a water loss greater than 2,000,000 gpd. *See* Wis. Stat. § 281.35(5)(d)1.

3. The Village's Argument Regarding Surface Water Withdrawal is Irrelevant and Inaccurate.

The Village also argues that a legislative choice to not require consideration of impacts to public water resources for wells with a water loss of less than 2,000,000 gpd would be consistent with the Legislature's alleged decision to allow unregulated withdrawals with a water loss of less than 2,000,000 gpd directly from surface waters, citing Wis. Stat. § 30.18. *See* Village Br. at 28-29. This argument is irrelevant, since it inherently acknowledges that the Legislature has chosen to separately regulate withdrawals from surface and groundwater. Moreover, Wis. Stat. §§ 281.11 and 281.12 are not limited to the public trust responsibilities for navigable waters: they apply to all "waters of the state," which are broadly and comprehensively defined to include navigable surface waters; non-navigable surface waters such as marshes and drainage ditches; and groundwater – including both natural and artificial, public and private. Wis. Stat. § 281.01(18).

The Village's argument is also inaccurate. An exemption from § 30.18 does not mean that the water withdrawal eludes regulatory review. Section 281.41 requires plan approval for every "owner," which is defined broadly to include anyone, public or private, "owning or operating any water supply, sewerage or water system or sewer and refuse disposal plant." Wis. Stat. § 281.01(8). Thus, every community water supply well is subject to approval. Here, the Village would have been required to obtain a DNR-issued plan approval under § 281.41 for a water supply from surface waters rather than groundwater.

Additionally, the Village (or any other person wishing to withdraw surface water) likely would be subject to the permit requirement in Wis. Stat. § 30.12. That statute requires a permit to place any structure or deposit on the bed of any navigable waters. Water supply intake structures are subject to that permit requirement, with limited exemption. *See* Wis. Stat. § 30.12(1g)(km) and (3m)(a). Therefore, the Village likely would be required to obtain a permit for its intake structures and any other appurtenances that must be placed below the ordinary high water mark. And as noted above, DNR may issue a permit only if, *inter alia*, "[t]he "structure or deposit will not be detrimental to the public interest." Wis. Stat. § 30.12(3m)(c)2.

This more complete recitation of the law applicable to surface water withdrawals not only illustrates the Village's incomplete and inaccurate analysis; it also reinforces the overriding intent of the Legislature to implement its

constitutional duty to protect waters of the state through a variety of interrelated statutes. The Village's effort to isolate §§ 281.34 and 281.35 is anathema to that legislative structure and purpose.

4. After-the-Fact Remedial Enforcement Regarding Impaired Waters Does Not Satisfy DNR's Statutory Duty to Protect Waters of the State.

The Village argues that there are other means of protecting the public trust, citing to DNR's authority to initiate common law claims, such as nuisance, if trust waters are impaired. Village Br. at 21. This weak argument suggests that DNR may not exercise its statutory authority to prevent harm to public trust waters before it occurs. The Village's argument is no better than closing the barn door after the horse is out.

The Public Trust Doctrine is an affirmative constitutional duty to protect and preserve navigable waters. Its implementation over time has most frequently been in the context of regulatory decisions, not enforcement. *See, e.g., Muench*; *ABKA Ltd. Partnership*; *Hilton*. Statutory delegations of public trust responsibility likewise have been directives to consider impacts in permitting processes. *See* statutes cited in Section II.C.2, above.

Surely, DNR has the authority to enforce the public trust by seeking to remedy adverse impacts to waters of the state and seeking applicable statutory forfeitures, in addition to its other regulatory authority and duties. *See, e.g.*, *State v. Bleck*. Indeed, the cases cited by the Village reinforce DNR's role as the administrator of the public trust through both regulation and enforcement:

> Regulation and enforcement of this public trust rests with both the legislature and the DNR…. The legislature has delegated to the DNR broad authority to regulate under the public trust doctrine and to administer ch. 30….

ABKA Ltd. Partnership, 2002 WI 106, ¶ 12 (citations omitted). *ABKA* and cases cited therein reflect DNR's broad, superintendent responsibilities to protect and preserve the public trust, not merely to seek relief once the waters have been impaired.

After-the-fact enforcement, in lieu of up-front evaluation, would be irresponsible in this setting. Here, the Village had proposed and DNR approved a well to meet the Village's obligations to provide a public water supply. This well was required to meet detailed, specific locational, capacity, design, and performance requirements under state regulations, as well as safe drinking water standards. *See* Wis. Admin. Code chs. NR 108 and NR 809-812. Additionally, the Village has dedicated literally hundreds of thousands of dollars of public funds to plan, construct and operate this well, as well as appurtenant treatment and distribution systems.

The Village's argument raises the question of what meaningful relief is available if, as a result of well usage, hydraulically connected surface waters are impaired. The Village remains obligated to provide water to its citizens, and it is required to maintain a minimum number of wells and pumping capacity, based on existing and projected population. It cannot merely shut down the well. The integrated legislative and regulatory process and standards in place recognize this reality, and they protect both public resources and the public purse.

DNR agrees with the Village that DNR could impose conditions on the operation of the well, such as pumping levels, if an adverse impact to Lake Beulah became apparent after it began operation. However, this or other remedial alternatives is a poor substitute for making responsible, resource-protective decisions before it invests in a new well.

5. There Already Are Well-Established Standards for DNR to Conduct Public Trust Evaluations.

Lastly, the Village argues that there are no specific standards for consideration or evaluation of public trust factors, that the Court of Appeals merely deferred to DNR on those technical evaluations, and that the decision creates a standard-less permit system. Village Br. at 41. While it was appropriate for the Court of Appeals to defer to DNR on the technical questions surrounding public trust review, it does not follow that there are no standards.

Evaluation of public interests in navigable waters, and the balancing of public interests in state waters with other public policies (such as a municipality's need to provide a potable water supply), are not new to DNR. Many other statutes require DNR to evaluate and balance competing public interests involving water resources. Several of those statutes, in chs. 23, 30, 281 and 283, have been identified in Section II.C.2, above. Additionally, DNR and its predecessor agencies have had a long history of performing those analyses. *See* Section I, above. Indeed, this Court has recognized DNR's statutory duty and experience in balancing public policy factors. *See, e.g., Hilton,* 2006 WI 84, ¶ 21.

Additionally, deference to the technical expertise of administrative agencies in administering their regulatory programs has long been a hallmark of administrative law. Under Wis. Stat. § 227.57(8), a court may not substitute its judgment for that of the agency on a matter within the agency's discretion. A court reviewing a contested case decision may not substitute its judgment for that of the agency as to the weight of evidence. Wis. Stat. § 227.57(6). A court also must accord due weight to "the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it…." Wis. Stat. § 227.57(10).

Where, as here, the agency has a long history of performing such analyses, the court applies the "great weight" standard; *i.e.*, the court will uphold an agency's interpretation or application of a statute if it is reasonable and consistent with the meaning or purpose of the statute. *See, e.g., DaimlerChrysler*, 2007 WI 15, ¶¶ 15-16; *see also*, discussion in Section I., above.

The character and quantum of evidence that is necessary for DNR to determine whether to conduct a public trust review will vary from case to case. In some cases, DNR's knowledge of the hydraulic interconnection between the affected groundwater aquifer and nearby surface waters may be sufficient to trigger further analysis. In other instances, DNR may require an objector asking for such evaluation to offer sufficient evidence of impact to warrant review. The Court of Appeals correctly determined that it cannot establish a hard rule on this

technical issue. Rather, it appropriately defers to DNR to make that threshold decision whether the evidence warrants additional review, as well as the ultimate decision on how to apply that evidence to the application at hand.

III. THE COURT OF APPEALS INCORRECTLY DECIDED THAT DNR MUST CONSIDER INFORMATION NOT SUBMITTED TO THE AGENCY IN THIS PROCEEDING FOR THE 2005 WELL APPROVAL.

DNR agrees with the Village that the Court of Appeals improperly required the agency to consider an affidavit sent to a DNR attorney in a related judicial proceeding, but not submitted to DNR's staff who would decide whether to issue the 2005 well approval. The Court of Appeals erred when it concluded that the affidavit should be "deemed" to be part of the record before DNR in the 2005 well approval proceedings. DNR offers the following analysis of why the Court of Appeals erred in this regard.

A. Additional Background Facts

As noted in the Village's brief at 5, LBMD had sought judicial review of the original approval for this well, issued by DNR in 2003. Although DNR is typically represented by the Department of Justice in such proceedings, DNR was represented by an in-house attorney in the 2003 judicial review action.

After the Walworth County Circuit Court upheld the 2003 Approval, an attorney for LBMD submitted a motion for reconsideration, attaching an affidavit (the "Nauta affidavit"). *See* App-6, ¶ 9. DNR's attorney was provided with a copy of the motion. The motion was summarily denied by the circuit court before DNR issued the 2005 Approval. *See* App-6, ¶ 10.

The 2005 Approval is the subject of this proceeding. For unexplained reasons, the LBMD attorney who submitted the Nauta affidavit with the motion for reconsideration in the 2003 judicial review action did not submit the affidavit or any other substantive information to DNR staff for consideration in the 2005 agency proceeding. Therefore, DNR's decisionmakers for well approvals did not have or consider that affidavit in conjunction with the 2005 Approval. LBMD was provided a copy of the 2005 Approval when it was issued, but LBMD did not request a contested case hearing to address potential impacts of the well.

In the subsequent judicial review of the 2005 Approval, LBMD "mentioned" a Nauta report in its brief; however, it did not seek to supplement the record with the Nauta Affidavit or other information. App-36. The circuit court refused to consider this reference to a Nauta report, as it had not been submitted to the agency as part of the record in the 2005 Approval. App-36-37.[13] Despite multiple opportunities for LBMD to submit the affidavit or other substantive information as part of the record, and despite its failure to take advantage of those opportunities, the Court of Appeals reversed and remanded the case, holding that any information in the possession of the agency's attorney is imputed to the agency and must be considered.

---

[13] The Nauta Affidavit would have had no bearing on the issue as framed by LBMD in the circuit courts in the cases regarding both the 2003 and 2005 Approvals. LBMD's position was that all petitioners had to do was raise an issue – *i.e.*, that there "might" be a surface water impact – to trigger DNR's duty to initiate an investigation. *See* App-31-32 and 35.

B. The Nauta Affidavit was Not Part of the Agency Record, as Defined in Chapter 227, for the 2005 Approval.

The scope of judicial review must be confined to the record. *See* Wis. Stat. § 227.57(1); *Barnes v. Dep't of Natural Res.,* 184 Wis. 2d 645, 661, 516 N.W.2d 730 (1994). The agency record is defined in Wis. Stat. § 227.55 as "the entire record of the proceedings in which the decision under review was made, including all pleadings, notices, testimony, exhibits, findings, decisions, orders and exceptions, therein."

An agency served with a petition for judicial review (here, DNR) is required to transmit the record to the reviewing court. *Id.* The process for supplementing the record is to make application to the circuit court for leave to present additional evidence, before the date set for trial. Wis. Stat. § 227.56(1). The court may allow additional evidence to be taken before the agency if the court finds that the evidence is material and that there were good reasons not to present it earlier.[14] *Id.* There was no such request to expand the record in this proceeding. Thus, it is undeniable that the agency record in this proceeding did not include the Nauta affidavit.

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[14] Another way to ensure that the agency considers documents is to request a contested case hearing under Wis. Stat. § 227.42. LBMD chose not to exercise this option.

C. The Court's Application of the Principle of Imputed Knowledge Is Inapplicable in Administrative Law Proceedings.

The Court of Appeals erred when it inappropriately relied upon a general principle of agency in the private corporate setting – that knowledge of a corporate agent or employee is imputed to the principal – to conclude that any information in the possession of DNR attorneys is imputed to the agency decisionmakers.

The court relied in part upon *Wauwatosa Realty Co. v. Bishop*, 6 Wis. 2d 230, 236, 94 N.W.2d 562 (1959). That case arose in the context of information that an attorney acquired while representing a client. The underlying proposition, however, is not unique to attorneys. The other case cited by the Court of Appeals involved the knowledge of a corporate director in his fiduciary capacity. *See Suburban Motors of Grafton, Inc. v. Forester*, 134 Wis. 2d 183, 185-86,192-93, 396 N.W.2d 351 (1996). *Suburban* and other cases make clear that the underlying premise of imputed knowledge of an agent to the principal applies to the corporate setting. *See, e.g., Tele-Port v. Ameritech Mobile Communications*, 2001 WI App 261, ¶ 7, 248 Wis. 2d 846, 637 N.W.2d 782, *rev den'd* 2002 WI 23. There is no law supporting the court's extension of this concept to an administrative agency.

D. The Court's Application of the Principle of Imputed Knowledge Conflicts with the Administrative Procedures Established in Chapter 227, and with LBMD's Stated Purpose in Submitting the Affidavit to the Circuit Court Regarding the 2003 Approval.

The Court of Appeals' extension of the principle of imputed knowledge to an administrative agency also undermines the established rule that parties must comply with the administrative procedures and deadlines outlined in Chapter 227.

The Legislature intended the procedures in Chapter 227 to be exclusive and mandatory. *See*, e.g., *Wisconsin's Environmental Decade, Inc. v. PSC*, 79 Wis. 2d 161, 170, 225 N.W.2d 917 (1977); *Charter Manufacturing Co. v. Milwaukee River Restoration Council, Inc.*, 102 Wis. 2d 521, 525-26, 307 N.W.2d 322 (Ct .App. 1981). The right to appeal under Chapter 227 is dependent on "strict compliance" with its provisions. *Cudahy v. Dep't. of Revenue*, 66 Wis. 2d 253, 257-62, 224 N.W.2d 570 (1974). Failure by any party to comply deprives the circuit court, and likewise the court of appeals, of subject matter jurisdiction. *Id.*

DNR agrees with the Village that Chapter 227 sets forth procedures that a party must follow to ensure that a document becomes part of the agency record. *See* Village Br. at 45-46. The Court of Appeals concurred. App-21-22 at ¶¶ 32-34. The court acknowledged that a party may create or supplement the record during the approval process, after an approval has been granted, and during the judicial review process. *Id.* The court also agreed with DNR that LBMD did not comply with any of those procedures for supplementing the record. However, the court erred by failing to conclude that these are the exclusive procedures for creating or supplementing the agency record.

A person cannot simply hand a document to any individual at DNR and expect that it will make its way into the record for a particular proceeding. Nor can a person submit a copy of a motion to a DNR attorney in one proceeding and

expect that the motion and all of its attachments will become part of the record in a different proceeding.

The attorney for LBMD regarding the 2003 Approval recognized that LBMD had not complied with any of the procedures under Chapter 227 for supplementing the record. When the attorney for the Village objected to the submission of the Nauta affidavit as part of the motion for reconsideration, LBMD's attorney responded: "Petitioners [LBMD] have not attempted, nor have they requested the Court to enlarge the record from the contested case hearing." R-Ap. 101 (letter from LBMD attorney David Meany to Judge Carlson). LBMD presented the Nauta affidavit to the circuit court for the stated purpose of demonstrating the "types of evidentiary materials" they would have submitted if they had been given sufficient time to contest the motion for summary disposition in the contested case hearing regarding the 2003 Approval. *Id.* Despite these factors, the Court of Appeals accepted the Nauta Affidavit for the purpose of expanding the agency record, in contravention of both Chapter 227 and the stated purpose for which it was offered.

E. Application of the Court of Appeals Decision Would Undermine the Orderly Administration of the Law and Unduly Burden Both Administrative Agencies and Parties.

In a footnote, the Court of Appeals indicated that its ruling on this issue may only apply in the narrow circumstance in which the agency's lawyer represents the agency both in court and in a companion administrative or judicial proceeding. App-25, ¶ 38, n.16. If this principle of imputed knowledge is limited

to the facts of this case, as suggested in the footnote, its impact on administrative agencies may be minimal. However, the court also stated that future courts will have to look closely at the facts and circumstances of each case. *Id.*

Imputed knowledge only applies when the information received is "something pertinent to the subject matter of that employment …." *Tele-Port*, 2001 WI App 261, ¶ 7. *See also, Suburban Motors*, 134 Wis. 2d at 192, quoting 3 Fletcher, *Cyclopedia of the Law of Private Corporations*, § 790 (rev. perm. ed. 1975) ("all material facts which its officer or agent received notice or acquires knowledge *while acting in the course of his employment within the scope of his authority* ….") (emphasis added). Given the limits of the case law and the unusual fact situation here, the Court of Appeals' decision may have limited prospective impact.

The court's rationale nevertheless is wrong. It relies upon and extends a more general rule of law that does not uniquely apply to attorneys and has no application to administrative agencies. If applied to a broader range of employees in future cases, it may well wreak havoc on administrative agencies, undermining their ability to effectively and timely administer their regulatory programs.

It is not unusual for interested parties to submit information to the wrong person within the agency, to the wrong office, or to an official with no direct knowledge of the proceeding. In an agency like DNR, with over two thousand employees, numerous programs, and multiple offices throughout the state, there is

no assurance that incorrectly submitted information will ever reach the actual decisionmakers.

If an agency's decision is defective for not considering incorrectly submitted information, it may actually behoove an opposing party to submit information incorrectly. That is, the opposing party would have a procedural basis to challenge the decision, creating the leverage of delay and an impediment to implementing the decision. Here, it is noteworthy that LBMD was represented by attorneys who should have known how and where to submit information, and they were given multiple opportunities to correctly submit the information before the agency and in circuit court.

Parties and agencies alike reasonably rely upon procedural rules and practices established in Chapter 227, as well as agency rules. Those rules and practices lend predictability to the administrative process, lead to equitable outcomes, and ensure timeliness of agency decisions. That need for consistency and predictability is reflected in both statutes and administrative rules, which provide instructions on how to apply for or contest an approval, submit information, seek judicial review, and request a court, on review, to supplement the record. *See, e.g.,* Wis. Stat. §§ 227.42; 227.55; 227.56; 227.57; *see also* Wis. Admin. Code ch. NR 2; § NR 812.09.

As the Court of Appeals acknowledged, LBMD used none of the available alternatives to create or supplement the record with respect to the 2005 Approval.

See App-1, ¶ 8. Failing to follow those established procedures for supplementing the record would lead to confusion as to what constitutes the agency record, among administrative agencies, the parties, and reviewing courts.[15] It also would foster inconsistent, inequitable and untimely outcomes.

CONCLUSION

For the reasons stated herein, the Wisconsin Department of Natural Resources respectfully requests that the Court affirm the Court of Appeals as to the scope of DNR authority to protect waters of the state in the high capacity well program. DNR further asks the Court to reverse the Court of Appeals regarding the content of the agency record, and to clarify that information not submitted to the agency or court under Chapter 227 is not part of the agency record on review.

Dated this 27th day of December, 2010.

AXLEY BRYNELSON, LLP

/s/_____
Carl A. Sinderbrand
State Bar No. 1018593
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Madison, WI 53703

[15] This case illustrates the confusion that can occur regarding the content of the record. The Court of Appeals noted three documents referred to by LBMD's attorney at oral argument but said "[i]t is unclear whether the DNR had this information, however, with the exception of the 2003 report from the Village's expert." App-10, ¶ 15, n.5. In fact, the second two documents were attached to the Nauta affidavit, which the court "deemed" to be part of the record. It is not surprising that the court's effort to expand the record has resulted in the court itself becoming confused as to what is in the record. *Id.*

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WISCONSIN DEPARTMENT
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CERTIFICATION OF COMPLIANCE WITH § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this Response, which complies with the requirements of § 809.19(12).

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

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

Dated: December 27, 2010.

/s/
Carl A. Sinderbrand

CERTIFICATION OF SERVICE

I hereby certify that 22 copies of this Response were hand delivered to the Clerk of the Supreme Court on December 27, 2010. I further certify that copies of the Response were served on all parties of record by First Class Mail on December 27, 2010. I further certify that the Response was correctly addressed and postage was prepaid.

Dated: December 27, 2010.

/s/
Carl A. Sinderbrand

FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in § 809.19(8)(b) and (d) for a response brief produced with a proportional serif font.

The length of this Response is 43 pages and 10,960 words.

Dated: December 27, 2010.

/s/
Carl A. Sinderbrand

STATE OF WISCONSIN
SUPREME COURT
Appeal No.: 2008 AP 3170

LAKE BEULAH MANAGEMENT DISTRICT,

Petitioner-Appellant-Cross-Respondent-Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT DISTRICT,

Co-Petitioner-Co-Appellant-Cross-Respondent,

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent.

VILLAGE OF EAST TROY,

Intervening Respondent-Respondent-Cross-Appellant-Petitioner.

APPENDIX

On Appeal from the Decision of the Court of Appeals, District II
Dated June 16, 2010

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RESPONDENT-RESPONDENT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed as a part of this brief is an appendix that complies with § 809.19(3)(b) and that contains, at a minimum: (1) a table of contents; (2) additional document in the record essential to an understanding of the issues raised.

Dated this 27th day of December 2010.

/s/
Carl A. Sinderbrand
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STATE OF WISCONSIN
SUPREME COURT
Appeal No.: 2008 AP 3170

LAKE BEULAH MANAGEMENT DISTRICT,

Petitioner-Appellant-Cross-Respondent-Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT DISTRICT,

Co-Petitioner-Co-Appellant-Cross-Respondent,

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent.

VILLAGE OF EAST TROY,

Intervening Respondent-Respondent-Cross-Appellant-Petitioner.

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Dated this 27th day of December 2010.

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August 11, 2005

VIA FACSIMILE 1-262-741-7050 AND U.S. MAIL

The Honorable James L. Carlson
Walworth County Courthouse
1800 County Road, NN
Elkhorn, Wisconsin 53121

RE: ***Lake Beulah Management District and Lake Beulah Protective Improvement Association vs. State of Wisconsin Department of Natural Resources and Village of East Troy***
Walworth County Case No.: 04-CV-683
04-CV-687

Dear Judge Carlson:

I represent Petitioner Lake Buelah Management District in the above-referenced consolidated actions. I have received a letter dated today, August 11, 2005, to the Court from Attorney Paul Kent, who represents the Village of East Troy. I am writing on behalf of the Petitioners to respond to Mr. Kent's contention that the Court cannot consider the affidavits filed by the Petitioners in support of their Motion for Reconsideration and Relief from Judgment (the "Motion"). Unfortunately, Mr. Kent has misapprehended the purpose of the affidavits of Mr. Nauta and Ms. Michalski.

As stated in their brief in support of the Motion, Petitioners submitted the supporting affidavits to demonstrate to the Court the types of evidentiary material that Petitioners would have been able to submit to the Administrative Law Judge if Petitioners had been afforded a reasonable period of time. Put another way, the affidavits, and the complex scientific issues addressed in them, show that the time period allowed by the ALJ, for the submission of evidence to contest a summary judgment motion, was prejudicial and unreasonable as a matter of law. Petitioners have not attempted, nor have they requested the Court, to enlarge the record from the contested case hearing.

Petitioners respectfully renew their request to the Court to schedule a hearing on the Motion prior to August 29, 2005.

Sincerely,

DEWITT ROSS & STEVENS, S.C.

David V. Meany

David V. Meany

DVM:vjs

cc: Paul Kent, Esq. *(Via Facsimile and U.S. Mail)*
Dennis Fisher, Esq. *(Via Facsimile and U.S. Mail)*
Judy Ohm, Esq. *(Via Facsimile and U.S. Mail)*

STATE OF WISCONSIN
SUPREME COURT

LAKE BEULAH MANAGEMENT DISTRICT,

Petitioner-Appellant-Cross-Respondent,

and

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner-Co-Appellant-Cross-Respondent,

vs. **Appeal No. 2008AP3170**

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent,

and

VILLAGE OF EAST TROY,

Intervening Respondent-Respondent-Cross-Appellant-Petitioner.

BRIEF AND SUPPLEMENTAL APPENDIX OF LAKE BEULAH MANAGEMENT DISTRICT

ON APPEAL FROM A DECISION OF THE COURT OF APPEALS, DISTRICT II, DATED JUNE 16, 2010, AFFIRMING IN PART AND REVERSING IN PART A JUDGMENT OF THE WALWORTH COUNTY CIRCUIT COURT ENTERED ON SEPTEMBER 30, 2008, THE HONORABLE ROBERT J. KENNEDY, PRESIDING, IN CASE NO. 06-CV-172

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December 27, 2010

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

On August 3, 2005, the Village of East Troy (the "Village") sent a letter to an in-house attorney employed by the State of Wisconsin Department of Natural Resources (the "DNR") requesting an extension of a permit to construct and operate a high capacity well ("Well No. 7") with a capacity to withdraw 1,440,000 gallons per day ("gpd") from the groundwater feeding Lake Beulah. R.22, tab 16; App.1.

The next day, August 4, 2005, the Lake Beulah Management District (the "Lake District") provided that same attorney with the following affidavit, letter and e-mail:

- An affidavit of a licensed geologist stating that "[i]t is my opinion that the existing data can only support the conclusion that pumping of proposed Well No. 7 would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah." R.19, tab 1, ¶ 31; App.10.

- A letter from the Southeastern Wisconsin Regional Planning Commission ("SWRPC") stating that "[t]he well construction being considered . . . will have the effect of reducing the groundwater flow to the Lake," which has the "potential for negative impacts on the wetland complex and the Lake itself." R.19, tab 1, exh. 2; App.26.

- An e-mail from the United States Geological Society stating that "[t]here is no question that pumping from the test well has an effect on Lake Beulah." R.19, tab 1, exh. 2; App.23.

The DNR completely ignored those affidavits, letters and e-mails and, on September 6, 2005, issued the requested permit extension to the Village. R.22, tab 17.

The Village argues in this case that, because Well No. 7 has a capacity to withdraw less than 2,000,000 gpd, sections 281.34 and 281.35, Wis. Stats., prohibit the DNR from considering the environmental impacts of the well under sections 281.11 and 281.12, Wis. Stats., in connection with the Village's application, ***even if everyone concedes that the well will destroy Lake Beulah.*** Additionally, the Village and the DNR argue that the affidavit, letter and e-mail were not part of the "agency record," and were thus properly ignored by the DNR when it considered the permit extension application of the Village. The Court of Appeals rejected both arguments.

Accordingly, the following two issues are presented for review in this case:

1. Do sections 281.34 and 281.35, Wis. Stats. (which provide a minimum graduated 3-tier environmental review process for high capacity wells, depending on their size), tacitly revoke the broad, general grant of authority to the DNR set forth in sections 281.11 and 281.12, Wis. Stats. (which require the DNR to "protect . . . the waters of the state, ground

and surface, public and private")?

Answered by Court of Appeals: No: "We therefore conclude that, just because the legislature was silent about the DNR's role with regard to some of the middling wells, this does not mean that the legislature meant to abrogate the DNR's authority to intercede where the public trust doctrine is affected. . . . We . . . hold that the legislature's mandate that the DNR complete a formal environmental review for only certain wells does not prohibit or rescind the DNR's authority to review other middling wells under Wis. Stat. §§ 281.11 and 281.12." *Op.* at ¶¶ 27, 28.

2. Do documents provided to the DNR's in-house attorney by the Village constitute documents in the "agency record," but documents provided to that same attorney by the Lake District -- the very next day -- do not?

Answered by Court of Appeals: No: "We thus rule that anything in the DNR's attorney file for the litigation concerning Well #7 is imputed to the DNR employees making the decisions regarding the permit for Well #7" and, "frankly, we are a bit perplexed as to why the DNR attorney did not show the affidavit to the decision makers. . . ." *Id.* at

¶¶ 37-38.

STATEMENT OF THE CASE

I. DESCRIPTION OF THE NATURE OF THE CASE.

This case principally involves statutory construction. Section 281.12(1), Wis. Stats., provides that the DNR "shall have general supervision and control over the waters of the state." Section 281.11, Wis. Stats., provides that:

> The department ***shall*** serve as the central unit of state government to ***protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private***. . . . The purpose of this subchapter is to ***grant necessary powers*** and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, this subchapter . . . ***shall be liberally construed in favor of the policy objectives set forth in this subchapter***. . . . (emphasis added).

Sections 281.34 and 281.35, Wis. Stats., provide a minimum graduated 3-tier environmental review process for applications for high capacity wells, depending on the capacity of the well at issue. For wells with a capacity of less than 100,000 gpd, no environmental review is required. For wells with a capacity of between 100,000 gpd and 2,000,000 gpd, an environmental review is required under limited circumstances. For

wells with a capacity of greater than 2,000,000 gpd, environmental review is required.

The Village contends that sections 281.34 and 281.35, Wis. Stats., tacitly revoke the Public Trust Doctrine authority granted to the DNR by sections 281.11 and 281.12, Wis. Stats., as it relates to high capacity wells with a capacity of less than 2,000,000 gpd, and the DNR is obligated (except in limited circumstances) to issue a permit for the construction and operation of such a well ***even if everyone concedes that the well will destroy a lake in this State***. The Village argues that the DNR's only authority is to act after the harm has already occurred by filing an enforcement proceeding or nuisance claim but, obviously, it may then be too late to save the waters of this State.

The Court of Appeals rejected the Village's argument, holding that "[t]he permit process has to be, as a matter of common sense, more than a mechanical, rubber-stamp transaction," *op.* at ¶ 27, and that:

> As we alluded to earlier, the Village interprets this silence in the presence of a comprehensive scheme to regulate high capacity wells as tacitly revoking any other authority the DNR might have over other wells, including its general authority to protect waters of the state. . . .
>
> The public trust doctrine is such an important and integral part of this state's constitution that, before we can accept the Village's argument, there should be

> some evidence that the legislature intended by these statutes to render nugatory the more general statutes bestowing the DNR with the general duty to manage the public trust doctrine. . . .
>
> . . .
>
> We therefore conclude that, just because the legislature was silent about the DNR's role with regard to some of the middling wells, this does not mean that the legislature meant to abrogate the DNR's authority to intercede where the public trust doctrine is affected. . . .
>
> We are convinced that we have harmonized the statutes to avoid conflict and ensured that no statute is surplusage. We agree with the conservancies and the DNR and hold that the legislature's mandate that the DNR complete a formal environmental review for only certain wells does not prohibit or rescind the DNR's authority to review other middling wells under Wis. Stat. §§ 281.11 and 281.12. The DNR's mission must be to protect waters of the state from potential threats caused by unsustainable levels of groundwater being withdrawn by a well, whatever type of well that may be.

Op. at ¶¶ 24, 25, 27, 28 (citations omitted).

II. PROCEDURAL STATUS OF THE CASE.

On September 6, 2005, the DNR issued a permit extension to the Village to construct and operate Well No. 7. R.22, tab 17. On March 3, 2006, the Lake District challenged the issuance of the permit extension by filing a Petition and Complaint for Judicial Review in the Walworth County Circuit Court. R.2.

On September 23, 2008, the circuit court denied the Petition, holding that while the DNR has the authority to consider public trust

doctrine concerns in connection with the issuance of a permit for the construction and operation of a high capacity well, regardless of its size, the DNR had no obligation to do so in this instance because it had no "scientific evidence" before it raising any such concerns. R.40.

On June 16, 2010, the Court of Appeals affirmed in part and reversed in part the trial court's ruling, holding that "the DNR had a duty to consider the information" in its possession. *Op.* at ¶ 39. It therefore "reverse[d] and remand[ed] to the circuit court with directions to, in turn, remand this case to the DNR so that it may consider the Nauta affidavit and any other information the agency had pertinent to Well #7 before it issued the 2005 approval." *Id.*

III. STATEMENT OF FACTS.

A. THE PARTIES.

1. LAKE BEULAH MANAGEMENT DISTRICT.

In 1973, the Wisconsin Legislature made specific findings that this State's lakes need protection, and enacted a statutory scheme to accomplish that:

> The legislature finds environmental values, wildlife, public rights in navigable waters, and the public welfare are threatened by the deterioration of public lakes; that the protection and rehabilitation of the public inland lakes of this state are in the best interest of the

> citizens of this state; . . . that lakes form an important basis of the state's recreation industry; that the increasing recreational usage of the waters of this state justifies state action to enhance and restore the potential of our inland lakes to satisfy the needs of the citizenry; and that the positive public duty of this state as trustee of waters requires affirmative steps to protect and enhance this resource and protect environmental values. . . .

Wis. Stat. § 33.001(1).

One such "affirmative step" was to authorize owners of land abutting public inland lakes to create "lake protection and rehabilitation" districts to "improve or protect the quality of public inland lakes." Wis. Stat. § 33.11.

The Lake District was created pursuant to Chapter 33, Wis. Stats., to protect Lake Beulah, an 834-acre inland lake located in Walworth County. R.2, ¶ 1; R.22, tab 1, pg. 2. As noted in a 1994 report prepared by the DNR:

> Lake Beulah is a valuable resource of the state of Wisconsin held in trust for the general public. The lake provides recreation, aesthetic enjoyment, opportunities for fishing and wildlife observation, boating and swimming. Lake Beulah has offered enjoyable conditions such as good water quality, abundant fisheries of good sized game fish and areas of aesthetic beauty. R. 22, tab 1, pg. 1.

2. <u>THE DNR.</u>

The DNR is an agency of the State and "a 'trustee' of the navigational waters of this state." R.6, ¶ 1; *State ex rel. Dep't of Natural*

Res. v. Walworth County Bd. of Adjustment, 170 Wis. 2d 406, 410, 489 N.W.2d 631 (Ct. App. 1992). As trustee, the DNR has the duty to "preserve inviolate" those waters. *Priewe v. Wisconsin State Land & Improvement Co.*, 103 Wis. 537, 550, 79 N.W. 780 (1899).

3. VILLAGE OF EAST TROY.

The Village is a municipal corporation organized under the provisions of Chapter 61, Wis. Stats. R.3, ¶ 1.

B. THE 2003 HIGH CAPACITY WELL PERMIT.

1. ISSUANCE OF THE PERMIT.

As of 2003, the Village had three operating municipal wells, but needed a fourth municipal well "to eliminate current deficiencies and supplement for future growth." R.17, Bates Nos. 000086, 000091. While it could have selected a whole host of locations in the Village for its fourth municipal well ("Well No. 7"), the Village chose to locate it a little more than 1,200 feet from Lake Beulah. R.17, Bates No. 000097. "Due to the proximity of the well site to Lake Beulah," the Lake District "expressed concern on how the proposed well would affect the lake level." R.17, Bates No. 000091.

After selecting the location for Well No. 7, the Village

submitted an application to the DNR for approval to construct a high capacity well on that site. The high capacity well proposed by the Village would have a capacity to pump 1,000 gallons per minute, which equates to 1,440,000 gpd and 525,600,000 gallons per year, from the groundwater feeding Lake Beulah. R.17, Bates No. 000092.[1]

At the time the DNR was considering the Village's application, the DNR had two pieces of information in its possession on the issue of whether Well No. 7 will negatively impact Lake Beulah. ***First***, the DNR had an April 2003 report prepared by the Village's engineering firm, Layne-Northwest, which acknowledged that Well No. 7 will negatively impact the groundwater discharge to Lake Beulah, but stated that it will not be a "serious disruption." R.22, tab 3, pg. 2. The report did not quantify "serious disruption." ***Second***, the DNR had a letter from SWRPC, dated July 28, 2003, which stated:

> The Commission staff agrees with the concerns raised in your letter relating to the potential for negative

[1] In an attempt to minimize the potential impact of Well No. 7 on Lake Beulah, the Village states that "[f]or context, Lake Beulah has 14,279 acre-feet of water, which translates to 4.7 billion gallons of water," and "[t]he 1,440,000 gpd maximum capacity of Well #7 is 0.03% of that volume." *Village's Brief* at 4. Using the Village's calculations, Well #7 will withdraw 525,600,000 gallons per year of groundwater feeding Lake Beulah which, in nine years, will equal the total volume of water in the lake (4.73 billion gallons).

> impacts on the wetland complex and the Lake itself, due to the pumping from the well. . . .
>
> . . .
>
> Groundwater impacts are an important factor in determining the quality of lake systems, such as Lake Beulah, given the clean and low temperature characteristics of groundwater inflow. The well construction being considered, as well as the subdivision construction itself, will have the effect of reducing the groundwater flow to the Lake. . . . R.19, tab 1, exh. 2; App.26.[2]

On September 4, 2003, the DNR issued a permit to the Village (labeled a "Water System Facilities Plan and Specification Approval") to construct and operate Well No. 7. R.22, tab 3. Despite having the report of Layne-Northwest and the letter from SWRPC in its possession, the DNR issued the permit without doing any analysis or investigation concerning whether Well No. 7 will negatively impact Lake Beulah. The reason the DNR failed to do so is explained on pages 12-13 of this brief.

The permit issued to the Village stated that it would be valid for two years, after which time it would become void:

> This approval is valid for two years from the date of approval and is subject to the conditions listed above. If construction or installation of the

[2] The letter indicates that a copy was provided to James D'Antuono of the DNR. R.19, tab 1, exh. 2; App.27.

> improvements has not commenced within two years the approval shall become void and a new application must be made and approval obtained prior to commencing construction or installation. R.22, tab 3, pg. 3.

2. THE LAKE DISTRICT'S PETITION FOR CONTESTED CASE HEARING.

On October 3, 2004, the Lake District filed a Petition for Contested Case Hearing with the DNR. R.22, tab 4. The Petition stated:

> The Lake District has specific standing and a substantial interest in this matter as it has a statutory delegation of responsibility which includes the protection of Lake Beulah, which the District believes will be injured in fact or threatened with injury if the Department of Natural Resources Water System Facilities Plan and Specification Approval of September 4, 2003 . . . permits the proposed Village of East Troy well to be located in its current location and under the permitted specifications. . . . R.22, tab 4, ¶ 3.

The Petition concluded by alleging that the DNR "has failed to comply with . . . [its] responsibility to protect navigable waters, groundwater and the environment as a whole" by issuing the permit to the Village. R.22, tab 4, ¶ 5.

On October 24, 2003, the DNR denied the Lake District's Petition. R.22, tab 5. In its letter, the DNR gave the following reason for doing so:

> The DNR shares your concern regarding the potential for negative impacts to nearby water resources when a high capacity well is constructed and operated and believes that those impacts should be considered

> when a request for a high capacity well approval is submitted to the Department. Unfortunately, the Legislature has only granted limited authority to the Department in that regard. For high capacity wells where the water loss will be greater than 2 million gallons per day, sec. 281.35(4)(b) and (5)(d), Wis. Stats., expressly requires the Department to consider environmental and public trust doctrine factors in determining whether or not to approve the application. However, for high capacity wells where the water loss will be 2 million gallons per day or less, sec. 281.17 [now section 281.34(5)], Wis. Stats., only allows the Department to consider the impact on public utility wells (*i.e.*, existing public drinking water supplies) in determining whether or not to approve the application. R.22, tab 5, pg. 1.

Three months later, the DNR retracted its denial of the Lake District's Petition. R.22, tab 6. In a letter sent to the Lake District on January 13, 2004, the DNR indicated that, after "consult[ing] with the Governor and the Wisconsin Department of Justice" on the matter, it decided to "grant[ ] your request for a contested hearing" on the following issue:

> Whether the Department should have considered any potentially adverse effects to the waters of Lake Beulah, including subsurface water sources feeding the lake, the groundwater aquifer in amounts affecting the lake and sensitive environmental areas and the overall ecosystem, and nearby private wells, when the Department granted a conditional approval of the plans and specifications for proposed Municipal Well No. 7 in the Village of East Troy. R.22, tab 6.

3. THE VILLAGE'S MOTION FOR SUMMARY DISPOSITION.

On March 26, 2004, the Village filed a Motion for Summary Disposition with the Administrative Law Judge (the "ALJ") assigned to the matter. R.22, tab 7. In its brief in support of the motion, the Village argued that:

> When the Department of Natural Resources issued the high capacity well approval to the Village of East Troy, there was only one factor that the Department of Natural Resources could consider in conditioning or denying this approval: assurance that the water supply of a public utility would not be impaired. . . .
>
> . . .
>
> Thus, Petitioner's allegations about impacts to Lake Beulah and its ecosystem are not relevant to issuance of an approval for Well No. 7.
>
> . . .
>
> As noted above, the Legislature specifically restricted the Department from considering effects of a proposed well of this capacity on public water rights in navigable waters, except when the water loss has exceeded 2,000,000 gallons per day. Wis. Stat. § 281.35(5)(d). It is undisputed that Well No. 7 does not meet this water loss threshold. Therefore, the Department would have to impermissible stretch the authority granted to it by the Legislature if it were to consider the potentially adverse effects of Well No. 7 on "the waters of Lake Beulah." R.22, tab 7, pgs. 1, 5, 6-7.

As the Village's brief makes clear, its position then, and still now, is that the DNR ***must*** issue a permit to every applicant seeking to

construct and operate a high capacity well with a capacity of less than 2,000,000 gpd ***even if everyone concedes that the well will destroy a Wisconsin lake***. While obviously absurd in its face, that is the Village's position.

On June 11, 2004, the ALJ assigned to the matter granted the Village's motion. R.22, tab 8. The ALJ agreed with the Village's statutory construction argument, holding that "a permit must be issued if the statutory standards are met" and "[h]ere, the Village has demonstrated compliance with the statutory standards and the permit must be issued." R.22, tab 8, pg. 6.

4. JUDICIAL REVIEW OF THE ALJ'S DECISION.

On July 16, 2004, the Lake District filed a Petition and Complaint for Judicial Review in the Walworth County Circuit Court seeking reversal of the ALJ's decision. R.22, tab 9. During the briefing in that case, the DNR reversed its previous position and asserted that it does in fact have the authority to refuse to issue a permit for a high capacity well, regardless of its size, if it has evidence that the well will negatively impact the navigable waters of this State:

> [The] LBPIA's Brief contained a lengthy discussion of WDNR's authority over high capacity wells where operation of the well has negative impacts on public

> rights in navigable waters. . . . WDNR agrees that it has authority under certain circumstances to consider the Public Trust Doctrine in its analysis of high capacity well approvals. To the extent that the legal analysis in Section III.C of LBPIA's Brief supports the position that WDNR has authority to condition or limit a high capacity well approval where operation of the well has negative impacts on public rights in navigable waters, WDNR agrees with that legal analysis. . . . R.22, tab 10, pgs. 2-3.

Despite the DNR's sea change in position, the Village remained vigilant in its position that regardless of whether a high capacity will destroy one of this State's lakes, the DNR must blindly issue a permit for the construction and operation of the well if it has a capacity of less than 2,000,000 gpd. In the Village's words:

> [U]nder the statutory scheme, the DNR is only authorized and required to evaluate environmental impacts including impacts on surface waters for high capacity wells over 2,000,000 gallons per day and for wells in certain locations. Those standards do not apply to Well #7. The only standard applicable to Well #7 under this statutory scheme is Wis. Stat. § 281.34(5)(a). The DNR has no authority much less an obligation to consider impacts to surface waters for wells in the category of Well #7. App.32-33.

On June 24, 2005, the Walworth County Circuit Court, the Honorable James L. Carlson, presiding, agreed with the Village and denied the Lake District's Petition, holding that:

> As the Village's proposed well will not trigger the requirements of Section 281.35, the DNR is not required to consider these criteria. Furthermore, not only is the DNR not required to do so, it should not, as the criteria

> for approval of this type of well is clearly and unambiguously spelled out in Section 281.17. . . . R.22, tab 12, pg. 11.

5. THE LAKE DISTRICT'S MOTION FOR RECONSIDERATION.

On August 4, 2005, the Lake District filed a motion for reconsideration of the trial court's dismissal of its Petition. In support of its motion, the Lake District filed an affidavit of Robert J. Nauta ("Nauta"), a Wisconsin licensed geologist with more than 18 years experience in his field. R.19, tab 1; App.3. The motion and affidavit were served on the DNR and the Village on August 4, 2005. In his affidavit, Nauta states as follows:

> 29. It is my opinion that the aquifer test performed by Layne-Northwest was inadequately designed and improperly conducted for the purposes of evaluating environmental impacts and therefore did not properly evaluate the potential impacts to sensitive environmental features and navigable surface water. Nevertheless, the brief aquifer test performed did confirm a lowering of groundwater levels in and adjacent to the Sensitive Wetland and Lake Beulah. Such results clearly demonstrate potential for adverse impacts to Lake Beulah and to an environment already classified by the WDNR as a sensitive environmental feature. Moreover, the aquifer test results clearly demonstrate interruption or disruption of groundwater supply to Lake Beulah and a diversion of surface water from Lake Beulah, which are likely to cause adverse effects to the Lake and wildlife dependent upon the Lake.
>
> . . .
>
> 31. It is my opinion that the existing data

> can only support the conclusion that pumping of proposed Well No. 7 would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah. App.9-10.[3]

Attached to Nauta's affidavit was an e-mail from the United States Geological Society, which states that:

> There is no question that pumping from the test well has an effect on Lake Beulah. . . . It is interesting that Layne's predictive analysis also suggests an effect on the lake. It shows that after 2 years of pumping there would be 2 ft of drawdown adjacent to the lake if the aquifer properties from the well point are assumed. R.19, tab 1, exh. 2; App.23.

The Lake District's motion for reconsideration was denied, without analysis.

6. APPEAL OF TRIAL COURT'S DECISION.

On August 26, 2005, the Lake District appealed the trial court's denial of its Petition. In connection with that appeal, the Wisconsin Department of Justice (the "DOJ") moved the Court of Appeals for leave to file an *amicus curiae* brief expressing the DOJ's strong opinion that the DNR failed to fulfill its responsibilities as a trustee of the State's waters in issuing a permit to the Village for construction and operation of Well No. 7

---

[3] The Village's description of Nauta's affidavit as stating that "Well #7 ***could*** have adverse impacts on Lake Beulah" is a mischaracterization of the affidavit. *Village's Brief* at 5 (emphasis added). Nauta's affidavit clearly states "would," not "could."

without first determining whether the well will negatively impact Lake Beulah. R.19, tab 13. The DOJ refused to represent the DNR in that case due to the DOJ's position that the "DNR had not adequately carried out its responsibilities to protect the waters of the State" in issuing the permit to the Village. R.25, pg. 10, n.2. As stated in the DOJ's *amicus curiae* brief:

> The DNR is a "trustee" of the navigational waters of this state.
>
> . . .
>
> [D]espite DNR's shared concern that the high capacity well's impacts on navigable waters are likely and should be considered at the application stage, DNR did not act on that concern. DNR did not conduct an investigation to allay its shared concern either before or after the contested hearing was held. As trustee it should have.
>
> . . .
>
> An agency of the State has no authority to approve permits that would violate the public trust or to follow a statute that obligates it to do so. R.22, tab 13, pgs. 2, 5, 11.[4]

7. THE 2005 PERMIT EXTENSION.

While the Lake District's appeal was pending in the Court of Appeals, the Village entered into discussions with the DNR to "extend" the

[4] On February 13, 2006, the Court of Appeals denied the DOJ's motion to file an *amicus curiae* brief on the grounds that "we are not persuaded that an amicus curiae brief from the State of Wisconsin is appropriate in this appeal because the State is already a party to the appeal by virtue of the Department of Natural Resources (DNR) being named a respondent," and "the DNR is dominant to the attorney general in protecting state waters." R.22, tab 14, pg. 1.

2003 permit, recognizing that it would be expiring on September 4, 2005. The Village told the DNR that it did not want to submit a new application or be granted a new permit because doing so would potentially open the door for a hearing on whether Well No. 7 will negatively impact Lake Beulah, and the Village desperately wanted to avoid such a hearing:

> Judy Ohm [the DNR's in-house attorney] called me this morning from DNR about the well extension request. She reindicated that her analysis was that since the law has changed, they cannot simply extend the current approval without a re-application. . . . I told her that this would create a number of problems not the least of which would be the re-initiation of the request for a hearing by [the Lake District] regardless of what [Judge] Carlson rules. I also told her I did not want a new application because from a PR perspective it would encourage [the Lake District] to press for relocation [of the well] which would require more testing. She agreed to hold any formal determination for a while to see what [Judge] Carlson rules. . . . R.22, tab 15.

The Village freely admits that it "wanted to avoid starting the process over by a decision that would create new hearing rights" for the Lake District. R.26, pg. 11.

Consistent with its plan, the Village never submitted an application to the DNR for a new permit and instead, on August 3, 2005, sent a letter to Ms. Ohm requesting an extension of the September 4, 2003 permit for an additional two-year period. R.22, tab 16; App.1. The letter stated:

> [T]he Village is hereby requesting a modification of the existing permit to extend the date for two years to allow the appeals to be completed.
>
> We acknowledge that since the original approval, the groundwater law has been renumbered and additional criteria have been added for high capacity wells in certain locations. . . . Since neither the relevant law nor facts have changed since our last application, we do not believe any additional analysis is required to allow the extension of the well approval. R.22, tab 16, pg. 1; App.1.

The very next day, August 4, 2005, the Lake District provided Ms. Ohm with the Nauta affidavit containing, as attachments, the letter from SWRPC and the e-mail from the U.S. Geological Society. R.19, tab 1; App.3-27.

On September 6, 2005, the DNR granted the Village a two-year extension of the 2003 permit. R.22, tab 17. The DNR did that, it contends, because "[t]here was simply no information available to [it] to suggest that operation of Village Well No. 7 would have any adverse impact on public rights in navigable waters."[5] How the DNR can make that statement, in the face of (1) Nauta's affidavit, (2) SWRPC's letter, (3) U.S. Geological Society's e-mail and (4) Layne-Northwest's report, which all unanimously conclude that Well No. 7 will have an adverse impact on Lake

[5] *See DNR's Brief in Court of Appeals*, dated May 18, 2009, at pg. 26 (emphasis in original).

Beulah, is unknown. Nonetheless, by letter dated September 6, 2005, the DNR granted the Village a permit extension:

> DNR has considered the Village's request under the standards set forth in 2003 Wisconsin Act 310, which became effective on May 7, 2004. . . . Under s. 281.34(4) and (5), Wis. Stats., DNR approves the request for an extension of the original approval, for a period of two years. Thus, the original approval is valid until September 4, 2007, subject to the conditions listed in the original approval (attached). R.22, tab 17, pg 1.

Of course, at the time the DNR granted the permit extension, there was nothing to "extend," as the original permit had expired two days earlier.

8. DISMISSAL OF APPEAL ON GROUNDS OF MOOTNESS.

After receiving the permit extension it requested, the Village did an about-face and argued to the Court of Appeals that the permit extension was not an "extension," after all, but instead was a new permit which rendered the Lake District's appeal moot. The Village argued that because the September 4, 2003 permit had expired, all issues relating to that permit were moot, and the appeal should be dismissed. The Court of Appeals agreed. R.22, tab 18. In an order dated June 28, 2006, it held as follows:

> What moots this case, however, concerns the history of the permit itself. The original approval required construction of the well to begin by September 4, 2005. That approval provided that if

> construction "has not commenced within two years the approval shall become void and a new application must be made and approval obtained prior to commencing construction. . . ." No construction had begun by that date, so East Troy sought an extension of the approval. On September 6, 2005, the day after the original permit expired, the DNR approved the request for an extension "under the standards set forth in 2003 Wisconsin Act 310, which became effective on May 7, 2004. . . ."
>
> Simply put, these appeals concern a permit that expired on September 5, 2005, after the circuit court rendered judgment in them. . . . A case is moot when a determination is sought upon some matter which, when rendered, cannot have any practical legal effect upon a then existing controversy. The present controversy in front of this court arises from a permit that became void; the appeals are therefore moot. R.22, tab 18, pgs. 2-3 (citation omitted).

C. THE LAKE DISTRICT'S CIRCUIT COURT CHALLENGE TO THE 2005 PERMIT EXTENSION.

1. THE LAKE DISTRICT'S PETITION AND COMPLAINT FOR JUDICIAL REVIEW.

On March 3, 2006, the Lake District filed a Petition and Complaint for Judicial Review in the Walworth County Circuit Court. R.2. In its Petition, the Lake District alleged as follows:

> 9. The [Lake District] contend[s] that the DNR must consider, in approving or reviewing a high capacity well permit, evidence that the State's public trust obligations to protect navigable waters in Wisconsin will not be infringed by the operation of the subject well.
>
> . . .
>
> 17. The [Lake District] [is] aggrieved by the decision of DNR to grant its approval for Well No. 7 on

> September 6, 2005 because:
>
> . . .
>
> (B) The proposed Village Well No. 7 . . . include[s] a proposal to pump substantial volumes of groundwater from an aquifer hydrologically connected to the surface water of Lake Beulah and its tributaries, thereby adversely affecting the quantity of water available to maintain the level of Lake Beulah, the physical and chemical properties of the water in the area near the location of Well No. 7, and the flora and fauna which currently live in Lake Beulah and its surrounding environs.
>
> . . .
>
> (D) The DNR failed to consider the impacts that the construction and operation of Well No. 7 will likely have on the navigable waters of Lake Beulah and nearby private wells when it reviewed and approved the Village's request for an extension of the 2003 conditional approval.
>
> (E) The negative impacts on the waters of Lake Beulah that are likely to arise from the installation and operation of Well No. 7 will cause substantial and irreparable harm to the interests sought to be protected by the [Lake District]. . . . R.2, pgs. 3, 5.

In connection with the briefing in this case, the trial court entered an order, dated July 28, 2008, defining the "agency record" for purposes of this case:

> The Court further notes that the record relied on by the parties in support of their contentions in 06CV172 can include any information shown by the record to have been known to the DNR before and after the issuance of the 9-3-03 permit and up to the time they issued the 9-6-0[5] permit as long as it is relevant to the claims the parties made in their pleadings in 06CV172. The above is allowed because on judicial review the Court must

> determine if the DNR's decision to issue the 9-6-05 permit was a reasonable exercise of discretion under the relevant facts that the DNR was aware of as well as the applicable law. App.56.

IV. DISPOSITION IN THE TRIAL COURT.

On September 23, 2008, the Walworth County Circuit Court, the Honorable Robert J. Kennedy, presiding, denied the Lake District's Petition, holding that (1) the September 6, 2005 permit extension is a new permit even though its underlying permit had expired before the permit extension was granted and the Village never applied for a new permit, (2) the DNR has a duty, under the Public Trust Doctrine, to determine whether a high capacity well, regardless of its size, will negatively impact the waters of this State before issuing a permit for construction and operation of such a well, but that duty is only triggered if the DNR is presented with "scientific evidence" that such negative impacts may occur, and (3) the Lake District presented no such "scientific evidence" to the DNR in connection with Well No. 7, and the DNR's duty was thus never triggered. R.40.

On September 30, 2008, Judgment was entered in this case, denying the Lake District's Petition. R.35. On December 22, 2008, the Lake District filed a Notice of Appeal, appealing from "the whole of the final Judgment." R.36.

V. DISPOSITION IN THE COURT OF APPEALS.

On June 16, 2010, the Court of Appeals issued a decision affirming in part and reversing in part the trial court's ruling. In a 25-page unanimous, published decision, authored by Chief Judge Richard S. Brown, the Court of Appeals affirmed the trial court's ruling that the DNR has a duty to investigate public trust doctrine concerns in connection with an application for a permit for the construction and operation of a high capacity well, regardless of its size, if the DNR has evidence suggesting that the well will cause adverse affects to the waters of this State. The Court of Appeals reversed the trial court's ruling, however, on the issue of whether the DNR had evidence to trigger its duty.

In its decision, the Court of Appeals first rejected the Village's argument that the DNR is precluded, under sections 281.34 and 281.35, Wis. Stats., from considering public trust doctrine concerns for high capacity wells with a capacity of less than 2,000,000 gpd:

> The public trust doctrine is such an important and integral part of this state's constitution that, before we can accept the Village's argument, there should be some evidence that the legislature intended by these statutes to render nugatory the more general statutes bestowing the DNR with the general duty to manage the public trust doctrine. Outside of what the Village considers to be the plain intent of the statutes, the only evidence of legislative intent is that, *in 2007*, the legislature rejected an advisory committee's

recommendation to amend Wis. Stat. § 281.34 by adding to the list of enumerated circumstances always requiring the DNR to conduct a formal environmental review. The immediate response to the Village's argument is that the legislature's actions after this permit was issued do not affect our analysis of the statutes and legislative history that existed at the time. And we have not found any legislative history suggesting that 2003 Wis. Act 310 was meant to *revoke* the DNR's general authority. But the more measured response is that rejection of the advisory committee's suggestion proves nothing. The action of rejecting the idea of requiring formal environmental review in every instance gives us no guidance as to whether the DNR could investigate a middling well at its discretion. We conclude that there is no evidence that the legislature intended to revoke the general grant of authority to the DNR regarding these other wells.

Moreover, we underscore the legislature's *explicit* command that the DNR's authority be "liberally construed" in favor of protecting, maintaining and improving waters of the state.

We therefore conclude that, just because the legislature was silent about the DNR's role with regard to some of the middling wells, this does not mean that the legislature meant to abrogate the DNR's authority to intercede where the public trust doctrine is affected. We are even more confident in our conclusion when we consider that the DNR must grant a permit for construction of all middling wells. Why would an agency have to grant a permit if it did not have any reviewing authority over a well? The permit process has to be, as a matter of common sense, more than a mechanical, rubber-stamp transaction. It must mean that the DNR has authority to become involved whenever it sees a public trust doctrine problem. In fact, the Village's own well application included its engineer's well pump test data and conclusion that the well "would avoid any serious disruption to the groundwater discharge at Lake Beulah." We question why the Village thought it necessary to provide this data if it did not think the DNR could consider the public trust doctrine.

> We are convinced that we have harmonized the statutes to avoid conflict and ensured that no statute is surplusage. We agree with the conservancies and the DNR and hold that the legislature's mandate that the DNR complete a formal environmental review for only certain wells does not prohibit or rescind the DNR's authority to review other middling wells under Wis. Stat. §§ 281.11 and 281.12. The DNR's mission must be to protect waters of the state from potential threats caused by unsustainable levels of groundwater being withdrawn by a well, whatever type of well that may be.

Op. at ¶¶ 25-28 (emphasis in original) (citations omitted).

The Court of Appeals next considered when the DNR's duty to consider public trust doctrine concerns is triggered, and held that its duty was triggered in this case:

> We have rejected the Village's contention that the DNR has no authority to act in this case. We likewise now reject the conservancies' completely opposite contention that the DNR was *required* to conduct a full and thorough environmental review. . . . We further agree with the DNR that its public trust duty arises only when it has evidence suggesting that waters of the state may be affected by a well. . . .
>
> . . .
>
> We do not have the expertise to say exactly what kind of evidence will prompt the DNR to further investigate a well's adverse environmental impacts or to condition or deny a well permit. There is no standard set by statute or case law. But we do have case law which recognizes that the DNR has particular expertise when it comes to water quality and management issues. The DNR is the central unit of state government in charge of water quality and management matters. We will leave it to the DNR to determine the type and quantum that it deems enough to investigate. But, certainly, "scientific evidence" suggesting an adverse affect to waters of the

> state should be enough to warrant further, independent investigation.

Id. at ¶¶ 29, 31 (emphasis in original) (citations omitted).

Finally, the Court of Appeals held that the DNR had a duty to consider the Nauta affidavit and the other information in its possession on the issue of whether Well No. 7 will negatively impact Lake Beulah before it issued the permit extension to the Village, since all of that information was provided to the same DNR in-house attorney who was provided the Village's application for a permit extension:

> The conservancies presented the Nauta affidavit to the DNR's attorney on August 4, 2005, as part of the litigation on the 2003 permit. That was little more than one month before the DNR issued the 2005 approval. The affidavit directly challenged the Village consultant's conclusion and the DNR's resultant decision that Well #7 would not seriously disrupt groundwater flow to Lake Beulah. However, the DNR argues that since the evidence was presented to its attorney during litigation on a prior permit and was not provided to its decision makers regarding the instant permit, the Nauta affidavit was not part of the "agency record" and therefore did not require its consideration. . . .
>
> As a general rule, however, the knowledge of an attorney acquired while acting within the scope of the client's authority is imputed to the client. . . .
>
> For the purposes of the imputation rule, the DNR attorney's clients were the DNR employees making the permit decisions. The attorney was an "in-house" attorney employed by the state and assigned to handle legal matters for the litigation over the 2003 and 2005 Well #7 permits. At oral argument, the attorney stated that everything in the 2003 application file would also be

> in the 2005 file; she had to have known that the 2003 case was linked to the 2005 permit decision and that any information submitted during litigation over the 2003 permit was relevant to the decision makers' consideration of the 2005 permit application. We thus rule that anything in the DNR's attorney file for the litigation concerning Well #7 is imputed to the DNR employees making the decisions regarding the permit for Well #7. It follows, therefore, that the attorney file is part of the agency record for the 2005 permit approval, regardless of whether the DNR's attorney actually gave the Nauta affidavit to the decision makers, because it concerns the same parties and the same precise contested issue.
>
> And frankly, we are a bit perplexed as to why the DNR attorney did not show the affidavit to the decision makers when she presumably consulted with them after the conservancies filed their motion for reconsideration. The conservancies gave *her* the affidavit a mere day after the Village applied to *her* to extend its permit. And the affidavit directly contradicted the previous evidence before the DNR about Well #7's environmental impacts. . . .

Id. at ¶¶ 35-38 (citations omitted).

Concluding, the Court of Appeals "reverse[d] and remand[ed] to the circuit court with directions to, in turn, remand this case to the DNR so that it may consider the Nauta affidavit and any other information the agency had pertinent to Well #7 before it issued the 2005 approval." *Id.* at ¶ 39.

LEGAL ARGUMENT

I. SECTIONS 281.34 AND 281.35, WIS. STATS., DO NOT REVOKE THE BROAD, GENERAL GRANT OF AUTHORITY GIVEN TO THE DNR BY SECTIONS 281.11 AND 281.12, WIS. STATS.

Sections 281.11 and 281.12(1), Wis. Stats., provide a broad, general grant of authority to the DNR and, in doing so, transfer Public Trust Doctrine obligations from the State to the DNR. These statutes expressly grant the DNR "general supervision and control over the waters of the state," and further authorize and obligate the DNR to "protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private."

Sections 281.34 and 281.35, Wis. Stats., create specific rules for issuing permits for high capacity wells, depending on the size of the well. The Village contends that sections 281.34 and 281.35, Wis. Stats., and sections 281.11 and 281.12, Wis. Stats., are in "direct conflict," *see Village's Brief* at 10, and that sections 281.34 and 281.35, Wis. Stats., tacitly withdraw the general grant of authority to the DNR by sections 281.11 and 281.12, Wis. Stats. The Village is wrong. Sections 281.34 and 281.35, Wis. Stats., and sections 281.11 and 281.12, Wis. Stats., are not in conflict, and can easily be harmonized.

A. SECTIONS 281.11 AND 281.12, WIS. STATS., AND THE PUBLIC TRUST DOCTRINE.

Section 281.12(1), Wis. Stats., provides that the DNR "shall have general supervision and control over the waters of the state." Section 281.11, Wis. Stats., provides that:

> The department ***shall*** serve as the central unit of state government to ***protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private***. . . . The purpose of this subchapter is to ***grant necessary powers*** and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, this subchapter . . . ***shall be liberally construed in favor of the policy objectives set forth in this subchapter***. . . . (emphasis added).

Pursuant to the broad, general grant of authority set forth in sections 281.11 and 281.12(1), Wis. Stats., the DNR has been designated the "'trustee' of the navigational waters of this state." *State ex rel. Dep't of Natural Res. v. Walworth County Bd. of Adjustment*, 170 Wis. 2d 406, 410, 489 N.W.2d 631 (Ct. App. 1992). As trustee of those waters, the DNR is empowered -- and duty-bound -- to protect those waters in accordance with its obligations under the Public Trust Doctrine.

"The public trust doctrine relative to the navigable waters of the state is one of the oldest legal doctrines in the state's case law." *State v.*

Village of Lake Delton, 93 Wis. 2d 78, 89, 286 N.W.2d 622 (Ct. App. 1979). The doctrine, which is constitutionally based, has its roots "in the common law imported from England, under which the King held title to all navigable waters in trust for the people." *Id.* at 90.

Almost 100 years ago this Court described the Public Trust Doctrine as follows:

> [E]ver since the organization of the Northwest territory in 1787 to the time of the adoption of our constitution the right to the free use of the navigable waters of the state has been jealously reserved not only to citizens of the territory and state but to all citizens of the United States alike. . . .
>
> . . .
>
> The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters, cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits. . . .

Diana Shooting Club v. Husting, 156 Wis. 261, 267, 271, 145 N.W. 816 (1914).

This duty to "steadfastly and carefully" preserve the waters of this State is sacrosanct:

> The legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the

> enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose. . . .

Priewe v. Wisconsin State Land & Improvement Co., 103 Wis. 537, 549-50, 79 N.W. 780 (1899). *See also ABKA Ltd. P'ship v. Wisconsin Dep't of Natural Res.*, 2001 WI App 223, ¶ 33, 247 Wis. 2d 793, 635 N.W.2d 168.

"The public trust doctrine . . . is to be broadly and beneficially construed." *R.W. Docks & Slips v. State of Wis.*, 2001 WI 73, ¶ 23, 244 Wis. 2d 497, 628 N.W.2d 781 (citations omitted). As trustee of this State's waters, the DNR must protect and preserve them:

> Title to the navigable waters of the state and to the beds of navigable waters is vested and continues in the state of Wisconsin in trust for the use of the public. This "public trust" duty requires the state not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty. The state's responsibility in the area has long been acknowledged.

Wisconsin's Envtl. Decade, Inc. v. Department of Natural Res., 85 Wis. 2d 518, 526, 271 N.W.2d 69 (1978) (citations omitted). *See also Just v. Marinette County*, 56 Wis. 2d 7, 18, 201 N.W.2d 761 (1972).

B. SECTIONS 281.11 AND 281.12, WIS. STATS., ARE NOT IN CONFLICT WITH SECTIONS 281.34 AND 281.35, WIS. STATS.

Sections 281.34 and 281.35, Wis. Stats., provide a minimum graduated 3-tier environmental review process in connection with

applications for high capacity wells, depending on the capacity of the well. For wells with a capacity of less than 100,000 gpd, no environmental review is required. For wells with a capacity of between of 100,000 gpd and 2,000,000 gpd, an environmental review is required under limited circumstances. For wells with a capacity of greater than 2,000,000 gpd, environmental review is required. These are the ***minimum*** standards to be applied by the DNR; the statutes say nothing about revoking the DNR's discretionary authority under sections 281.11 and 281.12, Wis. Stats., to conduct environmental review above and beyond these minimum standards.

The Village argues that this minimum graduated 3-tier environmental review process provides the DNR's sole and exclusive authority to conduct environmental review in connection with applications for high capacity wells, citing to subsequent legislative actions which refused to make the minimum mandatory standards more rigorous for wells with a capacity of less than 2,000,000 gpd. The Village's reliance on these subsequent legislative actions is misplaced, as subsequent legislative conduct is not properly considered as legislative history. *See Maus v. Bloss*, 265 Wis. 627, 634, 62 N.W.2d 708 (1954) ("[I]t is quite generally held that the legislature cannot by a later act establish or affect the

construction of a former act."); *Ross v. Foote*, 154 Wis. 2d 856, 863, 454 N.W.2d 62 (Ct. App. 1990) ("The use of legislative history is properly limited to materials presented contemporaneously with the creation of the legislation."); *Goodyear Tire & Rubber Co. v. Department of Indus., Labor & Human Relations*, 87 Wis. 2d 56, 76, 273 N.W.2d 786 (Ct. App. 1978) ("Legislative observations years after passage of the Act are not part of its legislative history.").

Sections 281.34 and 281.35, Wis. Stats., are silent on whether those statutes were intended to revoke any other authority the DNR may have regarding high capacity wells, such as the authority expressly granted to it by sections 281.11 and 281.12, Wis. Stats. The law is clear that courts may not infer tacit revocation of express statutory grants of authority without a clear indication by the legislature of its intent to do so, particularly where, as here, the Public Trust Doctrine is such an important and integral part of this State's constitution and case law.

The Village's position that the specific statutes trump the general statutes, even though the specific statutes do not expressly say that, has been expressly rejected in two recent cases in which this Court refused to grant review: *Pritchard v. Madison Metro. Sch. Dist.*, 2001 WI App 62,

242 Wis. 2d 301, 625 N.W.2d 613 and *Wisconsin Builders Ass'n v. State Dep't of Commerce*, 2009 WI App 20, 316 Wis. 2d 301, 762 N.W.2d 845. *Pritchard* dealt with the interplay between section 66.185, Wis. Stats., a specific grant of authority, and sections 118.001, 120.13 and 120.44, Wis. Stats., general grants of authority. Section 66.185, Wis. Stats., provides that school districts may pay for health insurance for its "employees and officers and their spouses and dependent children," as well as their "retired employees." The Court of Appeals noted that "the plain language of this statute grants the authority to the District to provide for the payment of health insurance premiums to only those classes of persons listed there." 2001 WI App 62 at ¶ 10. "However," the court further noted, "the plain language of § 66.185 does not prohibit the District from providing health insurance benefits to other persons, if that authority is granted by other statutes." *Id.*

The court then considered whether sections 118.001, 120.13 and 120.44, Wis. Stats., grant that authority. Section 118.001, Wis. Stats., provides that "[t]he statutory duties and powers of school boards shall be broadly construed to authorize any school board action that is within the comprehensive meaning of the terms of the duties and powers." Section

120.13, Wis. Stats., provides that a school board "may do all things reasonable to promote the cause of education." Section 120.44(1), Wis. Stats., provides that a school district has "the power to . . . do all other things reasonable for the performance of its functions in operating a system of public education."

The plaintiffs in *Pritchard* "contend[ed] that, according to the rule of statutory construction '*expressio unius est exclusio alterius*,' these statutory provisions do not give authority for the District to provide health insurance benefits to classes of persons not specified in Wis. Stat. § 66.185." 2001 WI App 62 at ¶ 12. "Accordingly, the plaintiffs argue[d], the listing of specific classes of persons in § 66.185 is an indication of legislative intent that the District may not provide health insurance benefits to other classes of persons. . . ." *Id.*

The Court of Appeals rejected that argument, holding:

> We do not find the rule of "*expressio unius est exclusio alterius*" applicable in this context. When we consider statutes that, though related, were not enacted at the same time such that we can say they were intended as a comprehensive scheme, the fact that the older statute specifically lists certain powers does not necessarily mean the legislature intended that a broadly worded, later enacted statute be thus limited. Rather, before we apply the rule, we must have some evidence the legislature intended its application. We see no such evidence here. . . .

. . .

> We also do not agree with the plaintiffs that Wis. Stat. § 66.185 limits the statutes giving broad powers to school districts because it is the more specific statute. The rule of statutory construction that a more specific statute controls when there is a conflict with a more general statute applies only when there is truly a conflict. Conflicts between statutes are not favored, and courts are to harmonize statutes to avoid conflicts when a reasonable construction of the statutes permits that. We conclude there is no conflict between § 66.185 on the one hand, and Wis. Stat. §§ 118.001, 120.13 and 120.44 on the other hand. The former grants authority to all municipalities, including school districts, to provide health insurance benefits to specified classes or persons, but does not prohibit municipalities from providing those benefits to other classes of persons. The latter statutes grant authority to school districts and school boards that is broad enough to include the authority to provide those benefits to other classes of persons. The fact that there is some overlap does not mean there is a conflict.

Id. at ¶¶ 13, 15 (citations omitted).

Wisconsin Builders dealt with the interplay of section Comm 62.0903(6), Wis. Admin. Code, and section 101.14(4m)(b), Wis. Stats. Section 101.14(4m)(b), Wis. Stats., requires automatic fire sprinkler systems in multifamily dwellings which contain more than 20 dwelling units. Section Comm 62.0903(6), Wis. Admin. Code, requires automatic fire sprinkler systems in multifamily dwellings which contain more than eight dwelling units. The plaintiff argued that these provisions are in direct conflict, and that the Department of Commerce had no authority to enact an

administrative code provision which requires a stricter standard than the statutory standard. The Department of Commerce, on the other hand, argued that the statute and administrative code provision are not in conflict, because the statute does not expressly prohibit the Department from requiring sprinkler systems in smaller multifamily dwellings.

The Court of Appeals ruled in favor of the Department, holding:

> An administrative agency has only those powers given to it by statute and an agency may not promulgate a rule that conflicts with a statute. If a rule is not authorized by statute it must be invalidated. . . .
>
> . . .
>
> We begin by noting that the Department has the general authority to enforce and administer all laws and lawful orders that require public buildings to be safe and that require "the protection of the life, health, safety and welfare of . . . the public or tenants in any such public building." Wis. Stat. § 101.02(15). "Public building" includes multifamily dwellings with three or more tenants. *See* Wis. Stat. § 101.01(12). More specifically, with respect to fire protective devices, Wis. Stat. § 101.14(4)(a) provides that the Department "shall make rules, pursuant to ch. 227, requiring owners of . . . public buildings to install such fire detection, prevention, or suppression devices as will protect the health, welfare, and safety of all . . . frequenters of . . . public buildings." Thus, in the absence of § 101.14(4m)(b), the Department plainly has the authority to promulgate Wis. Admin. Code § Comm 62.0903(6). . . .
>
> Wisconsin Builders' position is that Wis. Stat. § 101.14(4m)(b) removes not only the Department's discretion on whether or not to require sprinkler systems

> in multifamily dwellings that have more than twenty dwelling units or exceed the specified floor areas, but also removes the Department's authority to require sprinkler systems in smaller multifamily dwellings. Turning to an examination of the statutory language, we agree with Wisconsin Builders that the use of the word "shall" in § 101.14(4m)(b) means that the Department *must* require sprinkler systems in every multifamily dwelling that has more than twenty dwelling units or exceeds the specified floor areas. However, this paragraph is silent on whether the Department may require sprinkler systems in multifamily dwellings with fewer dwelling units or smaller floor areas. Had the legislature intended to remove the authority the Department has under other statutory provisions to require fire protection devices in multifamily dwellings with fewer dwelling units or smaller floor areas, we would expect that the legislature would have expressly stated that. As it is, we see no basis in the language of § 101.14(4m)(b) for limiting the Department's general authority to promulgate rules that require fire protective devices in multifamily dwellings that have fewer dwelling units or smaller floor areas than those prescribed in the statute. We conclude that § 101.14(4m)(b) limits the authority the Department has under Wis. Stat. §§ 101.02(15) and 101.14(4)(a) only insofar as it mandates the Department to require sprinkler systems in multifamily dwellings that exceed twenty units or the specified floor area.

2009 WI App 20 at ¶¶ 8, 10, 11 (emphasis in original).

These cases are directly on point. Nothing in sections 281.34 or 281.35, Wis. Stats., indicates that the legislature intended to revoke the broad, general grant of authority given to the DNR in sections 281.11 and 281.12, Wis. Stats., to protect the waters of the state, ground and surface, public and private, in connection with applications for high capacity wells. And to read a tacit revocation into those statutes would lead to absurd

results.

If the Village's statutory interpretation argument was accepted in this case, the DNR would be without authority to deny an application for a high capacity well with the capacity of less than 2,000,000 gpd ***even if it was an undisputed fact that the well will completely destroy one of this State's lakes***. It is, of course, a black-letter rule of statutory construction that courts "must reject an unreasonable or absurd interpretation of a statute." *State v. West*, 181 Wis. 2d 792, 796, 512 N.W.2d 207 (Ct. App. 1993) (citation omitted). *See also State v. Kleser*, 2009 WI App 43, ¶ 21, 316 Wis. 2d 825, 768 N.W.2d 230.

While the Village does not deny the absurd result of its argument, it contends that there are various after-the-fact remedies available to the DNR, the Lake District and private citizens should a high capacity well damage a lake.[6] But the goal of the Public Trust Doctrine is not to provide remedies after damage has already occurred, it is to prevent the damage from occurring in the first instance. As this Court so aptly

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[6] The Village's position that the DNR must issue a permit for a high capacity well with a capacity of less than 2,000,000 gpd, even if it is undisputed that it will damage a Wisconsin lake, but can then file a section 30.03(4)(a), Wis. Stats., enforcement proceeding or a nuisance action the very next day against the applicant to stop the damage from continuing, is absurd on its face.

noted:

> Our navigable waters are a precious natural heritage; once gone, they disappear forever.

Hilton ex rel. Pages Homeowners' Ass'n v. Department of Natural Res., 2006 WI 84, ¶ 28 n.14, 293 Wis. 2d 1, 20 n.14, 717 N.W.2d 166 (citation omitted).

The Court of Appeals correctly held that the DNR has the authority to analyze whether a high capacity well, regardless of its size, will negatively impact this State's lakes before issuing a permit for the construction and operation of such a well, pursuant to the authority and obligations delegated to it by sections 281.11 and 281.12, Wis. Stats., and its decision in that regard should be affirmed.

II. THE DNR HAD SUFFICIENT INFORMATION IN ITS POSSESSION TO TRIGGER ITS DUTY, REGARDLESS OF THE STANDARD, TO ANALYZE WHETHER WELL NO. 7 WILL NEGATIVELY IMPACT LAKE BEULAH BEFORE ISSUING THE PERMIT EXTENSION TO THE VILLAGE.

On August 3, 2005, the Village sent a letter to Judith M. Ohm, an in-house attorney with the DNR, "requesting a modification of the existing permit to extend the date for two years." R.22, tab 16, pg. 1; App.1.

The very next day, August 4, 2005, the Lake District served

Ms. Ohm with Nauta's affidavit which contained, as attachments, the letter from SWRPC and the e-mail from the U.S. Geological Society. R.19, tab 1; App.3-27. Nauta's affidavit stated that "[i]t is my opinion that the existing data can only support the conclusion that pumping of proposed Well No. 7 would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah." R.19, tab 1, ¶ 31; App.10. SWRPC's letter stated that "[t]he well construction being considered . . . will have the effect of reducing the groundwater flow to the Lake," which will result in the "potential for negative impacts on the wetland and the Lake itself." R.19, tab 1, exh. 2; App.26. The U.S. Geological Society's e-mail stated that "[t]here is no question that pumping from the test well has an effect on Lake Beulah," and "[t]he predictive analysis conducted by Layne . . . is suspect. . . ." R.19, tab 1, exh. 2; App.23.

The DNR completely ignored these affidavits, letters and e-mails and, on September 4, 2005, issued the Village a permit extension for the construction and operation of Well No. 7. R.22, tab 17. The DNR has never explained why it ignored these affidavits, letters and e-mails, but has subsequently stated that they are "not 'scientific evidence' but . . .

merely one person's professional opinion,"[7] whatever that means.

Regardless of whether the standard for conducting an environmental review in connection with an application for a high capacity well is triggered by every application, as the Lake District contends, or only when the DNR has scientific evidence of potential harm to navigable waters in its possession, as the Court of Appeals held, the standard has clearly been met in this case. The DNR had information from four different credible sources, all concluding that Well No. 7 will negatively impact Lake Beulah, at the time it issued the permit extension to the Village.

The Village makes two arguments in this regard. ***First***, it argues that the Court of Appeals failed to establish a black-and-white standard for when an environmental review is required. ***Second***, it (as well as the DNR) argues that the Nauta affidavit, the SWRPC letter and the U.S. Geological Society e-mail are not part of the "agency record" in this case and were thus properly ignored by the DNR. The Village and the DNR are wrong on both counts.

The standard established by the Court of Appeals for when the DNR is obligated to conduct an environmental review in connection

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[7] *See DNR's Brief in Court of Appeals*, dated May 18, 2009, at pg. 28.

with an application for a high capacity is a clearly defined standard:

> - The DNR's "public trust duty arises only when it has evidence suggesting that waters of the state may be affected by a well." *Op.* at ¶ 29.
>
> - "We will leave it to the DNR to determine the type and quantum that it deems enough to investigate. But, certainly, 'scientific evidence' suggesting an adverse affect to the waters of the state should be enough to warrant further, independent investigation." *Id.* at ¶ 31.

This standard merely rephrases the standard set forth in section 281.11, Wis. Stats., which requires the DNR to "protect . . . the waters of the state, ground and surface, public and private." If the DNR has information to suggest that a high capacity well will affect or impair the waters of this State, it has a duty to investigate and, if the evidence supports the suggestion, it must deny the application. Any other standard would result in one of this State's greatest resources being in jeopardy.

As to the second issue, if the Village's request for a permit extension is part of the "agency record," then surely so too is the Nauta affidavit and attached letter and e-mail -- the Village cannot have it both ways. Both were provided to the same employee of the DNR. Both were provided on back-to-back days. Both deal with the same issue. And the trial court specifically ruled, pursuant to section 227.55, Wis. Stats., that the "agency record" in this case consists of "any information shown by the

record to have been known to the DNR before and after the issuance of the 9-3-03 permit and up to the time they issued the 9-6-0[5] permit," and neither the Village nor the DNR cross-appealed that ruling (although the Village did cross-appeal the trial court's ruling that the Lake District's Petition was timely). App.56.

CONCLUSION

The Court of Appeals' decision should be affirmed in all respects, as it is fully supported by both the law and common sense. If the Village truly believed that Well No. 7 will not negatively impact Lake Beulah, it surely would not have litigated this case for the past seven years, at a cost of hundreds of thousands of dollars, and would instead have simply consented to a hearing on that issue. The Village's actions speak volumes, and demonstrate precisely why the DNR must have the authority, and the duty, to exercise its Public Trust Doctrine obligations in this case.

Dated this 27th day of December, 2009.

O'NEIL, CANNON, HOLLMAN, DEJONG & LAING S.C.
Attorneys for Lake Beulah Management District

By: _____
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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8)(b), (c)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and supplemental appendix produced with a proportional serif font. The length of this brief is 10,957 words.

Dated this 27th day of December, 2010.

Dean P. Laing
State Bar No. 1000032

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the supplemental appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of December, 2010.

Dean P. Laing
State Bar No. 1000032

TABLE OF CONTENTS - SUPPLEMENTAL APPENDIX

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(3)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with s. 809.19(3)(b) and that contains, at a minimum: (1) a table of contents; (2) a copy of any unpublished opinion cited under s. 809.23(a) or (b); and (3) portions of the record essential to an understanding of the issues raised.

I further hereby certify that if the record is required by law to be confidential, the portions of the record included in the supplemental appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 27th day of December, 2010.

_____

Dean P. Laing
State Bar No. 1000032

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that I have submitted an electronic copy of this supplemental appendix, which complies with the requirements of s. 809.19(13). I further certify that this electronic supplemental appendix is identical in content to the printed form of the supplemental appendix filed as of this date. A copy of this certificate has been served with the paper copies of this supplemental appendix filed with the court and served on all opposing parties.

Dated this 27th day of December, 2010.

_____

Dean P. Laing
State Bar No. 1000032

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August 3, 2005

Judy M. Ohm
Attorney
WI Department of Natural Resources
P.O. Box 7921
Madison, WI 53707-7921

RE: East Troy High Capacity Well Permit

Dear Judy,

As you know the high capacity well approval issued to the Village of East Troy for Well #7 required that construction commence by September 4, 2005. As you also know, the Village has been precluded from commencing construction of that well due to circumstances beyond its control; notably litigation over the DNR approval and the annexation of the well location into the Village. Although the Administrative Law Judge and the Circuit Court have upheld the DNR approval and the Circuit Court has rejected the annexation challenge, the appeals have not yet run their course.

As a result, the Village is hereby requesting a modification of the existing permit to extend the date for two years to allow the appeals to be completed.

We acknowledge that since the original approval, the groundwater law has been renumbered and additional criteria have been added for high capacity wells in certain locations. Specifically, Wis. Stat. §§ 281.34(4) and (5)(b)-(e) require an environmental review and additional standards for wells in a groundwater protection area, wells that create a water loss of more than 95 percent, wells that impact springs, or wells that exceed 2,000,000 gallons per day. None of those conditions are present here. As a result, the same standard that applied in the original review is still applicable to this well. That standard is now found in § 281.34(5)(a) and is limited to effects on public water supply wells. No additional public water supply wells have been installed that would be effected by Well #7. Since neither the relevant law nor facts have changed since our last application, we do not believe any additional analysis is required to allow the extension of the well approval.

I should also note that the new law specifically grants to the Department the authority to **modify** a prior approval granted under Wis. Stat. § 281.17(1) (2001) if the well cannot be installed in conformance with the original conditions. See, Wis. Stat. § 281.34(7). Here, the original date of construction cannot be met, and a modification is both necessary and appropriate. It should not be necessary to request a new approval.

We would appreciate an expeditious review and approval of this request. The Department made it clear to the Village the importance it places on adequate water supply through its notice of violation this past February. The Village places equal importance on moving forward and needs this extension to be able to meet those requirements in a timely fashion.

We look forward to hearing from you.

Very truly yours,

ANDERSON & KENT, S.C.

Paul G. Kent

PGK/mai
cc: William Loesch
Judy Weter

STATE OF WISCONSIN: CIRCUIT COURT: WALWORTH COUNTY

Lake Beulah Management District,
Petitioner,
and

Lake Beulah Protective and
Improvement Association,
Petitioner/Intervener,
vs.

State of Wisconsin Department of
Natural Resources,
and
Village of East Troy,
Respondents.

Case No. 04-CV-683
Case No. 04-CV-687

AFFIDAVIT OF ROBERT J. NAUTA

I, Robert J. Nauta, do hereby attest that:

1. I am a licensed professional geologist in the State of Wisconsin, (Lic. No. G-035), currently employed by RSV Engineering, Inc.

2. I have more than 18 years experience performing and interpreting hydrogeological studies.

3. I have been retained by the Lake Beulah Management District ("LBMD") to provide hydrogeological consulting services related to assessing the probable impacts the proposed Village of East Troy high capacity Well No.7 will have on the environment.

4. I have reviewed the following technical reports relating to the application of the Village of East Troy (the "Village") for a high capacity well permit for proposed Well No. 7 (the "Well" or "Well No. 7").

EXHIBIT
A

a. *Report on the Task 1.0 Geologic Reconnaissance Study to Identify Potential Municipal Well Sites for the Village of East Troy, Wisconsin*, by Layne-GeoSciences, dated March 2001.

b. *Pumping Test Analysis, Safe-Yield Projections and Recommended Well Design for Village Well No. 7, East Troy, Wisconsin*, by Layne-Northwest, dated April 2003.

c. *Lake Beulah Sensitive Area Assessment*, by the Southeast District Water Resources staff of the Wisconsin Department of Natural Resources, dated May 1994.

5. In addition to my review of the documents identified in paragraph 4 above, I have installed test wells and conducting groundwater and surface water studies relating to the hydrology of Lake Beulah, Wisconsin (the "Lake").

6. I make this declaration in support of the LBMD's Motion For Reconsideration and Relief From Judgment based on my personal knowledge and the specific references cited.

7. The short time period allowed by the court to file technical documentation of adverse environmental impacts from the proposed well was insufficient due to the complex nature of the technical hydrogeological issues involved in this project. Typically, proper groundwater studies require months of planning and years of data collection over seasonal weather changes, followed by weeks of computer modeling, before factual conclusions can be confidently drawn.

8. The Layne-GeoSciences screening study identified two locations where the shallow sand and gravel aquifer showed potential for providing adequate water to

satisfy the Village's needs. The two locations were: An area south of the East Troy municipal airport (the "Airport Site") and the area where the test well was installed by Layne-Northwest to the south of Lake Beulah (the "Proposed Well Site").

9. The Airport site was rejected by the Village due to a potential for the shallow sand and gravel aquifer to be contaminated by a nearby landfill.

10. The Proposed Well Site south of Lake Beulah was recommended and chosen by the Village as their primary study site. The test well that Layne-Northwest installed at the Proposed Well Site by is within 1,200 feet of a shoreland wetland adjacent to the south shore of Lake Beulah (the "Sensitive Wetland").

11. The Sensitive Wetland identified in paragraph 10 above has been classified by the Wisconsin Department of Natural Resources as "Sensitive Area #8" in a published Water Resources publication dated May 1994 (See document excerpt Exhibit "1").

12. The Village has distributed at least two publications informing the public that the proposed Well No. 7 would protect the Lake from any negative impacts based on the existence of "over 50 feet of clay and 150 feet of fine silty sand" that would serve to limit the migration of water between the upper and the lower portions of the aquifer.

13. Data from borings performed by Layne-Northwest do not indicate the presence of such a clay layer or a continuous confining layer of fine silty sand. Consequently, it is my professional opinion that there is only one aquifer in the sand and gravel penetrated by the test well, that there is only one water table in the aquifer and

that any silty sand or clay in the aquifer would not limit the migration of groundwater between the upper and lower portions of the aquifer.

14. Assuming the Village's position of the existence of a clay layer separating the upper aquifer from the lower aquifer were present and also assuming said clay layer were continuous from the Lake to the Well No. 7 site, the Lake bed would likely lie below the clay layer, resulting in any draw down of the aquifer by the pumping at Well No. 7 being directly connected to and influencing water levels in the Lake.

15. I began working with the Lake Beulah Management District ("LBMD") in the summer of 2003 to collect hydrogeologic and hydrologic data to study the Lake Beulah watershed. In 2003, RSV began recording stream flow data from immediately below the dam, which controls the lake level.

16. In the summer of 2004, RSV installed a series of ten wells at five locations around the lake, and measured water levels in these wells twice per week during warm weather months. The data collected are being used to estimate the water budget for the Lake, which includes a record of inflow to and outflow from the Lake.

17. From my work at RSV I have concluded that groundwater appears to be the primary source of water for the Lake. Lesser amounts of water are contributed to the Lake from precipitation and surface flow.

18. The LBMD study has shown that the Lake is a "flow-through" lake, meaning that groundwater enters the Lake at one end (the south end), and the Lake water discharges to the groundwater system at the other end (north end) (see Figure 1).

19. The LBMD is also providing funding for the completion of a three-dimensional groundwater flow model, to be used to assist in the water budget calculations, and to simulate the impacts of stresses to the aquifer (e.g., pumping). This model is estimated for completion in the fall of 2005.

20. Layne-Northwest performed an aquifer test at the approximate site of proposed Well No. 7 in February 2003. The test well was test pumped at a rate of 400 gpm, which is less than one-half the requested Well No. 7 permit capacity of 1,000 gpm, for a period of only 72 hours. Several wells were monitored for changes in the groundwater elevation in the area surrounding the test well during the pump test. One of those wells was a shallow well point installed in the Sensitive Wetland on the south shore of Lake Beulah and mentioned in paragraph 10 above. Additionally, two shallow wells were also monitored.

21. The documentation presented in the Layne-Northwest April 2003 report identified in paragraph 4 above confirmed that the groundwater level beneath the referenced wetland was lowered nearly 0.2 foot during the relatively short duration of the test pump period. In addition, the same documentation disclosed that the aquifer had not yet reached steady state before the test pump was terminated, indicating that, water levels were still dropping when the pump was turned off.

22. The documentation presented in the Layne-Northwest April 2003 report proving a loss of nearly 0.2 foot of water in the wetland along the shore of Lake Beulah, along with substantial lowering of groundwater levels in the shallow monitoring wells during the test, proves that the Village's claims that the upper and lower

water depths were confined from each other to prevent migration of water between them, are false.

23. Based on the results of the Layne-Northwest pumping test and the proposed pumping rate for Well No. 7, I believe that the actual drawdown of shallow groundwater in the wetland area will be greater than 0.2 foot, if the well is constructed and put into operation.

24. The documentation presented in the Layne-Northwest April 2003 report proves the proposed high capacity Well No. 7 will intercept groundwater that would otherwise flow northward and discharge into the lake, a condition which potentially could result in reversing the groundwater flow direction beneath the south end of Lake Beulah. If groundwater flow were reversed, surface water in the Lake would flow out of the Lake and toward the pumping well to the south.

25. As part of RSV's groundwater monitoring around the Lake, I have observed an upward groundwater flow gradient present around the southern perimeter of the Lake, except during the 72-hour pump test. An upward groundwater flow gradient means that groundwater flows into the Lake from the aquifer in this area. Based on the magnitude of the observed gradient and the results of the pumping test completed by Layne-Northwest, I believe that a significant reduction or reversal of this gradient could be caused by the proposed Well No. 7, resulting in the reduction or elimination of groundwater flow into this portion of the Lake.

26. The land area surrounding the site of the proposed Well No. 7 is proposed as a planned residential development. Such a change in land use will add roofs, paved roadways and paved driveways that will intercept and direct precipitation in a

very different pattern to that which exists today, thus reducing the amount of storm water that now recharges to groundwater and eliminates that flow to Lake Beulah.

27. The planned development will reduce groundwater recharge in the area, thereby further reducing the water available for discharge to the wetland and Lake Beulah.

28. Groundwater removed from proposed Well No. 7 will be used by the Village and discharged by means of sanitary sewer to a watershed other than that of Lake Beulah. Consequently, the water removed by Well No. 7 will be permanently taken from the Lake Beulah watershed, thereby reducing the water available for discharge to the Sensitive Wetland and to Lake Beulah.

29. It is my opinion that the aquifer test performed by Layne-Northwest was inadequately designed and improperly conducted for the purposes of evaluating environmental impacts and therefore did not properly evaluate the potential impacts to sensitive environmental features and navigable surface water. Nevertheless, the brief aquifer test performed did confirm a lowering of groundwater levels in and adjacent to the Sensitive Wetland and Lake Beulah. Such results clearly demonstrate potential for adverse impacts to Lake Beulah and to an environment already classified by the WDNR as a sensitive environmental feature. Moreover, the aquifer test results clearly demonstrate interruption or disruption of groundwater supply to Lake Beulah and a diversion of surface water from Lake Beulah, which are likely to cause adverse effects to the Lake and wildlife dependent upon the Lake.

30. I shared the concerns state in the paragraphs above with hydrogeology experts at the United States Geological Survey ("USGS") and the Southeastern Wisconsin Regional Planning Commission ("SEWRPC"). Both the USGS and SEWRPC experts concurred with our conclusions in written statements (Exhibit "2").

31. It is my opinion that the existing data can only support the conclusion that pumping of proposed Well No. 7 would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah.

32. It is my opinion there is no "protective layer" hydraulically separating the deeper groundwater the Village proposes to pump from the shallow groundwater that feeds Lake Beulah and the Sensitive Wetland.

33. It is my opinion that the scientific data from the tests conducted do not support the Village's claim that proposed Well No. 7 will not cause adverse environmental impacts or adverse effects to the navigable waters of Lake Beulah.

34. If the court had provided adequate time for the LBMD to present technical documentation, the following work would have been completed:

a. A detailed summary and analysis of the aquifer test data, providing documentation of the uncertainties of the report is conclusions.

b. A discussion of the testing necessary (and deficient in the Layne-Northwest study) to adequately evaluate the potential impacts on environmental features, including reduction in groundwater discharge to wetlands and Lake Beulah and effects on lakebed temperature and chemistry caused by a reduced influx of groundwater.

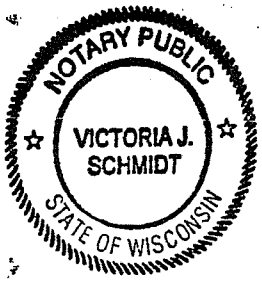
c. Computer simulation showing the potential extent of impacts when pumping continues beyond the 72 hours that the well was tested, as would be the case if proposed municipal Well No. 7 is placed in operation. This computer simulation would have combined data obtained by Layne-Northwest with data collected by the LBMD, which has shown the sensitivity of Lake Beulah to changes in its hydrology.

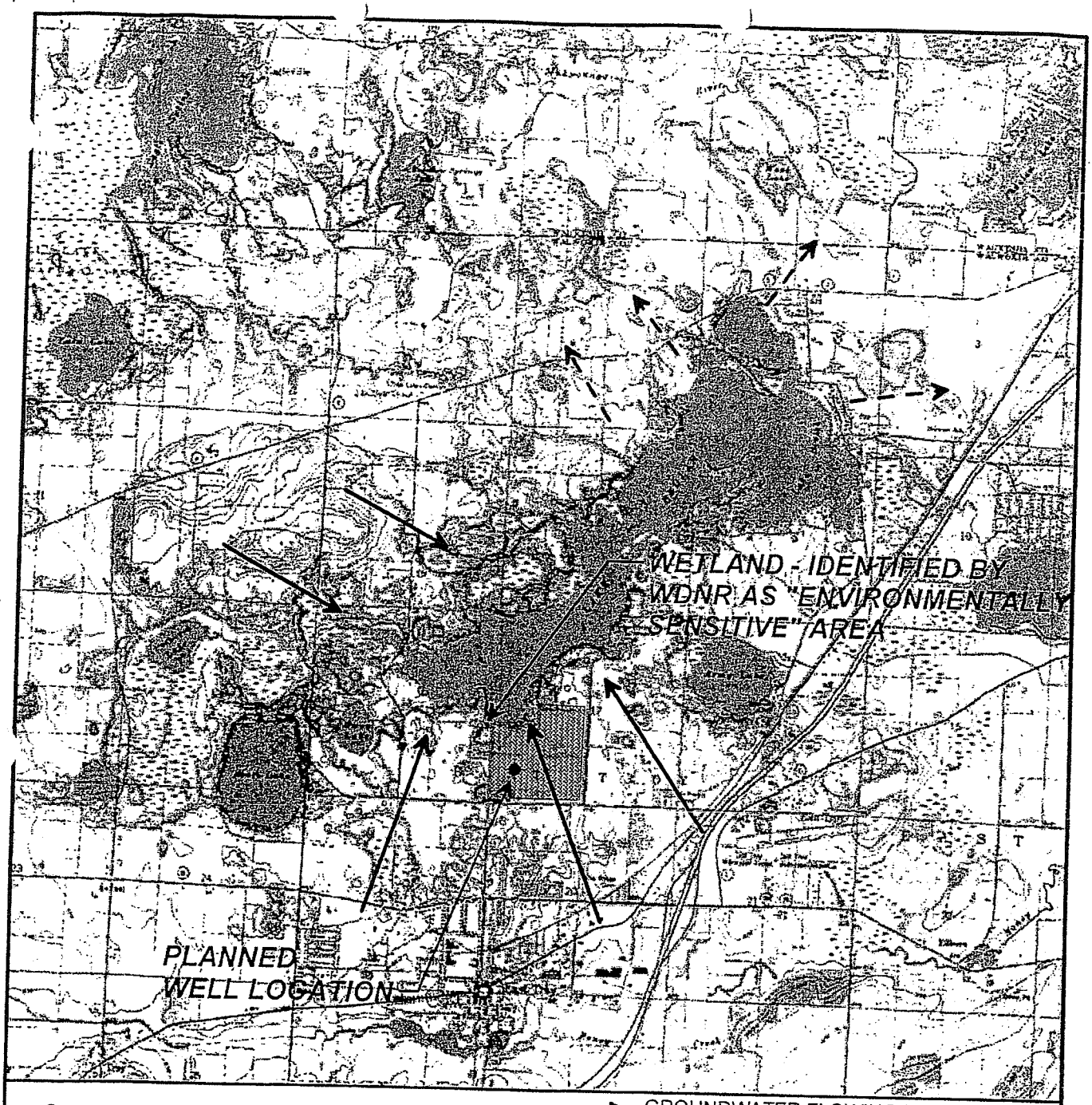
Dated this 4th day of August 2005.

Robert J. Nauta

Subscribed and Sworn to me
this 4th day of August 2005.

Notary Public
My commission expires: 1-11-2008





BASE MAP SOURCE: USGS 7.5 MINUTE TOPOGRAPHIC QUADRANGLES, MUKWONAGO, WISCONSIN (1960, REV. 1994) AND EAST TROY, WISCONSIN, (1960, REV. 1994).

RSV ENGINEERING, INC.
Engineers • Land Surveyors • Environmental Scientists
112 S. MAIN STREET JEFFERSON, WISCONSIN 53549 (920)674-3411

LAKE BEULAH MANAGEMENT DISTRICT
LAKE BEULAH, WISCONSIN
LAKE MAP

FIGURE 1

DRAWN BY	PROJ. No.	DATE	FILE NAME
RN	02-368	18 JUL 05	BEULAH MAP

Lake Beulah
Sensitive Area Assessment

Final Report
May 1994

Prepared By
Kathi Dionne
Water Resources Specialist
Dan Helsel
Water Resources Management Specialist
Southeast District
Wisconsin Department of Natural Resources

EXHIBIT
1

Provided by:
Lake Beulah Protective
and Improvement Association

Lynn Carlson

LAKE BEULAH SENSITIVE AREA STUDY

DNR WATER RESOURCES
MAY, 1994

INTRODUCTION

Lake Beulah is a valuable resource of the state of Wisconsin held in trust for the general public. The lake provides recreation, aesthetic enjoyment, opportunities for fishing and wildlife observation, boating and swimming. Lake Beulah has offered enjoyable conditions such as good water quality, abundant fisheries of good sized game fish and areas of aesthetic beauty.

The aquatic plants in this lake are a diverse community which has served the lake well, keeping nutrients and sediments to a minimum and providing valuable food and habitat for many desirable animals such as game fish and waterfowl.

In July of 1993, Department of Natural Resources staff visited Lake Beulah for the purpose of identifying areas which are sensitive and therefor in need of extra protection. Areas are considered sensitive if they fall under the following definition:

> "... areas of aquatic vegetation identified by the department as offering critical or unique fish and wildlife habitat, including seasonal or lifestage requirements, or offering water quality or erosion control benefits to the body of water." (NR 107, 1989)

These might include:

- Diverse stands of high quality native aquatic plants which help provide a buffer against invasion of Eurasian water milfoil, a very aggressive non native aquatic plant which is increasingly becoming a nuisance in Wisconsin's lakes.
- Areas of vegetation which trap sediments and nutrients flowing into the lake thereby improving water clarity and reducing available nutrients for undesirable plant growth.
- Areas of vegetation which offer spawning nesting or feeding habitat for fish or wildlife.
- Areas of vegetation whose species composition or hydrology make it an ecologically unique community.

Lake Beulah is an 834 acre drainage lake, with a maximum depth of 58 feet and an average depth of 17 feet. The water clarity at Lake Beulah typically ranges between 6 and 11 feet during the summer. There are eight areas in Lake Beulah identified as sensitive. Each of these areas possesses characteristics which are beneficial to the lake as a whole. Their protection will help to preserve the quality of the water in Lake Beulah. A brief description of the eight identified sensitive areas follows:

- Sensitive Area 1 is located along the eastern shore of Jesuit island in the northeastern part of the lake.
- Sensitive area 2 is a small cove located across from Jesuit island.
- Sensitive area 3 is located around a small island along the northeastern shore of the lake.
- Sensitive area 4 is located along the southern shore of the lake in the area also know as Mueller's Cove.
- Sensitive area 5 is in the south shore cove area, located on the southern shore of the eastern end of the lake.
- Sensitive area 6 is located in the narrows between the two basins of the lake.
- Sensitive area 7 is located in the bay near the inlet form Pickerel Lake in the southwestern part of the lake.
- Sensitive area 8 is located just southeast of the East Troy boat launch on the southwestern shore of the lake.

In general, these areas support a diverse community of native aquatic plants with limited areas of Eurasian water milfoil. They offer spawning and nursery areas for several fish species, nesting habitat for animals, act as a sediment and nutrient trap, as well as helping protect the shoreline from erosion.

Sensitive areas are determined by assessment of a team of scientists from the Wisconsin Department of Natural Resources, including fisheries, wildlife, water resources and water regulation and zoning staff. Each team member has expertise in areas relating to water quality and fish or wildlife biology and the ecological value of the area being assessed. The members of the team which investigated this area are:

Doug Welch (Fish Management)
Dan Helsel (Water Resources)
Mark Anderson (Wildlife Management)
Liesa Nesta (Water Regulation and Zoning)

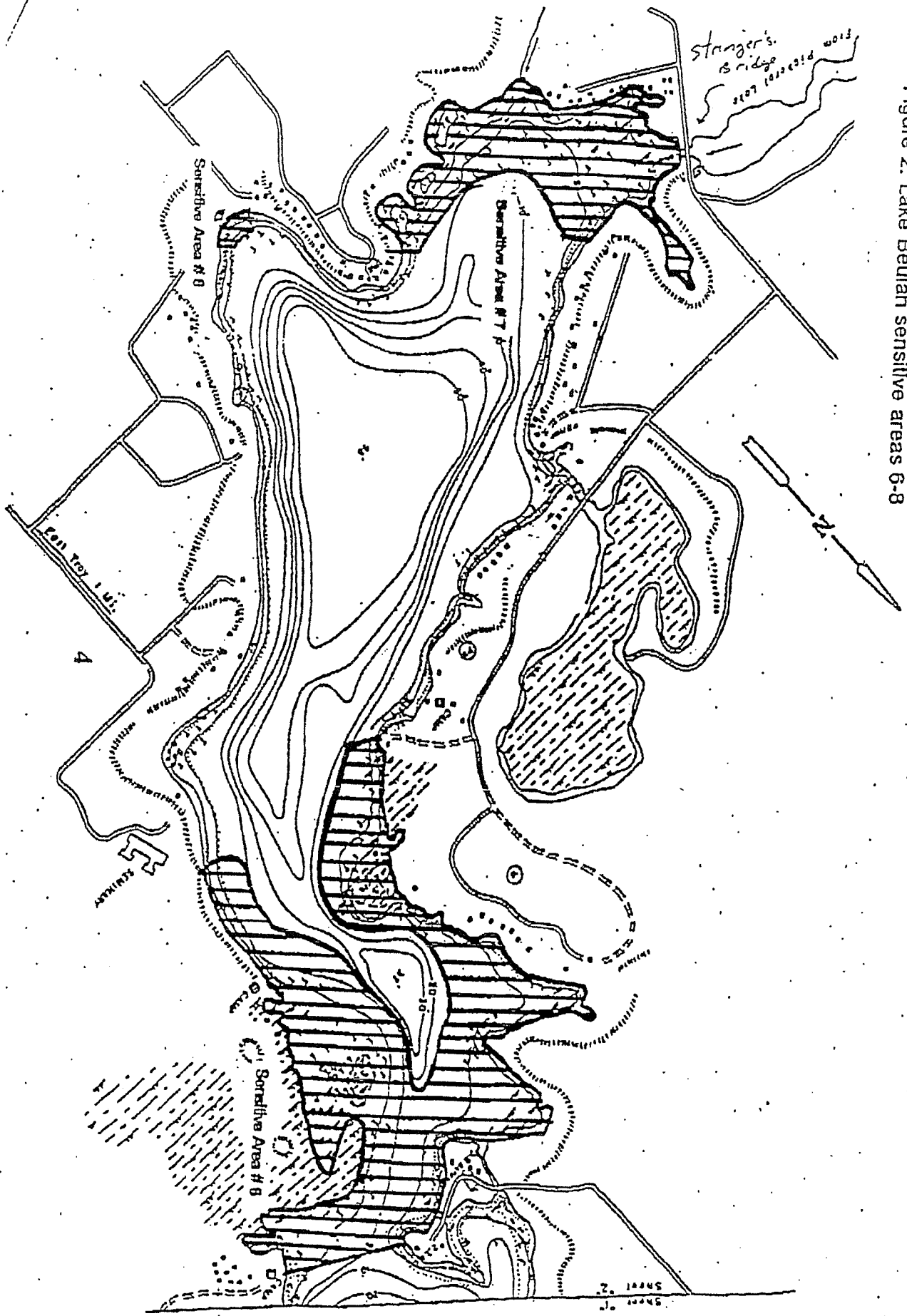


Figure 2. Lake Beulah sensitive areas 6-8

SENSITIVE AREA SITE DESCRIPTION

Sensitive area #8 is located just southeast of the East Troy boat launch on the southwestern shore of Lake Beulah. (Figure 2 and 3)

RESOURCE ASSETS OF SENSITIVE AREA #8

Sensitive area #8 supports an diverse reservoir of native aquatic plants, both submergent and emergent, and only limited areas of Eurasian water milfoil (*Myriophyllum spicatum*). (Table 1) The emergent and floating leaved community includes swamp loosestrife (*Decodon verticillatus*), bulrushes (*Scirpus sp.*), white water lily (*Nymphaea tuberosa*) and yellow water lily (*Nuphar variegatum*). The submergent community includes native water milfoil, (*Myriophyllum heterophyllum*), and a variety of pondweed species (*Potamogeton spp.*).

Fish utilize this community in a variety of ways. The diverse community of emergent and submerged aquatic plants provide excellent spawning habitat for northern pike, and very good spawning habitat for largemouth bass and bluegills. The less heavily vegetated areas provide spawning areas for crappie and walleye. The vegetated areas also provide high quality nursery areas for northern pike, largemouth bass, walleye, crappie and bluegill. All these species will also find ideal feeding habitat in these areas.

Wildlife also depends on the resources provided by sensitive area #8. This area offers high quality habitat for a variety of wetland species. Ducks such as mallards and wood ducks will nest, feed, and rear their young here. Wading birds such as the great blue heron, smaller herons and bitterns feed here, and stop here during migration. Shorebirds such as sandpipers will be found feeding here, and songbirds will find nesting habitat, and will feed and rear their young in the trees and shrubs along the wetlands. Muskrats, opossum and raccoons can be found here year round, feeding, nesting and raising their young.

The plant community in sensitive area #8 acts as a sediment and nutrient trap, as well as protecting the shoreline from erosion. It also stabilizes the bottom sediments. These functions benefit the entire lake in that they reduce nutrients available in the water to support the growth of nuisance aquatic plants, and improve the clarity of the water. (Table 2)

Sensitive area #8 is ecologically important to the lake for several reasons. The excellent native species reservoir will act as a buffer against invasion by exotic plant species, as well as a refuge where native species have established and can continue to spread. The emergent, floating leaved and submergent plant community and the

spawning grounds th... provide for fish are unique to the lake. (Table 2)

MANAGEMENT RECOMMENDATIONS FOR SENSITIVE AREA #8 (Table 4)

In-lake activities:

Aquatic plant control:

1. Chemical: chemical treatment of aquatic plants will be permitted in this area, but is limited to control of Eurasian Water Milfoil. These chemical applications should be as selective as possible to reduce impacts on the native aquatic plant community and be part of a lake wide Eurasian water milfoil control plan.

2. Mechanical: mechanical control of any type is not recommended.

Water Regulation and Zoning:

1. Dredging will not be permitted.

2. Filling will not be permitted.

3. Pea gravel/sand blanket will not be permitted.

4. Aquatic plant screens will not be permitted.

5. Special permitted piers/boardwalks for water access will be considered on a case by case basis.

Riparian Activities:

1. Wetland alterations of any type will not be allowed without the proper DNR and Army Corp of Engineers permits.

2. Boardwalks will be considered on a case by case basis for the purposes of limited riparian access and public education.

3. Shoreland zoning standards do not allow new homes or other structures such as gazebo's and decks to be built in wetlands. All other construction must comply with all Walworth County requirements, especially the 75 foot setback from the shoreline.

4. Shoreline protection will not be permitted as it is unnecessary in this area.

Common Name	Scientific Name	Sensitive Area Occurrence
Eurasian water milfoil	*Myriophyllum spicatum*	1,2,3,4,5,6,8
Swamp loosestrife	*Decodon verticillatus*	1,5,6,7,8
White water lily	*Nymphaea tuberosa*	1,2,3,4,5,6,7,8
Yellow water lily	*Nuphar variegatum*	1,2,3,4,5,6,7,8
Variable leaved water milfoil (native)	*Myriophyllum heterophyllum*	1,2,4,5,6,7,8
Sago pondweed	*Potamogeton pectinatus*	1,5,6,7
Clasping leaved pondweed	*P. richardsonii*	1,4,6,7
Floating leaved pondweed	*P. natans*	1,6,7
Large leaved pondweed	*P. amplifolius*	1,5,6,7
Narrow leaved pondweed	*P. spp.*	2
White stemmed pondweed	*P. praelongus*	4
Curly leaved pondweed	*P. crispus*	2
Bladderwort	*Utricularia sp.*	1,2,6
Wild celery	*Valisneria americana*	1,2,5,6,7
Musk grass	*Chara sp.*	1,2,4,5,6,7
Duckweed	*Lemna sp.*	5
Narrow leaved cattail	*Typha angustifolia*	6
Large leaved elodea	*Elodea canadensis*	6
Bulrushes	*Scirpus spp.*	4,6,7,8

Table 1. Aquatic plant species found in Lake Beulah sensitive areas and their locations

Resource Value	Area 1	Area 2	Area 3	Area 4	Area 5	Area 6	Area 7	Area 8
Diverse Native Plant Community	X	X	X	X	X	X	X	X
Sediment & Nutrient Trap- protects water quality	X	X	X	X	X	X	X	X
Wildlife & Fishery Value- spawning, nursery, feeding, etc.	X	X	limited by size	X	X	X	X	
Shoreline Erosion Protection	X	X	X	X	X		X	
Stabilization of Bottom Sediments- protects water quality	X		X			X	X	X
Ecological/ hydrological/other	spawning	buffer / refuge	fish cover		very diverse	traps incoming nutrients from Pickerel lake	buffer / refuge	

Table 2. Resource values of sensitive areas in Lake Beulah.

	Activity	Sensitive Area 1	Sensitive Area 2	Sensitive Area 3	Sensitive Area 4
In Lake Activities	Chemical control of aquatic plants	Allowed only as part of a Eurasian water milfoil control plan	Allowed only as part of Eurasian water milfoil control plan	Allowed only as part of Eurasian water milfoil control plan	Allowed only as part of Eurasian water milfoil control plan
	Mechanical harvesting of aquatic plants	Not recommended	Not recommended	Not recommended	Recommended only for Eurasian water milfoil
	Dredging	Navigational purposes only- native plantings required. Southern part only	May be permittable on a case by case basis - native planting required	Permit required - native planting required	Permit required - native planting required - not in shoreline area of bulrushes and willow
	Filling	Not permitted	Not permitted	Not permitted	Permit required
	Pea gravel / sand blanket	Not permitted	Not permitted	Permittable on a case by case basis	Permittable on a case by case basis
	Aquatic plant screens	Permittable	Permit required	NA	Permittable on a case by case basis
	Boardwalks and special permitted piers	Permittable on a case by case basis	Permittable - must meet local and DNR standards	NA	Permittable on a case by case basis
	Other - Seawall construction	Generally not permitted but possible if conditions warrant	Generally not permitted but possible if conditions warrant	NA	Generally not permitted but possible if conditions warrant
Riparian Activities	Wetland alterations	Permit required	NA	NA	NA
	Boardwalks	Permittable for limited riparian and educational uses	NA	NA	NA
	Shoreline protection	Riprap only- not in wetland- only in cases where erosion is occurring	Permit required	Permit required	Permit required
	Shoreline zoning	Must comply with local standards, 75 foot setback	Must comply with local standards	Must comply with local standards	Must comply with local standards

Table 3. Management recommendations and restrictions for Lake Beulah sensitive areas 1-4.

App. 22

	Activity	Sensitive Area 6	Sensitive Area 8	Sensitive Area 7	Sensitive Area 9
In Lake Activities	Chemical control of aquatic plants	Allowed only as part of Eurasian water milfoil control plan	Allowed only as part of Eurasian water milfoil control plan	Not permitted	Allowed only as part of Eurasian water milfoil control plan
	Mechanical harvesting of aquatic plants	Not recommended	Recommended for navigational channels only	Recommended for navigational channels only	Not recommended
	Dredging	Permittable but limited - native planting required	Not permitted	Not permitted	Not permitted
	Filling	Not permitted	Not permitted	Not permitted	Not permitted
	Pea gravel / sand blanket	Not permitted	Pea gravel possible- sand not permitted	Not permitted	Not permitted
	Aquatic plant screens	Permit required	Permit required	Not permitted	Not permitted
	Boardwalks and special permitted piers	NA	Permittable on a case by case basis	Permittable for limited water access only	Permittable on a case by case basis
	Other - Boating regulations	NA	Recommended to remain slow / no wake	NA	NA
	Other - Seawall construction	NA	NA	Generally not permitted but possible if conditions warrant	NA
Riparian Activities	Wetland alterations	NA	Not permitted	Permit required	Permit required
	Boardwalks	NA	Permittable for education and riparian access	Permittable for education and riparian access	Permittable for education and riparian access
	Shoreline protection	Riprap permittable - only in cases where erosion is occurring	Not permitted	Riprap permittable - only in cases where erosion is occurring	Not permitted
	Shoreline zoning	Must comply with local standards	Must comply with local and shoreline wetland zoning standards	Must comply with local and shoreline wetland zoning standards	Must comply with local and shoreline wetlands zoning standards

Table 4. Management recommendations and restrictions for Lake Beulah sensitive areas 5-8.

Bob Nauta

From: "Daniel T Feinstein" <dtfeinst@usgs.gov>
To: <whiskey@direcway.com>
Cc: <jtkrohel@usgs.gov>
Sent: Tuesday, June 03, 2003 3:05 PM
Subject: East Troy pumping test

Bob,

About two weeks ago you asked me to take a look at the pumping test analysis presented by Layne-Northwest of the East Troy, Wisconsin test well. After a quick, informal review of their report, I have the following comments:

1) The test appears to have been well designed and the analysis is generally well presented. The fact that the specific yield values from the analysis are reasonable suggests that the methodology has some merit.
2) It is difficult to interpret the transmissivity results. If the thickness of the coarse-grained material (about 80 ft) is applied to the results for MW2 and MW3, the derived hydraulic conductivity (K) is about 550 ft/day for the sand/gravel and the implied vertical conductivity of the overlying more fine-grained material is about 1 ft/day. These values seem high. If the well point is assumed to be far enough away so that its drawdown represents the response of the entire 260 ft thick system, then the average K is on the order of 45 ft/day. This estimate for the bundle of bedrock valley deposits also seems high.
3) One possibility not accounted for in the use of the Neumann solution is that Lake Beulah is acting as a head-dependent boundary that depresses drawdown and yields unreasonably high estimates of K when neglected. It would be interesting to take account of that boundary (using a numerical model and see if the K values decrease and if the specific yield values still remain reasonable. One difficulty would be the conductance value to assign the lakebed ? much would depend on its resistance.
4) Another possibility to explain the apparent high K results is that the underlying bedrock contributes transmissivity and should be included in the thickness (thereby reducing the overall K). Our databases show that the Silurian pinches out just in this area (with some islands further to the west). It also shows that the Maquoketa subcrop runs under this area. It is possible that remanants of these units plus weathred Sinnipee dolomite contributes transmissivity to the system, but it seems unlikely that the effect would be dominant.
5) There is no question that pumping from the test well has an effect on Lake Beulah. The period of pumping is not shown on Figure 9, but if it is between 4000 and 8320 minutes, then the drawdown at the lakeshore is on the order of 0.1 ft and is increasing at the end of the test. A longer pumping test would be valuable in this regard. It is interesting that Layne's predictive analysis also suggests an effect on the lake. It shows that after 2 years of pumping there would be 2 ft of drawdown adjacent to the lake if the aquifer properties from the well point are assumed.
6) I quickly looked for data from the staff gage, but didn't find any. I

EXHIBIT
2

8/28/2003

assume the lake level did not change during the test (??).
7) The predictive analysis conducted by Layne (Figure 13) doesn't really indicate equilibrium conditions after 2 years as assumed on p. 8 of text. Again, however, this analysis is suspect because the lake is not a head-dependent boundary.
8) It is unlikely that long-term pumping would reverse groundwater gradients into the lake, but clearly the magnitude of the gradients into the lake would be reduced and base flow into the lake would be affected.
9) Given the size of Lake Beulah, it is unclear if the reduction in base flow from long-term pumping at an average rate of 333 gpm would have significant effect on total base flow to the lake. However, it is likely that it would be the major source of water to the well, especially if the high K material is of limited extent. A more sophisticated modeling effort calibrated to the pumping test and then used in predictive mode could address that question.
10) One caveat ? The table on p 4 appears to indicate that well MW-2A experienced drawup of 0.26 ft during the test, but the plot in appendix C shows drawdown of 1 ft. I am missing something here.

Again I emphasize that these remarks are based on a very quick review and do not represent a thorough analysis of the problem.

Daniel

8/28/2003

SOUTHEASTERN WISCONSIN REGIONAL PLANNING COMMISSION
W239 N1812 ROCKWOOD DRIVE • PO BOX 1607 • WAUKESHA, WI 53187-1607
TELEPHONE (262) 547-6721
FAX (262) 547-1103

Serving the Counties of: KENOSHA MILWAUKEE OZAUKEE RACINE WALWORTH WASHINGTON WAUKESHA

July 28, 2003

Mr. David Skotarzak
Chairman
Lake Beulah Management District
P.O. Box 71
East Troy, WI 53120-0071

Dear Mr. Skotarzak:

This is to acknowledge receipt of your June 21, 2003, letter requesting that the Regional Planning Commission review and comment on issues raised concerning, and further proposed evaluations relating to, the development of a high-capacity well in the southwest one-quarter of U.S. Public Land Survey Section 17, Township 4 North, Range 18 East, Town of East Troy. In addition to the well construction, a subdivision with about 110 lots is proposed to be constructed in the same area. However, the well capacity is such that it appears to be designed to provide a water supply to a much larger area than the subdivision itself. Your letter describes issues of concern related to the possible negative impacts of the well by reducing the groundwater flow to the wetland complex on the south end adjacent to Lake Beulah, the nearshore area to the wetland complex, and to the Lake itself. These impacts include a reduction in groundwater input and an associated reduction in water levels. You also note the potential impacts on the Lake of nutrients in runoff from the proposed development.

In your letter, you also suggest that several additional studies should be conducted, including:

- An additional well pumping test and groundwater level monitoring analysis to better estimate the expected changes in groundwater levels in the surrounding area after the pumping system is operating.
- A wetland delineation and characterization and an evaluation of the expected impact on the wetland complex resulting from the estimated changes in the groundwater regime.
- Groundwater elevation monitoring to define the natural, or pre-construction, groundwater conditions.
- Analysis using a groundwater model to estimate the impacts of the well pumpage on the wetland, Lake, and surrounding area.

Pursuant to your request, the Commission staff has reviewed the materials provided with your letter and Commission file data relating to groundwater conditions in the subject area and offers the following comments for your consideration:

1. The District's consultant reported that the well capacity is proposed to be 1,000 gallons per minute, or 1,440,000 gallons per day, with the anticipated typical use being about one-third of that capacity.

2. Review of the Commission groundwater inventory (see SEWRPC Technical Report No. 37, *Groundwater Resources of Southeastern Wisconsin*, June 2002) indicates that the groundwater elevation in the subject area is relatively flat, with little gradient. Thus, the Lake, wetland, and general area water table are all likely at a similar elevation.

3. The Commission staff agrees with the concerns raised in your letter relating to the potential for negative impacts on the wetland complex and the Lake itself, due to the pumping from the well. However, as you indicate, the current level of knowledge is not adequate to make reasonable estimates of the severity of impacts. In addition to the issues you have raised, the potential impacts on surrounding private wells is another concern. There are several private wells within 1,000 feet of the proposed well.

4. The four additional studies that you have suggested be conducted are logical steps in determining the potential impacts of the proposed well. However, these studies will be of little value if the proposed well siting is not deferred until the evaluations needed to better define the impacts are completed and the option of changing the proposal is left open should the negative impacts be estimated to be significant. Once the well and subdivision is constructed, there is little that can be done to mitigate any significant negative impacts. The wetland delineation and characterization, pumping test, and modeling would all be important in this regard. The groundwater level monitoring will be useful, but will take a considerable period in order to characterize the natural fluctuations. However, such a groundwater monitoring program could be initiated and used as part of the pumping test and as modeling input.

5. Groundwater impacts are an important factor in determining the quality of lake systems, such as Lake Beulah, given the clean and low temperature characteristics of groundwater inflow. The well construction being considered, as well as the subdivision construction itself, will have the effect of reducing the groundwater flow to the Lake. The significance of that effect is not known. Given the size of the Lake and tributary watershed, the loss of about 400,000 to 500,000 gallons per day of groundwater may not have a major impact. However, over the long-term, this is not yet known. In any case, it is important to minimize such impacts, since the cumulative impact of this and similar actions can be significant when taken in aggregate over a long period of time.

6. The concern you raise regarding nutrient runoff from the subdivision can be partially mitigated by installing a high level of stormwater management control measures. However, given the density of the proposed subdivision, there will be some increase in nonpoint source pollutant loadings to the Lake and a reduction in groundwater inputs due to the increase of imperviousness resulting from the subdivision. This location would be one where stormwater infiltration measures can be appropriate as part of a series of stormwater management measures. This could help, somewhat, to reduce the impact on groundwater levels due to increased impervious area development.

Based upon the foregoing, it is recommended that the studies you have outlined be undertaken. However, in order to be effective, it is recommended that the well construction be deferred until such a time as a reasonable estimate of the impacts of the proposed actions is determined and that, if appropriate, alternatives to the proposed action be considered. Thus, it is recommended that the studies be undertaken in a cooperative effort involving the Village of East Troy, the Town of East Troy, and the Lake Beulah

Management District. It is further recommended that the well development proposal be reevaluated on a cooperative basis by these parties once the impacts are properly known.

We trust this responds to your request. Should you have any questions on this response or need anything further, please do not hesitate to call.

Sincerely,

Philip C. Evenson

Philip C. Evenson
Executive Director

PCE/RPB/pk
#85009 V1 - SKOTARZAK LTR

cc: Ms. Judy A. Weter, Village of East Troy
Mr. Clayton O. Montez, Town of East Troy
Mr. Neal A. Frauenfelder, Walworth County
Mr. James D'Antuono, WDNR, Southeast Region

STATE OF WISCONSIN CIRCUIT COURT Branch 1 WALWORTH COUNTY

LAKE BEULAH MANAGEMENT DISTRICT, AND LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Petitioners,

vs.

Case No. 06-CV-673 and Case No. 07-CV-674

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent,

VILLAGE OF EAST TROY,

Intervening Respondent.

THE VILLAGE OF EAST TROY'S RESPONSE BRIEF

The Respondent, Village of East Troy (Village) by its attorneys, Anderson & Kent S.C., hereby submits the within Response Brief in the above captioned complaint.

INTRODUCTION

Despite the voluminous materials submitted by the Petitioners, the facts and legal issues are narrow and simple. This case is about two modifications to a municipal well approval for the Village of East Troy. The Village sought and obtained an approval for the well (Well #7) from the Department of Natural Resources so it could provide an adequate public water supply to its residents. The initial approval was issued in September 2003 (2003 Approval) and was re-issued in September 2005 (2005 Approval). *See* R. 49 and R. 1. Subsequent to the 2005 Approval, the Village sought and obtained from the DNR two minor modifications to the well construction that did not affect its pumping capacity, depth, or basic location. The modifications were issued in

2006 and 2007. Petitioners requested contested case hearings on those two minor modifications and the DNR denied the first and partially granted the second.

The only issue before the Court in this proceeding is whether Petitioners are entitled to a contested case hearing on the two minor modifications. Instead of focusing on that issue, Petitioners ask this Court to "remand this matter to the DNR with directions to hold a hearing to determine whether Well No. 7 will negatively impact the navigable water of Lake Beulah and if so, to direct the Village to discontinue use of that well." Pet Br. at 45. In short, Petitioners seek to parlay their request for a hearing on two minor modifications into an open-ended hearing on Well #7. Petitioners' request is improper on multiple grounds.

First, as a preliminary matter, judicial review of agency decisions under Wis. Stat. ch. 227 is a review on the record established by the agency. The question here is whether there is a basis for a hearing on the two modifications. Yet, the Petitioners rest most of the arguments in their 46-page brief on a three ring binder full of documents from five years of proceedings most of which are wholly outside of the record before the Court. Those documents are the subject of the accompanying motion to strike. The Village strongly disagrees with the misleading and inaccurate rendition of the history Petitioners derive from these documents. What these documents show is that the Petitioners fully exhausted their rights to challenge the 2003 Approval and lost, and that they subsequently waived their rights to a hearing on the 2005 Approval. More importantly, they are irrelevant to decide the narrow issues before this Court. Any decision on whether a hearing should be granted must be based on the record before this Court.

Second, case law is clear that a party cannot use a minor permit modification to circumvent the requirements for obtaining a timely review of the underlying permit. If a party

has waived or exhausted its review of the underlying permit, they do not get a second chance to challenge the permit simply because a subsequent modification is made to that permit. This is a fundamental principle of administrative law designed to ensure the orderly review of administrative determinations. Any hearing must be based on the modifications, not the underlying permit.

Third, in order to have the right to a hearing, any request for a hearing must relate to the standards that are relevant under the statutes as they are written. Those standards are in Wis. Stat. § 281.34 – standards completely ignored by the Petitioners. Petitioners suggest that because of the public trust doctrine, the statutes should be re-written (or ignored) so that any applicant for a high capacity well has the burden to demonstrate that the well will have no adverse impact on surface waters. That is not the law in Wisconsin. In delegating public trust authority to the DNR, the Legislature has carefully established a three-part statutory scheme for regulating high capacity wells. While those statutes do require a surface water impact analysis for some high capacity wells, they clearly **do not** require such an analysis for wells of the size and location involved here. Indeed, the Legislature has repeatedly refused to expand the DNR's authority for wells like Well #7. This is neither the time nor the forum to re-write state statutes. Any right to a hearing must be evaluated based on the standards in the statutes.

Finally, while the Village believes Well #7 will have no adverse impacts on surface water and has taken measures to ensure that will not happen, even if the Petitioners' fears about Well #7 are realized, there are an assortment of remedies to address such concerns outside of the well permit process. It is not necessary to re-write the state statutes at issue here to address Petitioners' concerns.

Thus, as a matter of established law, there is no basis to grant a hearing on an approval issued years ago simply because there are now two minor modifications to that approval. Nor is there a basis to grant a hearing on the modifications based on factors outside of what the statutes require. These are not merely "procedural issues," they are fundamental constitutional law and administrative law issues which have already been the subject to extensive and careful review. Given the applicable law, the Department should have denied both hearings outright, but certainly it was well within its discretion to deny the first and limit the scope of the second.

FACTS

The Statutory Scheme For Regulation Of High Capacity Wells

This case involves the alleged right to a hearing on a DNR decision to modify a high capacity well approval. To evaluate that claim, it is necessary to understand the statutory scheme under which such approvals are granted.

The Legislature has established a three-part scheme in Wis. Stat. § 281.34 for the regulation of wells based on the capacity of the well in gallons per day (gpd) and the location of the well. That statutory scheme can be summarized as follows:

- Wells below 100,000 gpd are not defined as high capacity wells under Wis. Stat. §281.34(1)(b) and therefore do not require any DNR approval or review.
- Wells between 100,000 gpd and 2,000,000 gpd require an approval in accordance with the standards under § 281.34(5). The specific standards that apply depend on the location of the well and are noted below.
- Wells over 2,000,000 gpd require an approval in accordance with the standards under § 281.35 that requires a detailed review of environmental factors and a determination of several factors including that no public rights in navigable waters will be adversely affected. [1]

[1] Stat. § 281.35(5)(d) provides that if the water loss exceeds 2,000,000 gallons per day, then the Department is required to review seven additional statutory criteria including whether the withdrawal will adversely impact public rights in navigable waters. Among other things, subsection (d) provides the following criteria:

1. That no public water rights in navigable waters will be adversely affected...

There has never been a dispute that Well #7 has a capacity of less than 2,000,000 gpd and therefore falls in the second regulatory category. Thus, the standards in § 281.35 regarding review of surface water impacts do not apply. The standards for wells like Well #7 in Wis. Stat. § 281.34(5) are as follows:

> (5) Standards and conditions for approval.
>
> (a) *Public water supply.* If the department determines that a proposed high capacity well may impair the water supply of a public utility engaged in furnishing water to or for the public, the department may not approve the high capacity well unless it is able to include and includes in the approval conditions, which may include conditions as to location, depth, pumping capacity, rate of flow, and ultimate use, that will ensure that the water supply of the public utility will not be impaired.

There is no dispute that Well #7 meets this standard because it does not impair the water supply of another public well.

Until 2004, that standard was in Wis. Stat. § 281.17 and it was the **only** standard applicable to wells of that capacity. In 2003 Wis. Act 310, the Legislature created Wis. Stat. § 281.34, effective May 6, 2004. Act 310 added a requirement for environmental review for wells in designated groundwater protection areas, wells with an impact on springs and wells with a certain high water loss within a basin. *See* Wis. Stat. §281.34(5) (b)-(d). There has never been a dispute that Well #7 is **outside** any of those areas.

Thus, under the statutory scheme, the DNR is only authorized and required to evaluate environmental impacts including impacts on surface waters for high capacity wells over 2,000,000 gallons per day and for wells in certain locations. Those standards do not apply to Well #7. The only standard applicable to Well #7 under this statutory scheme is Wis. Stat.

---

5. That the proposed withdrawal and uses . . . will not be detrimental to the public interest.
6. That the proposed withdrawal will not have a significant detrimental effect on the quantity and quality of the waters of the state.

§ 281.34(5)(a). The DNR has no authority much less an obligation to consider impacts to surface waters for wells in the category of Well #7.

The Prior Proceedings

This case does have an extensive history. However, the only relevant facts from that history in the record before the Court are that the DNR issued high capacity well approvals to the Village of East Troy for a municipal well and granted modifications to the 2005 Approval in 2006 and 2007. If the Village's motion to strike is granted, the following material regarding the prior proceedings can be disregarded. If it is not granted, then the Court should review the following information in response to the misleading discussion of the procedural history surrounding Well #7 in Petitioners' brief.

2003 Approval and Review

Following the issuance of the 2003 Approval, the Petitioners sought and obtained a contested case hearing on the 2003 Approval. Petitioners assert that the Administrative Law Judge (ALJ) improperly dismissed the petition. Not so. The granting of the hearing request was for the ALJ to hold a hearing to determine "**whether** the Department should have considered . . . effects to the waters." Pet. Tab. 7. It does not direct the ALJ to hold an evidentiary hearing on those factors; it directs the ALJ to make the determination of **whether** the DNR should have considered those factors. That is precisely what the ALJ did. The Village moved for summary judgment on the grounds that the applicable statues do not require DNR to consider those factors and the ALJ granted the Village's motion on June 16, 2004. The ALJ stated in part:

> But a permit must be issued if the statutory standards are met. Here, **the Village has demonstrated compliance with the statutory standards and the permit must be issued.** Once such a permit is issued, the burden of persuasion and proof shifts to the party asserting that, despite the permit, that either the Department should rescind the permit of a private party should have some redress for an impact upon a private well. . . . Here the only facts before the Division indicate that the statutory standard have been met

> and any potential damage is purely speculative because there has been no factual record developed to support the allegations made in the petition. (Emphasis added.)

Pet. Tab. 9; Decision at 6. Petitioners omit from their rendition of the procedural history that they filed a motion for reconsideration, the ALJ invited the Petitioners to file evidentiary affidavits, and Petitioners refused to do so. To say the ALJ refused to follow the hearing request is simply wrong.

Next, the Petitioners filed a petition for judicial review in Walworth County Circuit Court. Judge Carlson issued a 15-page opinion on June 24, 2005, dismissing the case and upholding the ALJ. Judge Carlson rejected the Petitioner's claim that the DNR should look at factors beyond those in the statute:

> As the Village's proposed well will not trigger the requirements of Section 281.35, the DNR is not required to consider these criteria. Furthermore, **not only is the DNR not required to do so, it should not, as the criteria for approval of this type of well is clearly and unambiguously spelled out in Section 281.17 [now § 281.34].** A state agency has only the express or implied authority grant to it by statute. . . . There is a three-tiered structure of review depending upon the amount of water the well proposes to pump. As the proposed Village well falls into the middle tier it is that statutory criteria that must be followed by DNR. The statute is clear and unambiguous. . . .
>
> Petitioners wish the Court to reach beyond the statue in this case. This is not within the prerogative of the court nor the DNR, but rather is a matter for future legislation. (Emphasis Added)

Pet. Tab. 12; Decision at 11 -12. The Court also rejected the Petitioner's claim that they were deprived of an opportunity to present evidence to the ALJ:

> Nothing supplied by petitioners disputes that the Village established that it met the statutory requirements for a high capacity well. Petitioners argue that the public trust doctrine should be considered broadly, and that they wish the opportunity to show why they believe there will be scientific evidence showing the problem with granting the approval of the Village's well. **They were given that opportunity and failed to take it.** (Emphasis Added)

Id. at 14. Again, a subsequent motion for reconsideration was also rejected by the Court.

When the Petitioners filed their petition for judicial review in 2004, they also filed a separate action entitled a "Petition and Complaint for Judicial Review," and the cases were

consolidated. In the second action, the Petitioners' counsel obtained a Writ purportedly imposing a stay on well construction "until further order of the Court."[2] Pet. Tab. 11. Petitioners now contend that the "stay" was never lifted. Pet Br. at 14-15. That is absurd. There was a further order of the Court – one dismissing the entire action. Pet. Tab. At 12. The case was over and nothing more was required.

2005 Approval and Subsequent Review

By the time that Judge Carlson affirmed the ALJ decision and denied the motion for reconsideration, it had been nearly two years since the 2003 approval was granted. Since the 2003 Approval required that construction commence within two years, and the Village had refrained from construction during the litigation, it was necessary to obtain an extension before it expired on September 4, 2005.

In the intervening two years, the Legislature had passed 2003 Wis. Act 310. Act 310 also created a provision that allowed for modifications to well approvals issued under the old law. Based on that provision, the Village attempted to persuade the DNR to extend the 2003 Approval rather than issue a new decision. Having spent two years in litigation, the Village wanted to avoid starting the process over by a decision that would create new hearing rights.

Nevertheless, the DNR determined that because of the new law, it needed a new application fee and needed to confirm that the new standards did not apply. Pet. Tab.16. The Village provided that information but by the time the DNR issued the approval extending the time for construction, it was September 6, 2005 and the old approval expired. *Id.* The approval also expressly provided the Petitioners the right to ask for another contested case hearing and seek judicial review. The decision was mailed to Petitioners' counsel. *Id.* Petitioners, for

[2] The second action was both unnecessary and improper because Chapter 227 is the exclusive remedy for challenging an agency decision. *See* Argument I.A. Thus, there was no legal basis for the court to have issued any writ. Nevertheless, the Village did not construct the well during that time.

whatever reason, failed to request a contested case hearing.[3]

Given the fact that the DNR issued a new decision in September 6, 2005, the Village argued to the Court of Appeals that the appeal on the 2003 Approval was moot. The Court of Appeals agreed.[4] The Petitioners then filed a petition for review to the Supreme Court protesting the mootness determination but the petition was denied.

Summary of the 2003 and 2005 Approval History

Petitioners' repeated assertion that there was "malfeasance" by the DNR because it refused to hold a hearing on the well is not supported even by their own documents from outside the record. The DNR granted Petitioners' hearing request on the 2003 Approval. The ALJ reviewed the material submitted by the parties and ruled in favor of the Village. Whatever complaints the Petitioners had about the scope of that hearing were rejected on review all the way to the Supreme Court. As for the 2005 Approval, there is one and only one reason why Petitioners were not granted a contested case hearing – they did not ask for one.

The Approval Modification Proceedings Relevant to This Action

The case now before the Court is a consolidation of two separate actions in which the Petitioners requested contested case hearings concerning two minor modifications of the Village's 2005 Well Approval for Well #7.

The first modification was sought on May 19, 2006, to increase the well casing size of Well #7 six inches from 24 to 30 inches and to use an alternative drilling method. The modification was designed to aid construction and to insure constructability. R. at 49. The

[3] Nearly six months later, Petitioners filed a petition for judicial review. The timeliness of that petition is one of the issues that will need to be resolved in Case. No. 06-CV-172, but is not relevant for purposes of the cases currently before the Court.

[4] The Court of Appeals also rejected the attempt by the Attorney General to file an amicus brief taking a position different from that of DNR. Given that formal attorney general opinions are not binding on the Court, citation to an opinion expressed by an assistant attorney general in a rejected brief in a proceeding outside the record is wholly improper and irrelevant. *See F.A.S. v. Town of Bass Lake*, 2007 WI 73, ¶7, 301 Wis. 2d 321.

modification did not affect the depth of the well, its location, its pumping capacity or any other factor. R. at 46. The modification was granted by the DNR on May 25, 2006. ("2006 Modification").

On June 23, 2006, the Petitioners requested a hearing on the 2006 Modification." ("2006 Hearing Pet.") *See* R. at 40. As support for their request, the Petitioners state that, "the proposed Water Systems Facilities Plan involves a proposal to draw substantial amounts of groundwater that will adversely affect the waters of Lake Beulah. . . ." 2006 Hearing Pet. at ¶2; R. at 40. Nothing in the petition addressed how the modification of the well approval, apart from the well itself, affected their interests. In addition, nothing in the petition alleged that the modification failed to meet applicable standards in Wis. Stat. § 281.34(5)(a). The DNR denied this petition for failing to identify any injury to the Petitioners based on the actual modification. *See* R. at 38.

The second modification was sought on February 21, 2007, to move the well 12 feet. The modification was designed to address the fact that the temporary well casing had to be removed prior to installing the final casing, and the temporary casing could not be removed because the welds on the temporary casing broke. The modification did not affect the depth of the well, its pumping capacity or any other relevant factor. R. 22. The well was not moved any closer to Lake Beulah. R. at 30. The modification was granted by the DNR on March 16, 2007. ("2007 Modification"). R. 22. Petitioners filed a contested case hearing on this modification on April 13, 2007. ("2007 Hearing Pet.") R. at 6.

In support of their request for a hearing on that modification, the Petitioners claim that "[t]he Lake Association has a substantial interest in this matter because Well #7 will intercept and remove groundwater that would otherwise sustain Lake Beulah, thus causing harm to Lake Beulah contrary to the goals and values of the Lake Association." *See* 2007 Hearing Pet. at 4(b);

R. at 11. The Petitioners also claim that the modification makes it possible for the well to damage sensitive wetlands, encourage an adverse change in species of biota, harm the use and enjoyment of the lake by the Petitioners, reduce property values, and subject the Petitioners to claims for failure to uphold its legal duty to protect the Lake. *Id.* at 4(c)-(h). No allegation was made regarding the applicable standard under Wis. Stat. § 281.34(5)(a).

The DNR granted in part and denied in part the Petitioners' request for a hearing regarding the 2007 Modification. In so doing, the DNR allowed review of two issues:

1) Whether it was appropriate for the DNR to conditionally approve a modification of the Village of East Troy's Water Facilities Plan and Specification Approval for a High Capacity Well to change the location of Well No. 7 without using the environmental review process under s. 1.11, Wis. Stats., to the extent that any requirement to use that process applies only to the change in location of Well No. 7.

2) Whether all of the s. NR 811.16(4)(d), Wis. Admin. Code, requirements for separation distances from potential sources of contamination were complied with, given that the location of Well No. 7 was changed.

See 2007 Modification, R. at 1.

ARGUMENT

I. PETITIONERS CANNOT USE A MINOR PERMIT MODIFICATION TO OBTAIN A HEARING ON THE UNDERLYING PERMIT.

Petitioners repeatedly ask this Court to order a hearing that "the DNR granted four years ago" (Pet. Br. at 29, 41) and to determine the impacts of "Well No. 7." *Id.* at 45. There is no basis to grant a hearing on the 2003 or 2005 Approvals based on modifications issued years later.

A. There Is No Dispute That Petitioners Cannot Obtain A Hearing On The 2005 Approval.

The procedures for obtaining a contested case hearing are set forth by statutes and DNR administrative rules. The DNR rules that implement Chapter 227 expressly provide that a request for a contested case hearing must be made within 30 days of a final agency action unless another time is set by statute. *See* Wis. Admin. Code § NR 2.05. For high capacity well

approvals, the 30-day period applies, and this time limit was contained in the notice of appeal rights when the 2005 Approval was issued and sent to the Petitioners. Pet. Tab. 16.

Wisconsin courts have adopted "the general principle that where a method of review is prescribed by statute, the prescribed method is exclusive." *St. Ex. Rel.1st Nat. Bank v. M&I Peoples Bank*, 82 Wis. 2d 529, 542, 263 N.W.2d 196 (1978); *see also Jackson County Iron Co. v. Musolf*, 134 Wis. 2d 95, 101, 396 N.W.2d 323 (1986) ("This court has adopted the general principle that, where a method of review is prescribed by statute, the prescribed method is exclusive."). These same principles have been applied to hearings under Wis. Stat. § 227.42 and timeframes imposed by agency rules for § 227.42 petitions. *See Shearer v. DNR*, 151 Wis. 2d 153, 169-170, 443 N.W.2d 669 (Ct. App. 1989).

Compliance with statutory review timeframes is not simply an arbitrary rule, but one based on sound public policy to encourage orderly review of administrative decisions. As the court noted in *St. Ex. Rel. 1st Nat. Bank*, 82 Wis. 2d at 542-543:

> [This] rule is based on the strong public interest in creating effective administrative agencies, in insuring finality of agency determinations and certainty in legal relations; in establishing orderly judicial processes; in preventing a multiplicity of suits; and in achieving economy of judicial time.

There is no question that the time for requesting a contested case hearing on the 2005 Approval, much less the 2003 Approval, expired long ago and Petitioners cannot now obtain a hearing on those decisions.

B. Petitioners Cannot Obtain Indirectly What They Cannot Obtain Directly.

Knowing that they cannot get a hearing on the 2005 Approval directly, Petitioners attempt to obtain the same result by indirection. They attempt to use a hearing request on two minor modifications as a basis for "a hearing to determine whether Well No. 7 will negatively impact the navigable water of Lake Beulah. . . ." Pet Br. at 45. This case is not about Well #7, it

is only about the **modifications** to the prior approval for Well #7. Wisconsin and federal case law are clear that a party cannot use a permit modification as grounds for reopening long settled provisions of a permit.

In *Thiensville Village v. DNR*, 130 Wis. 2d 276, 386 N.W.2d 519 (Ct. App. 1986), the court rejected the same argument Petitioners are making here. In *Thiensville*, the DNR issued the Village a permit in 1977 with an expiration date of October 31, 1981, requiring that Thiensville construct an interceptor sewer to connect with Milwaukee Metropolitan Sewage District. *Id.* at 278. Several years later as the deadline approached, Thiensville sought an extension of the construction deadline. On October 15, 1981, the DNR issued a modified permit extending the permit. Thiensville objected to the new compliance dates in the permit modification **and** the requirements in the original permit. *Id.* The hearing examiner limited his review to the question of the reasonableness of the new compliance dates. *Id.* Thiensville appealed, arguing that "the hearing examiner erred in refusing to consider terms of the original permit which were not changed by the modified permit." *Id.* at 279.

The court rejected Thiensville's argument based on the language of the applicable permit statute in that case and general doctrines of administrative law. The Court of Appeals held that the hearing examiner properly limited his inquiry to the reasonableness of the modification. *Thiensville*, 130 Wis. 2d at 281. The Court noted that the policy of limiting review of permit modifications to the terms of the modification is sound and in keeping with the exhaustion of remedies doctrine long at the core of administrative law. *Id.*

Just like in *Thiensville*, the modifications to the Village's permit in this case were made by the DNR long after the underlying permit was issued and were based on events occurring after the permit was issued. There is no basis for this Court to allow a hearing on specific permit

modifications to open up the underlying 2005 Approval to the Village of East Troy. As in *Thiensville*, any hearing must be limited to the modification at issue.

The U.S. Supreme Court has reached a similar conclusion. In *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 217, 100 S. Ct. 1095 (1980), the Environmental Protection Agency (EPA) extended the expiration date of the City of Los Angeles' discharge permit for its sewage treatment plant. Pacific Legal Foundation attempted to use this modification to reopen the underlying permit. The Supreme Court rejected that argument and explained that parties "may not reopen consideration of substantive conditions contained within [a] permit through hearing requests relating to a proposed permit modification that did not purport to affect those conditions." *Costle*, 445 U.S. at 217.

Significant policy rationale supports limiting review of a permit modification to the modification triggering the challenge. In the case of *Sewerage Commission of Milwaukee v. DNR*, 102 Wis. 2d 613, 307 N.W.2d 189 (1981), the Wisconsin Supreme Court held that the failure to timely utilize the specified method of review precluded subsequent judicial review of the DNR's action on a WPDES permit. *See id.* at 621. "Such a challenge is 'ripe,' both as to fact and law, at the time the permits are issued; no delay is either necessary or appropriate." *Id.* at 625-626. It would undermine the principles of judicial economy and finality that form the basis for the procedures and time limitations in Wis. Stat. ch. 227 if the Petitioners were allowed to challenge the settled, unmodified provisions of the Village's well approval. The resulting uncertainty would cause significant waste of tax payer resources, not to mention years of unnecessary delay in attaining adequate water supplies for Village residents.

The time for a hearing on the 2005 Approval has expired. A similar analysis applies to the suggestion that the hearing granted to the 2003 Approval should be reopened. While there

are "issue or claim preclusion" arguments that could prevent the re-litigation of issues raised in Petitioners unsuccessful challenge to the 2003 Approval,[5] the Court need not reach those issues in this proceeding. The hearing and review process for the 2003 Approval has been exhausted. Even if some issues were not decided in those proceedings, there is no basis for further review of those agency actions because the timeframes in Chapter 227 have expired. The exclusive means for challenging both the 2003 Approval and 2005 Approval have expired.

Thus, to the extent there is any hearing right at this time that hearing arises from and is limited to the specific permit modifications, not the underlying permit. Alleged injuries from the approval of Well #7 cannot serve as a basis for a hearing, only alleged injuries arising from the modification to the 2005 Approval are relevant to whether a hearing should be granted.

II. PETITIONERS DO NOT STATE AN ADEQUATE BASIS FOR A CONTESTED CASE HEARING ON THE MODIFICATIONS.

A. Petitioners Must Meet All the Standards In Wis. Stat. § 227.42 For The Modification.

Wis. Stat. § 227.42(1) lists four requirements a petitioner must establish to gain the right to a contested case hearing:

> In addition to any other right provided by law, any person filing a written request with an agency for hearing shall have the right to a hearing which shall be treated as a contested case if:
>
> (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
>
> (b) There is no evidence of legislative intent that the interest is not to be protected;
>
> (c) The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and

[5] *See State v. Stuart*, 2003 WI 73, ¶24, 262 Wis. 2d 620("[A] court should 'be loathe' to reconsider previous decisions it or a coordinate court has rendered 'in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice.'") (quoting *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988)).

(d) There is a dispute of material fact.

As the court in *Metro. Greyhound Mgt. Corp. v. Racing Bd.*, 157 Wis. 2d 678, 692, 460 N.W.2d 802 (Ct. App. 1990) explained, a petitioner must establish prima facie entitlement to a contested case hearing. To receive a contested hearing under Wis. Stat. § 227.42(1), a person must satisfy the conditions in subsections (a) through (d). *See Milwaukee Metro. Sewerage Dist. v. DNR*, 126 Wis. 2d 63, 73, 375 N.W.2d 649, 652 (1985) (interpreting § 227.42, formerly numbered § 227.064).

Although the standard of review of an agency's denial of a contested case hearing may be *de novo*, a reviewing court must examine the record before the agency to determine whether a prima facie entitlement to a contested hearing has been made. *Metro. Greyhound* 157 Wis. 2d at 692 (citing *Shearer v. DNR*, 151 Wis. 2d at 165). An applicant who seeks a hearing is required "to meet a threshold burden of tendering evidence suggesting the need for a hearing." *Costle*, 445 U.S. at 217.

It is also worth noting that when reviewing an agency's denial of a contested case hearing, the court merely conducts a *de novo* review, and not a *de novo* trial. *De novo* review allows the reviewing court to limit the issues and evidence reviewed. Davis Admin. Law 2nd Ed., "Administrative Appeals", Vol. III, p. 90. *De novo* review is a standard that "accords due consideration to the arbitrator's decision, but the reviewing court is not bound by it." *Glendale Professional Policemen's Ass'n v. City of Glendale*, 83 Wis. 2d 90, 100, 264 N.W.2d 594 (1978).

B. The Petitioners Did Not Allege A Sufficient Injury In Fact.

1. The 2006 Casing Modification.

The Petitioners' request for a contested case hearing concerning the casing modification attempts to satisfy the requirements of Wis. Stat. § 227.42(1) (a) through (d) by claiming the following:

- "[T]he proposed Water Systems Facilities Plan involves a proposal to draw substantial amounts of groundwater" that will have adverse effects. *See* 2006 Hearing Pet. at ¶2.

- Lake Beulah will be injured in fact or threatened with injury if the 2006 Modification permits the Village's well to be located in its current location and under the permitted specifications. *See* 2006 Hearing Pet. at ¶3.

- The proposed harm directly relates to Lake Beulah, its groundwater resources, the Lake Beulah environment and the property owners who comprise the Lake District will be adversely impacted by said Water System Facilities Plan and Specification Approval. *See* 2006 Hearing Pet. at ¶4.

- "There is a dispute of material fact and the application of law, which forms the basis for the permit approval. In addition, the Petitioner believes that the Department of Natural Resources has failed to comply with other law which applies to this project including, without limitation, Wisconsin Administrative Code § NR 103.08..." *See* 2006 Hearing Pet. at ¶5.

The Petitioners explicitly state that their injury is related to the proposed "Water Systems Facilities Plan," not the "Modification of Water Systems Facilities Plan." Furthermore, the Petition claims an injury based on the "proposal to draw substantial amounts of groundwater that will adversely affect the waters of Lake Beulah. . . ." The casing modification approved by the DNR on May 25, 2006, does not affect the pumping capacity of the well (2006 Modification; R. at 46) and, therefore, is unrelated to the injuries alleged in the Petition.

Finally, the Petitioners allege a dispute of material fact and the application of law, but only as to that "which forms the basis for the permit approval," not the modification. None of the injuries alleged by the Petitioners can be attributed to a change in the casing of the well and, in fact, the Petitioners do not even make such an allegation. On its face, the petition for a contested case hearing does not allege an injury arising from the modification. The DNR was correct in denying the hearing.

2. **The 2007 12-foot Modification.**

The modification approved by the Department in 2007 allows Well #7 to be 12 feet from its original location. The DNR noted that the Modification "will not affect the anticipated pumping capacity of Well No. 7." R. at 22. Again, the Petitioners have alleged various hypothetical injuries, but none of them are related to the 12-foot change.

In support of their claim that the 2007 Modification injures or threatens to injure their substantial interest, the Petitioners' primary claims are as follows:

- The Lake Association has a substantial interest in this matter because Well #7 will intercept and remove groundwater that would otherwise sustain Lake Beulah, thus causing harm to Lake Beulah contrary to the goals and values of the Lake Association. *See* 2007 Hearing Pet. at 4(b).

- The modification makes it possible for the well to damage sensitive wetlands, encourage an adverse change in species of biota, harm the use and enjoyment of the lake by the Petitioners, reduce property values, and subject the Petitioners to claims for failure to uphold its legal duty to protect the Lake. *See* 2007 Hearing Pet. at 4(c)-(h).

However, the Petition is void of any specific assertion or explanation as to how the 12-foot change in location affects the Petitioners' substantial interests. The 2007 Modification merely moves the well 12 feet and the movement is no closer to Lake Beulah or any alleged shoreland wetlands. R. at 22. To establish prima facie entitlement to a contested case hearing, the Petitioners must specifically identify a substantial interest that is injured, or is threatened with injury, by the 12-foot change. This requisite element is not satisfied by asserting unsupported declarations that harm will occur as a result of the location of the well.

C. **The Petitioners Have Not Alleged An Interest Protected By Law Or A Dispute Of *Material* Fact.**

Even if the Petitioners alleged a sufficient injury, in order to be entitled to a hearing on an agency decision, a petitioner must allege interests protected by law and facts that are material to

the legal standards governing that decision. Wis. Stat. § 227.42(1)(b) and (d). This case involves the decision of the DNR to issue a modification to a permit for a high capacity well. As noted above, there is a detailed statutory scheme that defines the relevant factors and standards the DNR must apply in making those determinations.

Under that three-part scheme, the only applicable standard for Well #7 is Wis. Stat. § 281.34(5)(a) – whether it impacts other municipal wells. Petitioners make no claim in either petition that Well #7 fails to meet this standard. As a result, Petitioners have not asserted a right protected by law under Wis. Stat. § 227.42(1)(b) and, on that basis alone, the petitions should be denied. In addition, their claim that the well will cause other impacts is not material to the only applicable statutory standard. As a result, they do not meet the hearing requirement under § 227.42(1)(d).

The Petitioners wholly ignore the applicable statutory standards both in their petitions and in their brief before the Court. Instead, they accuse the DNR of malfeasance for not applying general public trust doctrine standards. Any analysis of a right to a hearing must be based on an analysis of the applicable law as written, not the law as Petitioners wish it to be.

1. DNR's Role In Approving High Capacity Wells Is Prescribed By Statute.

The suggestion that the DNR is obligated to implement the public trust doctrine apart from its statutory charge, reflects a fundamental misunderstanding of the public trust doctrine and separation of powers principles.

First, under the public trust doctrine, the Legislature, not the DNR, has the primary responsibility for implementing the public trust doctrine. *See Hilton v. Dept of Natural Resources,* 2006 WI 84, ¶19, 293 Wis. 2d 1 ("The legislature has the primary authority to

administer the public trust for the protection of the public's rights, and to effectuate the purposes of the trust."); *Gillen v. City of Neenah*, 219 Wis. 2d 806, 820-821, 580 N.W.2d 628 (1998); and *State v. Village of Lake Delton*, 93 Wis. 2d 78, 91, 286 N.W.2d 622 (Ct. App. 1979) ("The primary power to administer the trust for the enhancement of these public rights to use the water for commercial and recreational purposes reposes in the legislature.")

Second, to the extent that the Department of Natural Resources implements the public trust doctrine, it is only insofar as the Legislature has delegated it authority to do so. *State v. Town of Linn*, 205 Wis. 2d 426, 443-44, 556 N.W.2d 394 (Ct. App 1996) ("The legislature may delegate to the DNR the authority to exercise such legislative power as is necessary to make public regulations interpreting [its] statute[s] and directing the details of [their] execution. . . . This is precisely what the legislature has done with the public trust doctrine.")(internal citation omitted.) *See also Hilton*, 2006 WI at ¶20 ("the legislature has charged the DNR with regulating piers under §§ 30.12 and 30.13. . .").

This basic delegation principle follows from the constitutional principle of separation of powers. The DNR, like any state agency, has only those powers "which are expressly conferred or which are necessarily implied by the statutes under which it operates." *Wisconsin Citizens v. DNR*, 2004 WI 40, ¶14, 270 Wis. 2d 318 (quoting *Kimberly-Clark Corp. v. PSC*, 110 Wis. 2d 455 (1983)). "Every administrative agency must conform precisely to the statute which grants the power." *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929, 942 (1928). "Such statutes are generally strictly construed to preclude the exercise of power which is not expressly granted." *Browne v. Milwaukee Bd. of Sch. Directors*, 83 Wis. 2d 316, 333, 265 N.W.2d 559 (1978).

The only public trust question involved in this case is to what extent the Legislature has

delegated public trust authority to the DNR in the context of high capacity wells. That is a simple question and one wholly ignored by the Petitioners. Here, the Legislature has implemented its public trust duties with respect to high capacity wells through the statutory scheme in Wis. Stat. § 281.34. Under that scheme, there is no authority, much less a duty, to look at surface water impacts from wells like Well #7. Alleged "surface water impacts" are not material to the standards for Well #7 and can form no basis for a hearing.

In an attempt to circumvent that clear statutory scheme, the Petitioners assert that there is broad delegation to the DNR under the public trust doctrine and the provisions of Wis. Stat. §§ 281.11 and 281.12 (formerly §144.025). Petitioners are incorrect on both counts. As to the public trust doctrine, Petitioners ignore the fact that, "The public trust doctrine, in itself, does not create legal rights" *Borsellino v. DNR*, 2000 WI App 27, 232 Wis. 2d 430 (citing *Robinson v. Kunach*, 76 Wis. 2d 436, 452, 251 N.W. 2d 449, 451 (1977) and *State v. Deetz*, 66 Wis. 2d 1, 11, 13, 224 N.W.2d 407, 412-13 (1974)). Thus, the court in *Borsellino*, rejected an assertion similar to that raised by Petitioners here stating, "Although in granting pier permits under § 30.12, Stats. the DNR acts in furtherance of the public trust, **Borsellino cannot state a cause of action based only on a general allegation of a violation of the public trust doctrine.**" Borsellino 2000 WI App at ¶18. (Emphasis added). As in *Borsellino*, Petitioners cannot assert public trust doctrine violation when the DNR was acting in accordance with its delegated statutory authority.

Petitioners are equally incorrect in asserting that Wis. Stat. §§ 281.11 and 281.12 (formerly § 144.025) is a general grant of public trust authority that allows DNR to consider factors beyond those in specific statutes. In *Rusk County Citizen's Action Group, Inc. v. DNR*, 203 Wis. 2d 1, 10, 552 N.W.2d 110 (Ct. App. 1996), the court expressly rejected the argument that general authority cited in Wis. Stat. § 281.12 can authorize the DNR to impose conditions

beyond those established in a statutory scheme. In *Rusk County*, a citizen group petitioned the DNR to ban sulfide mining citing § 281.12. The Court noted that the DNR had a regulatory scheme to govern the issuance of mining permits and therefore, rejected the claim that the general provisions of § 144.025 could add to it:

> The Mining Act is the more specific statutory grant of authority dealing with the question of sulfide mineral mining and it was enacted eight years after § 144.025. When a specific grant of authority to an agency conflicts with a more general grant of authority, the specific statute controls. *Grogan v. PSC*, 109 Wis. 2d 75, 81,325 N.W.2d 82, 85 (Ct. App. 1982). This is especially true when the specific statute is enacted after the general statute as in this case.

Id. The same analysis holds true here. Wis. Stat. § 281.34 is a more specific and more recent enactment than §§ 281.11 and 281.12 and therefore controls the standards for granting high capacity wells.[6]

Thus, Petitioners assertion that the DNR needs "no statute or regulation" to evaluate impacts of high capacity wells on surface waters (Pet. Br. at 7) is simply at odds with established Wisconsin law. The Legislature has implemented its public trust duties with respect to high capacity wells by delegating authority to DNR through the statutory scheme in Wis. Stat. § 281.34. Neither the DNR nor the Petitioners can ignore that scheme. If there is to be a change to that scheme, it is for the Legislature to make.

2. Petitioners' Demand that DNR Hold a Hearing to Consider Alleged Surface Water Impacts for Well #7 Is Contrary to the Legislative Scheme and Is Thus Not An Interest Protected By Law.

Petitioners' attempt to expand the statutory criteria is directly contrary to the legislative history and principles of the statutory construction. Statutes must be read as a whole to give effect to the entire statutory scheme. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004

[6] In addition, Wis. Stat. § 281.11 is not even applicable to high capacity wells. Wis. Stat. § 281.11 is a statement of "the purpose of this subchapter" (i.e. subchapter II) not the entire chapter. The high capacity well provisions of Wis. Stat. § 281.34 are in Subchapter III.

WI 58, ¶46, 271 Wis. 2d 633. Here, the Legislature clearly has established a multi-level regulatory scheme in which environmental factors are to be considered before permit issuance in some categories and not others. Well #7 is in a category in which such review is not required. Petitioners demand to consider factors beyond and contrary to the legislative scheme is unwarranted.

The intent of this scheme is reflected in the legislative history. As the high capacity well statute has evolved, the Legislature has granted the DNR limited additional regulatory authority in a careful sequential process.[7] The Legislature has never given the DNR open ended authority. In addition to the changes enacted in 2003 Wis. Act 310, the Legislature also created a Groundwater Advisory Committee for the express purpose of reporting back to the Legislature in 2006 and 2007 regarding additional changes to the groundwater law.[8] The 2007 Report to the Legislature reviewed various changes to the existing law, one of which was to expand the environmental review for tier two wells to all waters.[9] That option was rejected and has not been adopted by the Legislature. There are obviously legitimate public policy considerations on both sides of this issue, but it is a legislative issue. If the Department has *carte blanche* authority as Petitioners assert, all of these careful legislative choices would be meaningless.

This same conclusion is supported by accepted statutory construction principles. Courts construe the statutory text so that no part of it is surplusage, "giving effect to all the words that

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[7] The original focus of the high capacity well statute was only the protection of public utility wells. *See* Wis. Stat. § 144.025(2)(e), Laws of 1965, ch. 614. In 1985, the Legislature granted additional authority to the Department to condition or deny approvals for wells over 2,000,000 gallons per day based on various factors including surface water impacts. *See* 1985 Wis. Act 60. As noted above, 2003 Act 310 also provided limited additional authority to DNR.

[8] *See* 2003 Wis Act 310 § 15.

[9] A copy of the 2007 Report is available on DNR's website at http://dnr.wi.gov/org/water/dwg/gac/GACFinalReport1207.pdf.

are used." *Randy A.J. v. Norma I. J.*, 2004 WI 41, ¶22, 270 Wis. 2d 384. *See also Kalal*, 2004 WI 58 at ¶46. Here, the Petitioners would render whole sections of the statutory scheme surplusage. Similarly, under the rule of construction, "*inclusion unius est exclusion alterius* . . . to include one thing implies the exclusion of the other." *Keip v. Wisconsin Dept. of Health and Family Services*, 2000 WI App 13, ¶18, 232 Wis. 2d 380. Sections 281.34(5)(a) state that the Department "shall" condition or deny an approval for a high capacity well to ensure "that the water supply of a public water utility will not be impaired." Because no other factors are listed, the Legislature intended to exclude any consideration of factors not expressly authorized. *See C.A.K. v. State*, 154 Wis. 2d 612, 623, 453 N.W.2d 897 (1990).

In short, there is no basis under current law to imply that the DNR has the authority to require environmental review or an evaluation of surface water impacts of high capacity wells beyond those expressly enumerated in the statutes. That being the case, Petitioners allegations that the 2007 Modification will allow Well #7 to intercept and remove groundwater, damage the sensitive wetlands at and adjacent to the Lake, and adversely alter the physical properties of the Lake are not material facts under Wis. Stat. § 281.34 and cannot not form the basis for a hearing. The same is true with respect to the alleged surface water impacts associated with the 2006 Approval. The only material fact – impact to public utility wells – was never alleged.

3. The Legislative Scheme Addresses Public Trust Impacts Through Other Remedies, Outside of the Permitting Process.

The Petitioners repeatedly chastise the DNR for "shifting its duty" under the public trust doctrine to Petitioners. The DNR has done no such thing. The DNR has followed the balance of public interests prescribed by the Legislature in the established three-part legislative scheme for regulating high capacity wells. The Legislature has provided other remedies to parties like the Petitioners who believe that there is the potential for other surface water impacts.

The Legislature is well within its prerogative to balance how public trust considerations are taken into account. The public trust doctrine is not absolute.[10] The three-part scheme adopted for high capacity wells is similar to many other legislative determinations affecting public trust waters. The Legislature has determined that some activities that impact navigable waters can be allowed by permit. *See, e.g., State v. Bleck*, 114 Wis. 2d 454, 467-68, 338 N.W.2d 492 (1983). In other cases, the Legislature has determined that some activities are exempt from regulation.[11] In still other cases, the Legislature has determined that some threshold must be reached before regulation is necessary. Wisconsin water law is replete with examples where such lines have been drawn by the Legislature.[12] That does not mean that there are no impacts to public trust waters from such activities, only that those impacts are not sufficient to warrant regulation by permit.

Equally important, the statutes provide that even when the DNR is not required to consider public trust impacts as part of its permitting scheme, members of the public have other remedies if they can come forward and show some actual detriment to the public trust. For example, the DNR has authority to address certain "infringement of the public rights relating to

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[10] *See State v. Village of Lake Delton*, 93 Wis. 2d 78, 96, 286 N.W.2d 622 (Ct. App. 1979), ("[N]o single public interest in the use of navigable waters, though afforded the protection of the public trust doctrine, is absolute. Some public uses must yield if other public uses are to exist at all. The uses must be balanced and accommodated on a case by case basis.")

[11] For example, agricultural uses of land, highway projects, and projects in Milwaukee County have been exempt from the requirements of that section of Wis. Stat. § 30.19 since the early 1960s governs connected enlargements to navigable waters and grading on the banks of such waters.

[12] For example, permits for grading on the banks of a navigable water are required only where the grading exceeds 10,000 square feet, § 30.19(1g)(c); permits for unconnected ponds are required only where the pond is within 500 feet of a navigable water, § 30.19(1g)(am); permits for stormwater discharges from construction sites are required for activities of one acre or more in accordance with federal requirements implemented under § 283.33(1)(a); stormwater permits for municipalities are limited to those exceeding the population limits in § 283.33(1)(b)-(cr); and shoreland zoning requirements apply only to those areas defined as shorelands within unincorporated areas governed by § 281.31 and § 59.692.

navigable waters" pursuant to Wis. Stat. § 30.03(4)(a).[13] *See ABKA Limited Partnership v. DNR*, 2002 WI 106, ¶17, 255 Wis. 2d 486. Similarly, DNR and members of the public also have the right to bring nuisance abatement actions under the provisions of Wis. Stat. § 30.294. *See Gillen v. City of Neenah*, 219 Wis. 2d at 828-829. The same is true here. If Petitioners can come forward with facts to show an actual adverse impact, they have other remedies available to them outside of the permitting scheme should they chose to use them. Those remedies however, do not include altering the regulatory scheme for issuing permits under Wis. Stat. §281.34.

III. IF A HEARING IS GRANTED ON THE MODIFICATIONS, IT MUST BE LIMITED TO ISSUES RELEVANT UNDER THE APPLICABLE LAW.

Based on the foregoing analysis, the Village maintains that no contested case hearing is warranted because the Petitioners have not met the requirements for a hearing under Wis. Stat. § 227.42. However, if the Court should grant a hearing, the scope of that hearing must conform to the standards under Wis. Stat. § 281.34 and Chapter 227. Any contested case hearing must be limited in two primary respects:

- The hearing must be limited to the modification, not the underlying permit.
- The hearing must be limited to the standards under the statute and not an open ended inquiry as to whether "Well No. 7 will negatively impact the navigable waters of Lake Beulah."

The only applicable standard to Well #7 is set forth in Wis. Stat. § 281.34(5)(a). If there is a hearing, the hearing must be limited to whether the modification affects that standard. Any authorization of a hearing beyond those parameters is a clear violation of the scope of the statutes under which the Village's approval was granted and Chapter 227.

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[13] This section provides: (a) If the Department learns of a possible violation of the statutes relating to navigable waters or a possible infringement of the public rights relating to navigable waters, and the Department determines that the public interest may not be adequately served by imposition of a penalty or forfeiture, the Department may proceed as provided in this paragraph, either in lieu of or in addition to any other relief provided by law.

CONCLUSION

This is not the forum for the Petitioners to obtain the hearing they requested (and lost) on the 2003 Approval four years ago, nor is it the forum to obtain a hearing on the 2005 Approval which they waived, nor is it the forum to re-write the statutes governing the issuance of high capacity well permits in Wisconsin. This case is about whether Petitioners have stated a sufficient interest to have a hearing on two minor modifications to the Village's municipal well. There is no basis for any hearing, but if one is granted, it must be limited to the requirements that apply to the permit modifications at issue. If there really is an impact on surface water from Well #7 at some future time, the Petitioners can bring an appropriate action at that time, but this case should be dismissed.

DATED this 19th day of June, 2008.

ANDERSON & KENT, S.C.

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Re: Walworth County Case #06-CV-673
Lake Beulah Management District,
Petitioner
Lake Beulah Protective and Improvement Association,
Co-Petitioner,
vs.
Wisconsin Department of Natural Resources,
Respondent,
Village of East Troy,
Intervening Respondent.

3 pages

Counsel, following is the Court's response to you regarding the above file:

"After careful review of files 06CV673 and 07CV674 and the briefs and record filed therein, the Court believes the parties and/or the court have collectively taken a wrong procedural turn. After the Court reached that conclusion, the Court turned and reviewed file 06CV172.

In file 06CV172 filed 3-3-06, the petitioners contended that the 9-6-05 well permit was not properly issued. At the time petitioners filed 06CV172 they did not know if the 9-6-05 permit would be treated as an extension of the 9-3-03 permit or as an entirely new permit in its own right. If the 9-6-05 permit were ruled to be a new permit, then defendants were conceding that they were too late to request a contested hearing before the DNR under §227.42 stats since such a request had to be made within 30 days of the issuance of the permit per §227.53(1)(a)2. (The appellate court eventually did rule the 9-6-05 permit was a new permit.)

However, petitioners hedged their bets in their 06CV172 petition by also asking for judicial review of the DNR's granting of the 9-6-05 permit. Their present contention is that under §227.52 they can ask for judicial review of the DNR's decision to issue the 9-6-05 permit if they request the same within six months of the issuance of the permit. Their petition was filed on 3-3-06 which is within six months of the issuance of the 9-6-05 permit (note still within six months even if that permit was effective on 9-3-05).

Upon the Court's review of 06CV673, 07CV674 and then 06CV172 the Court now realizes that if 06CV172 is decided in petitioners' favor the issues raised in 06CV673 (5-25-06 modification of the 9-6-05 permit) and 07CV674 (3-16-07 modification of the 9-6-05 permit) would be moot since the underlying 9-6-05 permit would be invalid.

It therefore makes no sense to decide 06CV673 (now consolidated with 07CV674) when that decision could turn out to be meaningless if 06CV172 is decided in favor of the petitioner. Furthermore, even if 06CV172 is decided in favor of the DNR and the Village of East Troy, that decision will profoundly affect the factual status of files 06CV673 and 07CV674 thus, almost certainly, requiring any decision the Court makes on them now to be revisited after the decision on 06CV172 is made.

Therefore, this Court will not decide 06CV673 or 07CV674 until after 06CV172 is decided.

However, the Court believes the parties can quickly do briefs on 06CV172 because their prior pleadings in all three files and their respective briefs in 06CV673 and 07CV674 show an intimate familiarity with the facts underlining 06CV172.

The Court further notes that the record relied on by the parties in support of their contentions in 06CV172 can include any information shown by the record to have been known to the DNR before and after the issuance of the 9-3-03 permit and up to the time they issued the 9-6-03 permit as long as it is relevant to the claims the parties made in their pleadings in 06CV172. The above is allowed because on judicial review the Court must determine if the DNR's decision to issue the 9-6-05 permit was a reasonable exercise of discretion under the relevant facts that the DNR was aware of as well as the applicable law.

In light of the above, this court requires petitioners to file a brief on 06CV172 by 8-11-08, DNR and the Village by 8-25-08, and petitioners' rebuttal by 9-1-08. Furthermore, the 8-13-08 hearing on the motion to strike is cancelled.

(Note: Contrary to petitioner's claim {page 9, footnote 3 of petitioner's 7-11-08 brief filed 7-14-08} petitioner has never clearly asked this Court to issue a briefing schedule on 06CV172. In fact the Court originally set a briefing schedule that covered 06CV172 as well as 06CV673 and 07CV674 but the caption on a stipulation and order to extend discovery filed 11-12-07, which all the attorneys signed on to, confused the arrangement of the cases. It showed 06CV172 consolidated with 06CV673 instead of with 07CV674.)

On 1-30-08 the Court correctly set a briefing schedule for 06CV172 and one for 06CV673, the latter of which had been consolidated with 07CV674, so that everything henceforth in 06CV673 and 07CV674 was to be subsumed into 06CV673.

Thereafter, Attorney Kent for the Village caught what he perceived was a caption confusion. (There was a caption confusion on the 11-12-07 stipulation but none on the 1-30-08 "Briefing Schedule.") To correct the perceived confusion, Attorney Kent sent a 2-20-08 letter with a proposed order that would correct the caption. Attorney Kent's letter specifically recognized that the briefing schedule for 06CV172 remain separate from the briefing schedule for the two consolidated cases. But his proposed order recommended that the briefing schedule of 1-30-08 be limited to the two consolidated cases. When the Court signed the order, Attorney Kent had sent with his 2-20-08 letter it did not catch on or realize that in effect Attorney Kent's proposed order was canceling the briefing schedule for 06CV172. In fact this Court did not realize that that had happened until the Court read petitioner's reply brief (said page 9, footnote 3) and then checked back in the files for any sign that petitioner had previously asked the Court to set a briefing schedule on 06CV172.

The Court wishes petitioner had reminded the Court of the need for a briefing schedule for 06CV172. The Court then would have immediately corrected the matter. RJK"

The Honorable Robert J. Kennedy, Walworth County Circuit Court Judge

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(3)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with s. 809.19(3)(b) and that contains, at a minimum: (1) a table of contents; (2) a copy of any unpublished opinion cited under s. 809.23(a) or (b); and (3) portions of the record essential to an understanding of the issues raised.

I further hereby certify that if the record is required by law to be confidential, the portions of the record included in the supplemental appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 27th day of December, 2010.

Dean P. Laing
State Bar No. 1000032

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that I have submitted an electronic copy of this supplemental appendix, which complies with the requirements of s. 809.19(13). I further certify that this electronic supplemental appendix is identical in content to the printed form of the supplemental appendix filed as of this date. A copy of this certificate has been served with the paper copies of this supplemental appendix filed with the court and served on all opposing parties.

Dated this 27th day of December, 2010.

Dean P. Laing
State Bar No. 1000032

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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2008AP003170

LAKE BEULAH MANAGEMENT DISTRICT

Petitioner-Appellant-Cross-Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner-Co-Appellant-Cross-Respondent,

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent-Respondent,

VILLAGE OF EAST TROY

Intervening Respondent-Respondent-Cross-Appellant-Petitioner.

COMBINED REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF VILLAGE OF EAST TROY INTERVENING RESPONDENT-RESPONDENT-CROSS-APPELLANT-PETITIONER

On Appeal from an Decision of the Court of Appeals, District II dated June 16, 2010 relating to a Final Order Entered on September 20, 2008
The Honorable Robert J. Kennedy, Judge
Walworth County Circuit Court Case Nos. 06-CV-172

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January 11, 2011

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INTRODUCTION

The Wisconsin Legislature carefully crafted a graduated regulatory framework in Wis. Stat. §§ 281.34 and 281.35 to govern the permitting of high capacity wells by the Wisconsin Department of Natural Resources (DNR). Despite the histrionics of the Respondents,[1] such a graduated regulatory program is not "illogical, unprecedented and dangerous." DNR Br. at 1. To the contrary, it is a commonplace and common sense way of regulating water resources. Graduated regulatory approaches are not an abdication of the Legislature's public trust responsibilities, but rather reflect legislative judgments on how best to *effectuate* the public trust.

Specific permit standards, such as those established in Wis. Stat. §§ 281.34 and 281.35, reflect legislative judgments on how to best balance various public interests, such as the necessity for reliable public water supply and other public interests. Projects exempt for review or subject to limited review reflect legislative judgments on when projects typically have acceptable impacts on public trust resources, when the expenditure of

[1] The Lake Beulah Management District (LBMD or District) and the Lake Beulah Protective and Improvement Association (LBPIA or Association) and Wisconsin Department of Natural Resources (DNR) will be referred to collectively as Respondents.

agency resources is not warranted, and when post-permit remedies are adequate.

The Respondents want to replace the carefully crafted legislative judgment governing the permitting of high capacity wells with the approach adopted by the Court of Appeals, which the Court acknowledges is without any standards to guide the DNR's consideration of well permit applications. App-20, ¶3.[2] Respondents assert that §§ 281.34 and 281.35 merely establish "minimum standards" and that Wis. Stat. § 281.12 authorizes DNR to require more whenever the DNR deems it appropriate to do so. This is simply incorrect. Respondents fail to acknowledge, much less address, the fundamental and irreconcilable conflicts that arise when one substitutes prescribed legislative standards for a standardless system.

Respondents justify this approach based on an assertion that it is required under the public trust doctrine to prevent the destruction of lakes and the devastation of water resources. DNR Br. at 1; Dist. Br. at 42. Not so. Permitting thresholds for water withdrawal have been in place for decades, along with perfectly appropriate remedies outside of the permit process. To use the public trust doctrine as a basis to justify regulatory

[2] References to "App." are the Village's Appendix, "Supp. App." to the Village's Supplemental Appendix, "Dist. App." to the District's Appendix.

chaos and to ignore specific legislative choices on how to effectuate the public trust is an abuse of this important doctrine.

Finally, applicants like the Village, must be able to rely on the administrative *process* as well as the *standards* approving high capacity wells. Allowing parties like the District and Association to avoid the process for submitting evidence under Wis. Stat. ch. 227 and then claim that any document submitted to the DNR is part of the agency record, is contrary to law and a further invitation to regulatory chaos. The decision of the Court of Appeals should be reversed.

ARGUMENT

I. THE STATUTORY FRAMEWORK FOR PERMITTING HIGH CAPACITY WELLS DOES NOT ENDANGER PUBLIC TRUST RESOURCES.

There is nothing to support the District's repeated assertions that Well #7 will destroy Lake Beulah, or that following the legislative framework for permitting high capacity wells will destroy the waters of the state. Indeed, Well #7 has been in operation now for over two years without such catastrophic impacts.

A. The District And Association Misrepresent The Alleged Impacts To Lake Beulah From Well #7.

The District and the Association hope that, by asserting exaggerated and unsubstantiated claims about the potential impact of Well #7 on Lake Beulah, that the Court might be more inclined to overturn the legislative judgments reflected in Wis. Stat. §§281.34 and 281.35. The relevant analysis is a *statutory* analysis. Nevertheless, it is important to place the claims of the District and Association in context.

First, Respondents do not refute the fact that Lake Beulah has 4.7 billion gallons of water and that the maximum capacity of Well #7 is 0.03% of that volume. Instead, the District responds by noting that in nine years this will equal the entire volume of the lake. Dist. Br. at 10, n.1. That assertion is highly misleading in that it ignores rain, snow, surface water runoff and groundwater recharge. In fact, Lake Beulah water levels are regulated by a dam, and water flows out of Lake Beulah at a summer average of 20.2 to 29.3 cubic feet per second, which translates to a discharge of water of 13.0 to 18.9 million gallons per day.[3] Thus, the

[3] SEWRPC completed a detailed report of the Mukwonago Watershed in June 2010. Southeastern Wisconsin Regional Planning Commission, *Mukwonago River Watershed Protection Plan* (June 2010) *available at* http://maps.sewrpc.org/publications/capr/capr-309-mukwonago-river-watershed-protection-plan.pdf. The standard conversion is 1 cfs = 448.83 gallons per second.

maximum capacity of Well #7 (2.0 million gallons per day) is a small percent of the *surplus* water leaving the lake.

Second, the District's assertions that various experts "unanimously conclude that Well No. 7 will have an adverse impact on Lake Beulah," (Dist Br. at 21), is simply false. Of the four reports cited by the District, the only one in the DNR record is the Layne-Northwest report which concludes that Well #7 "will *avoid* any serious disruption of groundwater discharge to Lake Beulah."). App. 54. As to the other documents, even if they were in the record, they do not support the District's claim. At most, they *question* the extent of potential impacts. SEWRPC concludes, "the current level of knowledge is not adequate to make reasonable estimates of the severity of impacts. . . . Given the size of the Lake and the tributary watershed, the loss of 400,000 to 500,000 gallons per day of groundwater *may not have a major impact*." (Emphasis added.) Dist. App. 26. U.S.G.S. similarly states, "Given the size of Lake Beulah, *it is unclear* if the reduction in base flow …would have a significant effect on total base flow to the lake." (Emphasis added.) Dist. App. 24. Even Mr. Nauta, who asserts that there

will be an impact, ultimately recommends that more information be obtained. Dist. App. 10 ¶34.[4]

The Respondents would like nothing better than to have this Court remand this case to DNR to investigate the parties' competing claims about the likely impact of Well #7 on Lake Beulah, but that is exactly what this Court should not do. Doing so would improperly interfere with the choice the Legislature has already made regarding the standards for permitting a well with the capacity of Well #7.

Finally, the Association's suggestion that there must be adverse impacts on Lake Beulah because the Village has attempted to avoid a hearing has no basis in fact. Ass'n. Br. at 1. The Village has always maintained, based on sound scientific data, that Well #7 will not have adverse impacts to Lake Beulah.[5] The reason the Village wanted to avoid a second round of hearings is straight-forward and documented in this record. The first round of hearings by the District and the Association on the 2003

[4] It should also be recalled that the Nauta affidavit was submitted as part of a motion for reconsideration which was summarily denied (Ct. App. ¶10, App. 6) and neither the District nor the Association asked for a contested case hearing on the 2005 Approval. *Id.* ¶34, App. 22. The result is that Nauta was never subject to cross examination and the Village never had the opportunity to submit expert testimony to refute these claims.

[5] *See e.g.* Statement of Village President Bill Loesch, *Facts Village Residents Need to Know about Well #7* (July 9, 2010) *available at* http://www.easttroy-wi.com/.

Approval took two years, and by 2005, DNR advised the Village that it was not in compliance with DNR water capacity regulations and subject to penalties of $5,000 per day. R.8-14. The Village wanted to avoid a second round of proceedings so it could construct the well, provide adequate water to its residents and thereby avoid threatened enforcement actions.

More importantly, regardless of the Village's intent, DNR issued a new approval which triggered new hearing rights. If the District or Association wanted a contested hearing on the 2005 Approval all they had to do was to ask for one. They chose not to do so. The implication from this history is that it is the District and the Association who wanted to avoid subjecting their allegations to the scrutiny of a contested hearing.

B. The Well Permitting Thresholds Established By The Legislature Are Not Unreasonable.

The assertion that other waters of the state will be destroyed if wells that have a capacity of less than 2,000,000 gpd are not subjected to full environmental review before a permit is granted, is also unwarranted. Regulatory thresholds exist throughout water resources programs and are designed to avoid unnecessary review where impacts are expected to be minimal. Village Br. at 25-28. The same is true here.

Respondents do not deny the fact that the Legislature has also set 2,000,000 gpd as the threshold for surface water withdrawal, and had the Village sought to withdraw water from Lake Beulah directly, it would not have needed a surface water withdrawal permit at all.[6] Indeed, until the enactment of 2003 Wis. Act 310, the Legislature set similar thresholds for all groundwater withdrawals. These threshold levels have been in effect for decades. And when concerns about the impact of groundwater withdrawal on sensitive waters such as trout streams and springs were raised, the Legislature addressed those concerns in Act 310.

Finally, the Respondents wholly fail to address the fact that DNR has enacted rules governing when environmental review should be undertaken for various activities including high capacity wells. Those rules provide that a high capacity well permit is an action which DNR has found not to have significant impacts and therefore does *not* require *any*

[6] The only response to this argument was from DNR which noted that the Village would require *other* permits associated with a surface water withdrawal such as intake structure under Wis. Stat. ch. 30 or a plan review under Wis. Stat. § 281.41. Maybe so, but neither of these permits regulates the impacts from the *withdrawal* of surface water below 2,000,000 gpd. Most intake structures are subject to a Chapter 30 exemption or general permit which do not require a full public interest review. The plan review standards under § 281.41(1)(c) are limited reviews of water withdrawals *over* 2,000,000 gallons per day that are subject to § 281.35(5)(d).

environmental review. *See* Wis. Admin. Code § NR 150.03(8)(h)1.[7] The Legislature has only altered that administrative determination by requiring environmental review in limited circumstances. Otherwise, DNR rules apply and wells like Well #7 do not warrant environmental review.

C. Remedies Outside The Existing Permit Framework Are Adequate.

The graduated permit program indicates that, in the judgment of the Legislature, adverse impacts are not likely to occur for wells like Well #7. However, if they do occur, post-permit remedies are adequate and appropriate. The Respondents do not disagree that such remedies are *available*, they merely criticize their effectiveness. But the Respondents substitute rhetoric for analysis and fail to explain *why* post permit remedies are not adequate.[8] In the context of high capacity wells, there are several reasons why such remedies *are* adequate.

First, the operation of a high capacity well is not an all-or-nothing proposition. It is not, as the DNR asserts, a matter of shutting down the

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[7] This section classifies high capacity wells as a "Type IV" action. Wis. Admin. Code §NR 150.03(4)(e) notes that Type IV actions are those actions which include,"(e) Actions **which individually or cumulatively do not significantly affect the quality of the human environment**, do not significantly affect energy usage and do not involve unresolved conflicts in the use of available resources." (Emphasis added.)

[8] For example, the District simply asserts without any explanation that post permit remedies are "obviously" too late. Dist. Br. at 5.

well if it is determined that the well is having an adverse impact. DNR Br. at 32. Rather there are a variety of options that can be tailored to address whatever issues might arise. For example, the annual average rate of Well #7 could be reduced, or pumping could be seasonally limited or pumping could be limited during certain times of low flow. Even DNR concedes these options are available. DNR Br. at 33.

Second, if there are impacts to surface water resources from the withdrawal of groundwater, such impacts are not like the immediate and permanent impacts that would occur from physical changes to a waterway such as from dredging, filling or the placement of structures. For example, in the case relied upon by the District and the Association, *Hixon v. Public Service Commission,* 32 Wis. 2d 608, 611, 146 N.W.2d 577 (1966), the issue was dredging and the permanent placement of fill 85 feet by 120 feet into a lake. Dist. Br. at 43, Ass'n Br. at 46.[9] By comparison, the impacts from pumping groundwater are likely to occur gradually over time and are able to be reversed by altering the timing and amount of pumping.

[9] The District cited to *Hilton ex rel Pages Homeowner's Ass'n v. Department of Natural Resources,* 2006 WI 84, ¶28 n.14, 293 Wis. 2d 1, 20, n.14, 717 N.W.2d 166 which quotes from *Hixon*.

Third, in this context, putting restrictions in place at the "front end" is not necessarily a better way of addressing potential impacts. Unlike physical changes to a waterway where the impacts can be known with a high degree of certainty up front, the impacts of withdrawal of groundwater on adjacent surface water in a dynamic hydrologic system may not be capable of determination with certainty beforehand.[10] As the Legislature recognized, below a certain threshold, it is not unreasonable to wait and see whether the withdrawal of groundwater will affect adjacent surface waters. Then, if actual impacts occur over a period of time, Wis. Stat. § 30.03 or common law remedies can be used to tailor an appropriate response.

D. A Graduated Permit Framework Is Consistent With The Public Trust Doctrine.

The Association's lengthy history of the public trust doctrine ably documents the evolution of the doctrine from its early focus of promoting the floating of saw logs to market and developing water power dams to today's focus on recreational uses and water quality. This discussion is not

[10] *See* for example, the Wisconsin Groundwater Coordinating Council observed on page 8, "Aside from a few cases, the picture of groundwater withdrawals and associated impacts on surface water is ill-defined at the state-scale. There is a need to further quantify hydrologic relationships between surface water and groundwater, as well as to develop tools to evaluate the impacts of withdrawals on surface waters." Wisconsin Groundwater Coordinating Council, *Fiscal Year 2010 Report to the Legislature*, (August 2010), *available at* http://dnr.wi.gov/org/water/dwg/gcc/rtl/2010/gccreport2010.pdf.

inconsistent with the position taken by the Village. Indeed, it illustrates that the public trust doctrine has never required that the navigable waters of the state be free from all adverse impacts.

What the public trust doctrine requires is that the waters be held in trust for the public. How the Legislature has defined the public interest has evolved, but it has always involved a balancing of the various public uses of the water. As the court in *State v. Village of Lake Delton*, 93 Wis. 2d 78, 93-94, 96, 286 N.W.2d 622 (Ct. App. 1979) observed:

> In many cases, the supreme court has upheld a variety of intrusions into the public waterways, sometimes in the service of commercial interests, even when such intrusions are permanent in nature and destructive of other interests protected by the trust. The test employed in each case has been a balancing test in which the court has weighed the harm done by the intrusion against the benefits conferred by allowing it.
>
> * * * *
>
> The principle established by the *Merwin* and *Milwaukee* cases is that no single public interest in the use of navigable waters, though afforded the protection of the public trust doctrine, is absolute. Some public uses must yield if other public uses are to exist at all. The uses must be balanced and accommodated on a case by case basis. The principle has been reasserted in many decisions of the supreme court.

The Association's public trust history also notes the large body of implementing legislation which reflects the fact that the Legislature has the primary responsibility for implementing the public trust and making those choices. *Hilton*, 293 Wis. 2d at 15. In many cases, the Legislature has

delegated certain authority to the DNR to implement those choices.[11] This is also consistent with the position of the DNR and the Court of Appeals that the public trust doctrine is not self executing and the DNR does not have authority to act absent legislative authorization. DNR Br. at 9-10; Ct App. ¶29, App. 18-19.

As noted in the Village's initial brief, the Legislature has frequently utilized graduated permit programs as a way of implementing its public trust responsibilities, and that is precisely what it has done here. It has carefully balanced various public interests in setting the standards for high capacity wells. *See* Village Br. at 24-28. None of the Respondents appear to take issue with such an approach in other contexts. Here, however, the Respondents contend that a graduated permit program is "illogical, unprecedented and dangerous." DNR Br. at 1. To the contrary, the graduated permit program at issue here is an appropriate exercise of the Legislature's duty to protect the public trust because it balances the competing public interests in the use of the state's waters.

[11] Thus, to the extent that the DNR can be characterized as a "trustee" as claimed by the District and Association, it is only to the extent it has been delegated authority to do so.

II. RESPONDENTS' INTERPRETATION OF WIS. STAT § 281.12 DIRECTLY CONFLICTS WITH LEGISLATIVE CHOICES IN WIS. STAT. §§ 281.34 AND 281.35.

In its opening brief, the Village explained that the Legislature has established a three-tiered permitting framework in Wis. Stat. §§ 281.34 and 281.35 based on the capacity of a well in gallons per day, and the location of the well. Village Br. at 10-14. The statutory framework establishes the procedures *and* standards to be used for each of these three permit categories. The Respondents attempt to avoid this framework: (1) by characterizing the standards as minimum standards, (2) by ignoring the inherent conflicts between the DNR's general and specific authority if § 281.12 is read to authorize additional standards, and (3) by dismissing the legislative history associated with the adoption of this framework. The Respondents' arguments are without merit and should be rejected.

A. Wis. Stat. §§ 281.34 And 281.35 Are Not Minimum Standards That May Be Supplemented Whenever DNR Sees Fit.

The Respondents argue that §§ 281.34 and 281.35 are "minimum standards" and that § 281.12 therefore may be used as a basis for DNR to impose upon applicants additional standards before they may obtain a well permit. This argument does not withstand scrutiny because it ignores the

impermissible conflict created when § 281.12 is used as a basis for regulating that which the Legislature has already regulated in §§ 281.34 and 281.35.

1. Wis. Stat. §§ 281.34 And 281.35 Are Not Drafted As Minimum Standards.

When the Legislature has wanted to create a regulatory framework with minimum standards, it has said so, as the following examples illustrate:

- **Stormwater standards**: "the department shall establish by rule **minimum standards** for activities related to construction site erosion control at sites" Wis. Stat. § 281.33(3)(a)1.

- **Great Lakes Compact diversion standards**: "(4t) Water management and regulation; applicability. (a) ***Minimum standard***. This standard of review and decision shall be used as a **minimum standard**. Parties may impose a more restrictive decision-making standard for withdrawals under their authority. . . . Wis. Stat. § 281.343(4t)(a)

- **Wastewater effluent standards**: "(b) ***Minimum compliance.***" Wis. Stat. § 283.13(3)(b)1.

- **Solid waste facilities**: "(1) The department shall promulgate rules establishing **minimum standards** for the location, design, construction, sanitation, operation, monitoring and maintenance of solid waste facilities." Wis. Stat. § 289.05(1).

- **Metallic mining facilities**: "(a) The department by rule after consulting with the metallic mining council shall adopt **minimum standards** for exploration, prospecting, mining and reclamation to ensure that such activities in this state will be conducted in a manner

consistent with the purposes and intent of this chapter." Wis. Stat. § 293.13(2)(a).

- **Mercury air pollution standards**: "The department shall: . . . . (9) Prepare and adopt **minimum standards** for the emission of mercury compounds or metallic mercury into the air, consistent with s. 285.27 (2) (b)." Wis. Stat. § 285.11(9).

- **Solid waste incinerator operator certification** " **(2)** . . . The department shall do all of the following: . . . (b) Establish the requirements for and term of initial certification and requirements for recertification upon expiration of that term. **At a minimum**, the department shall require applicants to complete a program of training and pass an examination in order to receive initial certification." Wis. Stat. § 285.51(2)(b).

These sections illustrate that the Legislature knows how to draft a statute that establishes minimum standards when it wants to do so. No such "minimum standard" language appears in the high capacity well statutes. Had the Legislature intended that Wis. Stat. §§ 281.34 and 281.35 merely establish minimum standards, it would have said so.

Similarly, where the Legislature has wanted to grant DNR authority to adopt standards beyond a specified list, it has also said so. One example is Wis. Stat. § 160.15 relating to the establishment of groundwater standards. While § 160.15(1) specifies groundwater standards which the DNR must establish by rule, § 160.15(2) and (3) allow the DNR to establish additional standards. Wis. Stat §160.15(2) provides:

> **(2) The department may establish a preventive action limit for a substance which is lower than the level specified under sub. (1) if the department concludes, to a reasonable degree of scientific certainty, based on significant technical information which is scientifically valid, that a more stringent level is necessary** to protect public health or welfare from the interactive effects of the substance. **In evaluating whether the evidence provides a sufficient basis for a more stringent level, the department shall consider** the extent to which the evidence was developed in accordance with generally accepted analytical protocols and may consider whether the evidence was subjected to peer review, resulted from more than one study and is consistent with other credible medical or toxicological evidence. (Emphasis added.)

Significantly, the Legislature not only expressly authorized DNR to impose more stringent requirements, but it specifically established when and how DNR may do so and the standards it is to apply. This stands in sharp contrast to the totally undefined standards that the Court of Appeals claims may be added to §§ 281.34 and 281.35 by implication based on the general directive in § 281.12. In short, when the Legislature has wanted DNR to go beyond the standards set forth in statute, it has said so and it has given DNR specific direction. It did not do so here.[12]

[12] Ironically, the Association cites Wis. Stat. § 160.15 statute as an example where the Legislature has limited DNR authority to specified standards, when in fact, § 160.15(2) and (3) provide DNR authority beyond the minimum standards in § 160.15(1). *See* Ass'n Br. at 33.

2. Wis. Stat. §§ 281.34 And 281.35 Establish A Set Of Prescribed Standards That Conflict With A "Minimum Standards" Approach.

In its initial brief, the Village explained why the prescribed standards in Wis. Stat. §§ 281.34 and 281.35 cannot be reconciled with an approach that allows the DNR to add new or different standards under § 281.12 whenever it sees fit. Village Br. at 36-38. The Respondents fail to respond to those conflicts. The conflicts are, however, worth reviewing in light of the "minimum standards" argument now proffered in place of a response.

First, the Legislature established prescribed standards and procedures depending on the size and location of the well, and chose not to provide *carte blanche* powers to DNR. This can be seen at each regulatory level.

- For Category 2 wells that are *not* within groundwater protection areas or springs or do not involve high water loss, the standard in Wis. Stat. § 281.34(5)(a) is to ensure that the well does not interfere with other public water supply wells. That is the prescribed standard applicable to Well #7.
- For Category 2 wells in groundwater protection areas and springs or that do involve high water loss, the DNR must perform an

environmental review and determine that a permit has conditions that "ensure that the high capacity well does not cause significant environmental impact." Wis. Stat. § 281.34(5)(b)1., and (5)(d)1.

- For Category 3 wells, the DNR uses seven factors which include the balancing of various public interests. Wis. Stat. § 281.35(5).

By contrast, the District argues that the Court of Appeals decision requires DNR to replace all of these standards with one in which DNR must deny the application if there is evidence that "supports the suggestion" that a well "will affect or impair the waters of the state." Dist Br. at 46. "Any affect" is not the standard the Legislature has adopted for any high capacity well. For the DNR to apply its "general authority" under § 281.12 to impose the District's standard, or whatever alternative standards DNR deems appropriate, is a direct conflict with the prescribed legislative standards in Wis. Stat. § 281.34.

Second, the Legislature has chosen to make public water supply wells a priority. Specifically, Wis. Stat. § 281.34(5)(b)2. exempts public water supply wells from environmental review otherwise required in a groundwater protection area and prescribes a standard that balances environmental impact with the public benefit of providing a public water

supply.[13] This standard is not a minimum standard, it is a prescribed standard reflecting how the Legislature has chosen to balance environmental impacts and public benefits for public water supply wells.[14] Allowing DNR to exercise its "general authority" to impose a different standard or additional criteria for public water supply wells creates a direct conflict with this legislative choice regarding public water supply wells.

Third, in Wis. Stat. §§ 281.34 and 281.35, the Legislature authorized environmental review of wells in specific circumstances, thereby overruling DNR's determination in Wis. Admin. Code ch. NR 150 that no environmental review is otherwise required. Requiring environmental review for any well with potential surface water impacts disregards the choices of the Legislature and DNR's own rules.

Thus, to call §§ 281.34 and 281.35 "minimum standards" in an effort to "harmonize" these sections with the Respondents' interpretation of Wis. Stat. § 281.12, is simply wrong. The way to harmonize these sections and avoid impermissible conflicts is to allow Wis. Stat. §§ 281.34 and 281.35

[13] The same distinction is present for public water supply wells affecting a spring. Wis. Stat. § 281.34(5)(d)2.

[14] This standard is not applicable to Well #7 because it is not within a groundwater protection area or spring, but it illustrates that even for the most sensitive waters, the Legislature has established prescribed standards which recognize the importance of public water supply.

control groundwater withdrawal standards, and apply Wis. Stat. § 281.12 only where doing so would not create a conflict with standards put in place by the Legislature in specific statutes.[15]

3. The Existence Of Parallel Statutory Requirements Does Not Transform Wis. Stat. §§ 281.34 And 281.35 Into Minimum Standards.

DNR argues that § 281.34 is not fully comprehensive in scope and therefore is a minimum standard contrary to the Village's claim. DNR Br. at 18-20. This mischaracterizes the Village's position. The Village has not argued that §§ 281.34 and 281.35 purport to regulate all aspects of high capacity wells. The Village has argued that these sections are comprehensive with respect to the standards for *groundwater withdrawal*; specifically, the questions of when a permit is needed for groundwater withdrawal and the standards to be applied to that withdrawal. Thus, the fact that the well construction code, Great Lakes basin standards and public drinking water standards impose requirements in addition to the groundwater *withdrawal* standards is irrelevant. They do not convert Wis. Stat. §§ 281.34 and 281.35 into minimum standards. None of the

[15] Thus, contrary to the District's claim, this interpretation is not a "tacit revocation" of Wis. Stat. § 281.12. It is simply an interpretation that avoids a conflict with a more specific statute and set of standards.

provisions cited by DNR attempt to alter the standards for groundwater withdrawal established by Wis. Stat. §§ 281.34 and 281.35.

B. Wisconsin Case Law Underscores That A General Statute Cannot Be Used To Change The Standards Set Forth In A Specific Statute, Because To Do So Creates A Conflict.

There are two primary cases discussed by the Village that address potential conflicts between DNR's general authority and specific grants of authority: *Rusk County Citizen Action Group, Inc. v. Wisconsin Department of Natural Resources,* 203 Wis. 2d 1, 552 N.W.2d 110 (Ct. App. 1996) and *Martineau v. State Conservation Commission*, 46 Wis. 2d 443, 175 N.W.2d 206 (1970). With the sole exception of a passing footnote on *Rusk County* in DNR's brief, (DNR Br. at 12, n.7), Respondents completely ignored these cases.

This omission speaks volumes. In addition to the fact that these cases deal with the DNR and, in the case of *Rusk County*, the same statute at issue here, they are the closest cases analytically to the issue before the Court in this case. Both cases addressed situations where the Legislature had prescribed a set of standards and those standards were held to preclude DNR from using its general authority to impose different standards.

In *Rusk County*, the issue was whether the DNR had the authority under the predecessor to Wis. Stat. § 281.12 to enact a rule prohibiting mining when there was a statutory framework that prescribed standards for granting mining permits. The court found § 281.12 did not allow the department to substitute a prohibitory standard for the prescribed mine permitting standards. 203 Wis. 2d at 10. Here, Respondents make the same argument that was rejected in *Rusk County* when they ask this Court to use §281.12 to impose different (even if not prohibitory) standards from those in §§ 281.34 and 281.35.

In *Martineau*, the issue was whether the predecessor agency to DNR could use its general condemnation authority to acquire forest land when there was a separate statute that specified the procedures for acquiring forest land. The court again held that a general statute does not re-write the standards and procedures in a more specific statute. 46 Wis. 2d at 449.

Instead of addressing these cases, the District cites two other cases, *Pritchard v. Madison Metropolitan School District*, 2001 WI App 62, 242 Wis. 2d 301, 625 N.W.2d 613 and *Wisconsin Builders Ass'n v. State Department of Commerce*, 2009 WI App 20, 316 Wis. 2d 301, 762 N.W.2d

845, both involving agencies other than DNR and standards that did not conflict. These cases are irrelevant.

In *Pritchard*, a specific statute authorized school districts to provide health benefits to "employes and officers and their spouses and dependent children." 242 Wis. 2d 301, ¶19. The court held that this list did not preclude a school district from using its general authority to provide benefits to other designated family partners as well. *Pritchard* is not a case where the school district's general authority was used to alter the benefit standards applicable to the "employes and officers and their spouses and dependent children." Those standards remained unchanged. *Pritchard* merely allowed other persons to be covered. By contrast, here the Village is already covered by the standards in § 281.34, and the Respondents want to use DNR's general authority to subject the Village to different and additional standards than those prescribed in § 281.34. *Pritchard* does not support that proposition.

Similarly, in *Wisconsin Builders*, the statute required sprinklers for buildings with more than 16,000 square feet or more than twenty dwelling units. 316 Wis. 2d 301, ¶3. The court held that Commerce was not precluded from using its general authority to regulate buildings with less

than 16,000 square feet. *Id.* at ¶13. Again, in *Wisconsin Builders*, the agency was merely extending the regulation to a broader class not covered by the statute. It did not impose different standards on those already regulated.

Like the District, the Association also ignores *Rusk County* and *Martineau*, but it cites other cases for the proposition that an agency can apply criteria from more than one statute in regulating an activity. That is not a remarkable proposition if more than one statute applies and there is no conflict between the statutes.

The Association cites *Maple Leaf Farms, Inc. v. Department of Natural Resources*, 2001 WI App 170, 247 Wis. 2d 96, 633 N.W.2d 720 for the proposition that the court looked at DNR's general authority to support regulation of off-site manure application. That is true, but it was a conclusion fully consistent with the specific statute at issue, Wis. Stat. § 283.31. *Maple Leaf Farms* argued that there was an implied distinction between on-site and off-site application in Wis. Stat. § 283.31, but the Court disagreed holding, "The plain language of the statute [§ 283.31] does not distinguish between discharges that occur off-site or on-site." 247 Wis. 2d 96, ¶23. Thus, *Maple Leaf Farms* was not a case where the DNR used

its general authority to impose different standards than those allowed under the specific statute. The specific statute allowed the regulation at issue.

Similarly, the Association cites several cases arising out of activities subject to Chapter 30 where the applicable standard is a broad "public interest" standard. Ass'n Br. at 34-35. In *Houslet v. Department of Natural Resources,* 110 Wis. 2d 280, 329 N.W.2d 219 (Ct. App. 1982), the DNR was authorized to apply its wetland standards in addition to the standards for dredging under Wis. Stat. § 30.20. In *Reuter v. Department of Natural Resources,* 43 Wis. 2d 272, 168 N.W.2d 860 (1969), the DNR was required to make a finding on water pollution in addition to its other public interest determinations under § 30.20. In *Sterlingworth Condominium Association, Inc. v. Department of Natural Resources,* 205 Wis. 2d 710, 724, 556 N.W.2d 791 (Ct. App. 1996), the DNR was required to make a finding on natural scenic beauty in the placement of piers under Wis. Stat. § 30.12. The consideration of wetlands, water pollution and scenic beauty are all consistent with the broad public interest standard in Chapter 30. Wis. Stat. § 281.34 is different. As noted above, there are particular standards for each kind and location of well, and allowing the general provisions of § 281.12 to override those standards is a conflict.

In this case, the Village is not disputing that DNR can enact other regulations affecting Well #7 such as well construction code and public drinking water standards. But what DNR cannot do, is use DNR's general authority in § 281.12 to impose standards for *water withdrawal* different from those set forth in §§ 281.34 and 281.35.

This brings us back to *Robinson v. Kunach*, 76 Wis. 2d 436, 251 N.W.2d 449 (1977), yet another case ignored by the Respondents (apart from a dismissive footnote, DNR Br. at 13, n.9). While *Robinson* was addressing an enforcement issue, the Court held that nothing in DNR's general authority, "in any way changes the permit requirements or penalties for noncompliance with such requirements as specifically provided for by statute." 76 Wis. 2d at 450. The same holds true here.

C. Respondent's Interpretation Of Wis. Stat. §§ 281.34 And 281.35 Conflicts With Legislative History.

The Village has also shown how the legislative history underscores the deliberate creation of a legislative framework for permitting high capacity wells. The Respondents largely ignore the legislative history of §§ 281.34 and 281.35, and implore the Court to do the same. Their arguments are overwrought and incorrect.

DNR begins by claiming that, "The village's resort to any legislative history is unnecessary where, as here, the meaning of the statute can be ascertained from a review of its terms and intrinsic evidence of legislative intent." DNR Br. at 23. If the DNR means that § 281.34 is unambiguous, the Village agrees. Under the plain meaning of § 281.34(5)(a), there is a standard that applies to Well #7, and the Village meets that standard. But that does not mean use of legislative history is improper. It is appropriate to use legislative history to confirm otherwise clear statutory language. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶51, 271 Wis. 2d 633, 681 N.W.2d 110.

If the DNR means that § 281.12 is unambiguous, that argument is irrelevant and wrong. It is irrelevant because the statute at issue here is § 281.34, and it is wrong because a claim that § 281.12 controls over § 281.34 is not one that can be made from a review of the terms of § 281.12. Thus, either way, the legislative history of §§ 281.34 and 281.35 is relevant.

Next, while DNR admits that 2003 Wis. Act 310 expanded DNR's authority, it claims "the Village cites to no legislative history, that limited DNR's authority to . . . . those specific circumstances." DNR Br. at 24.

DNR is wrong. In addition to the carefully limited statutory language of Act 310, there is the non-statutory language creating the Groundwater Advisory Committee. 2003 Wis. Act 310, § 15. That committee's broad charge was to review the implementation of Wis. Stat. § 281.34 and make "recommendations for changes in the regulation of high capacity wells. . . ." 2003 Wis. Act 310, § 15(g). If the DNR's authority was not limited to the circumstances specified by the statutes, why create an advisory committee to recommend changes to the statute?

The DNR and the District then claim that the Court should not look at the 2007 Report of the Groundwater Advisory Committee required in Act 310[16] and the most recent Groundwater Workgroup because they were not official legislative committees and the actions came after Act 310. This attack is misplaced. First, as noted in *Kalal*, there are a variety of sources of legislative intent including special legislative committees. 271 Wis. 2d 633, ¶69 (Abrahamson, J. concurring).

Second, while the failure to pass legislation may not be as strong an indicia of legislative intent as other sources, it is not impermissible to look at such materials. Recently, this Court considered legislative inaction in

[16] 2007 Groundwater Advisory Committee Report to the Legislature (2007 Report) is *available at* http://dnr.wi.gov/org/water/dwg/gac/GACFinalReport1207.pdf.

Schill v. Wisconsin Rapids School District, 2010 WI 86, ¶125, 327 Wis. 2d 572, 786 N.W.2d 177:

> This legislative inaction coupled with rules of statutory interpretation **shows that the legislature has both contemplated the specific problem at hand and enacted numerous other amendments** to the public record law. In these circumstances, legislative inaction points to acquiescence in the attorney general's long-standing opinion that the meaning of "record" in § 19.32(2) excludes documents whose content demonstrates no connection with a government function. (Emphasis added.)

Here, the Legislature has certainly "contemplated the specific issue at hand," i.e. the scope of DNR authority under Wis. Stat. § 281.34. The Legislature has enacted various amendments to this section carefully defining the scope of that authority. In addition, the Legislature has continued to evaluate DNR's authority by requiring the Groundwater Advisory Committee 2007 Report and by creating a special legislative Groundwater Workgroup to study and report on this issue throughout 2009-2010. In light of these developments, the failure of the Legislature to take action following 2007 Report and in the most recent legislative session should not be ignored.

III. ABANDONING THE GRADUATED FRAMEWORK IN WIS. STAT. §§ 281.34 AND 281.35 WILL CREATE CONFUSION AND UNCERTAINTY.

A. The Court Of Appeals Decision Creates A Standard-Less Permit System.

The Village noted that under the Court of Appeals decision, the DNR can decide on a case-by-case basis how to evaluate environmental impacts for high capacity wells regardless of their location or capacity. Even the Court of Appeals acknowledged that "[t]here is no standard set by statute or case law" to guide this process. App-20, ¶31.

DNR claims that this is not a problem because "many other statutes require DNR to evaluate and balance competing public interests involving water resources." DNR Br. at 33. That is true. There are many "other statutes" which give the DNR broad discretion, but the question is what standards apply *here*. The question is not one of DNR's *ability* to exercise discretion, but the standards the DNR must apply in that exercise of discretion.

Here, the Legislature has enacted a framework that prescribes standards for different categories of wells. As noted above, allowing DNR to disregard the standards in Wis. Stat. §§ 281.34 and 281.35, by invoking its general authority creates a direct conflict. But, even apart from that

conflict, such an approach is unworkable. In the absence of the standards prescribed by the Legislature, by what standards will a permit application now be reviewed? Should the Village assume that for Well #7 the more exacting standards for Category 2 wells in groundwater protection areas and springs apply and, if so, will there be a corresponding consideration for public water supplies as in § 281.34(5)? Or, will all seven criteria for public interest review in Wis. Stat. § 281.35 apply? Or, will some other general public interest standard such as that used in the DNR's "many other statutes" be deemed applicable? There is no way to know under the Court of Appeals ruling.

B. The Court Of Appeals Decision Created Uncertainty With Respect To All Graduated Permit Programs.

The DNR claims that interpreting Wis. Stat. § 281.12 in a manner that allows DNR to override specific permitting standards will not affect other graduated permit programs outside of Wis. Stat. ch. 281. Not so.

Chapter 281 covers many graduated water resource programs, not merely high capacity wells. Great Lakes Compact permitting, wetlands permitting, shoreland zoning and other programs are part of Chapter 281. Even under DNR's reading, any of those graduated permit programs are now open for challenge.

A decision from this Court on the issue of the scope of DNR's general powers also will have a precedential affect on other programs, and indeed those of other state agencies. There is general authority language present in many DNR chapters such as Wis. Stat. ch. 283 which governs wastewater discharge permits. If a graduated permit program with specific standards and extensive legislative history like the high capacity well program at issue here can be overridden by general authority, other graduated permit programs are certainly subject to similar challenge.

C. The Respondents Fail To Respond To The Separation Of Powers Issues.

The Respondents failed to respond to the concern over separation of powers except for DNR's claim that the Village was not clear enough on how the Court of Appeals has effectively added words to those used by the Legislature in §§ 281.34 and 281.35. The Court has re-written the statutes by creating a different set of standards for high capacity wells than set by the Legislature. It is as simple as that.

IV. THE COURT OF APPEALS IMPROPERLY REDEFINED THE SCOPE OF THE RECORD BEFORE AN AGENCY.

A. The District And Association Concede That They Failed To Use Available Procedures For Including The Nauta Affidavit In The Agency Record.

The following facts are not disputed: (1) the Nauta Affidavit and its attachments were not in the agency record designated by DNR in this case; (2) the District and the Association did not seek to present the Nauta Affidavit to the DNR by requesting a contested case hearing; and (3) the District and Association did not seek to have the Nauta Affidavit added to the record in this case by using Wis. Stat. § 227.56.[17] The consequences of these undisputed facts are clear: the Nauta Affidavit was not part of the agency record and not properly part of the record before the reviewing courts.

B. The District Misrepresents The Facts Surrounding Its Handling Of The Nauta Affidavit.

The District's response to its failure to make the Nauta Affidavit part of the record boils down to this: "Close enough." According to the District, because the DNR had the document in its possession (even though

[17] The District and Association wholly ignore *State Public Intervenor v. Wisconsin Department of Natural Resources*, 171 Wis. 2d 243, 490 N.W.2d 770 (Ct. App. 1992) (holding that § 227.56 is the means to supplement an administrative record.).

proper procedures were not followed), it had to consider it. But "close enough" is not good enough in the face of procedures designed to prevent precisely the kind of dispute that is involved here.

The District tries to bolster its "close enough" argument with a misleading recitation of the facts. Yes, the District served the DNR's attorney with a copy of the Nauta Affidavit the day after the Village first requested an extension of its permit. Dist. Br. at 43-44. But what the District does not explain is that its "service" was of a copy of a motion for reconsideration that the District filed *with the court* (not the DNR) relating to the 2003 Approval (not the 2005 Approval, at issue in this case). The Nauta Affidavit was an exhibit to that motion.

The best the District can do in addressing its failure to follow well-established procedures is to argue that "if the Village's permit extension is part of the 'agency record,' then surely so too is the Nauta Affidavit." Dist. Br. at 46. This is factually and legally incorrect. The Village's legal counsel did send a letter directly to DNR's legal counsel regarding the need for a permit extension, but the Village's engineer also wrote directly to the DNR staff person in charge of high capacity well approvals requesting the

extension and submitting an application fee. R.8:11; R.24:4.[18] These requests resulted in a new administrative proceeding and decision. In contrast, the District copied the DNR's lawyer on a motion filed with the court *in a different* (albeit related) *judicial* proceeding and now expects the DNR to have considered one of the exhibits to that motion as part of the agency record in the newly-filed *administrative* proceeding. The problems this sort of "close enough" approach creates are obvious. Where does one draw the line? And why go down that path in the first instance when there are clear statutory rules in place defining what constitutes the agency record and how that record may be modified if the parties want the agency to consider additional information.

The District also claims that the Nauta Affidavit should be considered part of the record because the "trial court specifically ruled, pursuant to Wis. Stat. § 227.55, that the 'agency record' in this case consists of "any information shown by the record to have been known to the DNR before and after the issuance of the 9-3-03 permit and up to the time they issued the 9-6-0[5] permit.'" Dist Br. at 47. This argument is incorrect.

[18] The District's assertion that the Village never submitted a new application is false and was properly discussed and rejected by the Court of Appeals at ¶14. App. 8-9.

First, § 227.56, not § 227.55, is the procedure to use to supplement an agency record. Village Br. at 49-50.

Second, the trial court did not "specifically rule[ ] pursuant to section 227.55. . . ." The trial court's July 28, 2008 ruling makes *no* reference to a motion under Wis. Stat. § 227.55. Indeed, while the District filed a motion pursuant to § 227.55 in this case, the motion was not filed until September 2, 2008, nearly six weeks *after* the trial court's July ruling. (R. 31, Supp. App. 59.) Even then, the motion did *not* include the Nauta Affidavit. *Id.* The District's § 227.55 motion references the documents filed with the District's August 11, 2008 brief and the Nauta Affidavit was not among those documents. *See* R.22, Supp. App. 61-63.[19]

Indeed, the District never even mentioned the Nauta Affidavit in its briefing to the trial court in this case. *See*, R. 21 and 32.[20] Although the trial court referenced the Nauta Affidavit in its oral ruling in this case (06-CV-172), the court made it clear that the Nauta Affidavit was *not* part of

[19] The District did include the Nauta Affidavit in its submittals in two *companion* cases on Well #7 that were pending in Walworth County Circuit Court and were referenced in the trial court's July 28, 2008 ruling as Case Nos. 06-CV-673 and 07-CV-674. Dist. App at 56. However, as that ruling also makes clear, those cases were *not* consolidated with the case now on appeal, 06-CV-172, which the court chose to decide separately. *Id.*

[20] The DNR's assertion that the District cited the Nauta affidavit in its briefs in *this* case is incorrect.

the agency record *in this proceeding,* stating, "Nothing in the *new 6-CV-172 file, which I'm dealing with now*, provided any evidence from a scientific or technical point of view that such adverse impact would affect – in effect occur, much less how significant it would be. . . ." (Emphasis added) R.40-11.[21] Thus, the trial court did not consider the Nauta Affidavit to be part of the agency record in reaching its decision.[22]

The District chose to submit documents to the trial court and court of appeals as "attachments" to its briefs regardless of whether they were part of the agency record and in complete disregard of the procedures under Chapter 227. It is not surprising therefore that the contents of the record is in dispute between the parties. But this illustrates precisely the reason why there are procedures for establishing the agency record and why they should be followed. Failure to follow established procedures creates confusion for the parties and the courts.

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[21] Even the Association agreed that "the Lake District's motion [for reconsideration with the Nauta affidavit] *was not submitted to the circuit court in this case*. . . ." Ass'n Ct. App. Br. at 23, n.13.) It however claimed that the motion should nevertheless be considered as a matter of judicial notice.

[22] The District's comment that the Village did not appeal from the trial court's ruling on the Nauta Affidavit is misplaced. As noted, the trial court never ruled on the Nauta Affidavit in this case and so there was no need to file an appeal on that issue. However, in any event, the issue of what constitutes the record is properly before this court because it was addressed by the Court of Appeals and it was identified in the Village's Petition for Review as part of this case.

C. Expanding The Record As The District And The Association Urge Will Have Widespread Negative Consequences.

The Association, like the Court of Appeals, argues that the facts of this case are unique because the DNR was represented in this case by its own attorney, rather than DOJ, thus creating the possibility that a DNR attorney could receive information from an opposing party relevant to another action pending before the agency. Assn, Br. at 45; Ct. App. ¶ 38 n.16. App. 25. This misses the point. The fact that the Nauta Affidavit was sent to a DNR attorney and thereby was imputed to the client (in this case, the DNR) produces a result no different than if the document was sent to some other DNR official. Either way, it was in the DNR's possession and possession was the basis for the Court of Appeals' decision. Thus, far from being unique, this case opens the door for parties to argue that documents in the agency's possession need to be considered by the agency in any relating proceeding, even if they were not made a part of the agency record in that proceeding through the use of procedures established for that purpose.

Similarly, the fact that the Nauta Affidavit came into DNR's possession close in time to the Village's 2005 application for a permit

extension does not provide a principled basis for addressing what is or is not in the record. How close in time must two documents land in the hands of an agency employee (anywhere in the agency) in order to fall within the rule the Court of Appeals has created? A week? A year? Two years? The Court of Appeals suggests that these questions can be answered by the courts looking closely at the facts and circumstances in each case. Ct. App. ¶ 38, n.16; App. 25. There is, however, no need to place that additional burden on the courts, particularly when litigants, like the District and the Association, had ample opportunity to follow the proper procedures but simply failed to do so.

CONCLUSION

The Court of Appeals would have DNR make permit decisions for high capacity wells based on standards outside of the Legislative framework and based on facts outside of the agency record. Neither conclusion should be upheld.

Allowing DNR to use its general authority to override the specific Legislative standards for evaluating high capacity well permits creates conflict not harmony between the statutes. Moreover, the specific Legislative framework for high capacity well permits is fully consistent

with the public trust doctrine by balancing the competing public interests regarding groundwater withdrawal, while preserving DNR's ability to address specific public trust concerns outside of the permitting framework.

Similarly, the Legislature has prescribed procedures governing the record for administrative decision for a reason – to assure an orderly process for agency decision making and judicial review. Allowing parties to ignore those provisions creates unnecessary confusion and undermines decision making and review at all levels. The Court of Appeals should be reversed.

DATED this 11th day of January, 2011.

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By: _____

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CERTIFICATE OF COMPLIANCE WITH RULE §§ 809.19(8)(b) AND (c)

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with Times New Roman, 13 point font. The length of this brief is 8,965 words.

Dated this 11th day of January, 2011.

_____

Paul G. Kent (#1002924)

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 80.19(12). I further certify that:

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

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

Dated this 11th day of January, 2011.

_____

Paul G. Kent (#1002924)

CERTIFICATE OF SERVICE

I, Marjorie Irving, am legal assistant to Paul G. Kent. I hereby certify that I caused true and correct copies of this Combined Reply Brief and Supplemental Appendix of Village of East Troy Intervening Respondent-Respondent-Cross-Appellant-Petitioner, to be served on counsel for the parties by placing the same in U.S. mail, first class postage, on this date:

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Dated this 11th day of January, 2011.

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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2008AP003170

LAKE BEULAH MANAGEMENT DISTRICT

Petitioner-Appellant-Cross-Respondent, Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner-Co-Appellant-Cross-Respondent,

vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent-Respondent,

VILLAGE OF EAST TROY

.

Intervening Respondent-Respondent-Cross-Appellant; Petitioner.

SUPPLEMENTAL APPENDIX

On Appeal From A Final Order Entered on
In The Walworth County Circuit Court on September 20, 2008
The Honorable Robert J. Kennedy, Judge
Walworth County Circuit Court Case Nos. 06-CV-172

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SUPPLEMENTAL TABLE OF CONTENTS

APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 11th day of January, 2011.

_____

Paul G. Kent (#1002924)

STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2008AP003170

LAKE BEULAH MANAGEMENT DISTRICT

Petitioner-Appellant-Cross-Respondent, Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner-Co-Appellant-Cross-Respondent,

vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent-Respondent,

VILLAGE OF EAST TROY

Intervening Respondent-Respondent-Cross-Appellant; Petitioner.

SUPPLEMENTAL APPENDIX

On Appeal From A Final Order Entered on
In The Walworth County Circuit Court on September 20, 2008
The Honorable Robert J. Kennedy, Judge
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Dated this 11th day of January, 2011.

Paul G. Kent (#1002924)

STATE OF WISCONSIN CIRCUIT COURT WALWORTH COUNTY

LAKE BEULAH MANAGEMENT DISTRICT,

Petitioner,

and

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner,

vs. Case No. 06-CV-172

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent,

and

VILLAGE OF EAST TROY,

Intervening Respondent.

LAKE BEULAH MANAGEMENT DISTRICT'S MOTION TO SUPPLEMENT THE RECORD AND/OR TAKE JUDICIAL NOTICE

PLEASE TAKE NOTICE that the Petitioner, Lake Beulah Management District (the "LBMD"), by its attorneys, O'Neil, Cannon, Hollman, DeJong S.C., hereby moves the Court, the Honorable Robert J. Kennedy, presiding, for an order, pursuant to section 227.55, Wis. Stats., and the Court's inherent authority, to supplement the record in this case by adding the documents included at tabs 1, 2, 4-15 and 18 of the 3-ring binder filed with the Court by the LBMD on August 11, 2008, and/or to take judicial notice of those documents.

The grounds for this motion are set forth in a brief being filed herewith by the LBMD.

Dated this 2nd day of September, 2008.

O'NEIL, CANNON, HOLLMAN, DEJONG S.C.
Attorneys for Petitioner

By: _____
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STATE OF WISCONSIN CIRCUIT COURT WALWORTH COUNTY

LAKE BEULAH MANAGEMENT DISTRICT,

Petitioner,

and

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner,

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent,

and

VILLAGE OF EAST TROY,

Intervening Respondent.

Case No. 06-CV-172

DOCUMENTS REFERENCED IN LAKE BEULAH MANAGEMENT DISTRICT'S BRIEF IN SUPPORT OF ITS PETITION FOR JUDICIAL REVIEW

Submitted By:

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17. "Extension" of September 4, 2003 Permit issued by the DNR to the Village, dated September 6, 2005.

18. Order, dated June 28, 2006, issued by the Court of Appeals.

19. Petition and Complaint for Judicial Review filed by the LBMD on March 3, 2006 in Walworth Co. Case No. 06-CV-172.

20. Answer, dated March 27, 2006, filed by the Village in Walworth Co. Case No. 06-CV-172.

21. Answer, dated August 23, 2006, filed by the DNR in Walworth Co. Case No. 06-CV-172.

22. Brief in Support of the Motion to Dismiss, dated June 20, 2008, filed by the Village in Dane Co. Case No. 08-CV-1693.

SUPREME COURT OF WISCONSIN

Lake Beulah Management District,

Petitioner- Appellant-Cross-Respondent,

Lake Beulah Protective and Improvement Association,

Co-Petitioner-Co-Appellant-Cross-Respondent,

v.

State of Wisconsin Department of Natural Resources,

Respondent-Respondent,

Village of East Troy,

Intervening-Respondent-Respondent-Cross-Appellant-Petitioner.

COURT OF APPEALS, DISTRICT II
APPEAL NO. 2008-AP-3170
WALWORTH COUNTY CIRCUIT COURT CASE NO. 06-CV-172
HONORABLE ROBERT J. KENNEDY PRESIDING

NONPARTY *AMICUS* BRIEF OF WISCONSIN TROUT UNLIMITED, INC.

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December 9, 2010

INTEREST OF THE AMICUS

This *amicus curiae* brief is submitted by Wisconsin Trout Unlimited, Inc. ("WITU"). WITU is devoted to conserving, protecting, and restoring Wisconsin's coldwater fisheries and their watersheds, so that by the next generation robust populations of native and wild coldwater fish will once again thrive within their native ranges, such that our children will enjoy healthy fisheries in their home waters.

INTRODUCTION

It can hardly be questioned that all water is connected. Water that flows underground feeds the lakes and streams of this state, which belong to the people. Care of the people's water is the job of the state "in trust" for the people. In this case, the Court of Appeals held that under the Public Trust Doctrine, the Department of Natural Resources ("DNR") has the ability to commence review of *all* varieties of high capacity wells when evidence is submitted which shows that such wells may cause an adverse impact upon Wisconsin's waters. The ruling of the Court of Appeals was correct and should be affirmed.

Seeking reversal, the Petitioner argues that Wisconsin's high capacity well permitting statutes must be read in isolation, prohibiting DNR review of high capacity wells except in those limited instances set forth in §§ 281.34 and

281.35. WITU believes that such a reading 1.) would substantially injure the Public Trust Doctrine and Wisconsin citizens' constitutionally protected water rights, 2.) render sections of Chapter 281 meaningless in violation of Wisconsin's canons of construction, and 3.) lead to potentially disastrous results.

I. THE PUBLIC TRUST DOCTRINE.

The Public Trust Doctrine is contained in Article IX, § 1 of the Wisconsin Constitution[1] which states that the Wisconsin's navigable waters "shall be common highways forever free," and shall inure to the benefit of "the inhabitants of the state" and "to the citizens of the United States[.]"

Early decisions by this Court discussed this reservation as relating primarily to commercial navigation. *See State v. Public Service Commission*, 275 Wis. 112, 118, 81 N.W.2d 71, 74 (1957). Over time, however, the full expanse of the Public Trust was recognized as including "all public uses of water,"

[1] The doctrine has roots predating Wisconsin's entry into the Union. In *Pollad's Lessee v. Hagen*, 44 U.S. 212, 230, 11 L.Ed 565 (1845), the United States Supreme Court noted:

> First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states.

"including pleasure boating, sailing, fishing, swimming, hunting, skating, and enjoyment of scenic beauty." *Id.* As a result, this Court "has noted that '[t]he right of the citizens to enjoy our navigable streams for recreational purposes... is a legal right that is entitled to all the protection which is given financial rights.'" *State v. Town of Linn*, 205 Wis.2d 426, 442, 556 N.W.2d 394, 402 (Wis. App. 1996), *quoting Muench v. Public Service Commission*, 261 Wis. 492, 511-512, 53 N.W.2d 514, 522 (1952).

The public's constitutional water rights are safeguarded first by Wisconsin's legislature. *See State v. Mauthe*, 123 Wis.2d 288, 302, 366 N.W.2d 871, 878 (1985), *see also Gillen v. City of Neenah*, 219 Wis.2d 806, 820-821, 580 N.W.2d 628, 633 (1998). The legislature, in turn, may delegate enforcement of the public's water rights. *See Mauthe*, 123 Wis.2d at 302.

In Chapter 281 of Wisconsin's Statutes, the Wisconsin Legislature specifically delegates Public Trust duties to the DNR. *See* Wis. Stat. §§ 281.11, 281.12. This means that the various provisions of Chapter 281 are not simple technical recipes for administrative action, but are all read in the context of the delegated embodiment of Wisconsin's citizens constitutionally protected water rights. The Court of Appeals' decision appropriately recognizes this fact.

II. WIS. STAT. §§ 281.11 AND 281.12 EVINCE A CLEAR INTENT THAT THE DNR PROTECT WISCONSIN'S WATERS.

The Court of Appeals correctly interpreted Wis. Stat. §§ 281.11 and 281.12 as "expressly delegating regulatory authority to the DNR necessary to fulfill its mandatory duty 'to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private." *Lake Beulah Management District v. State Dept. of Natural Resources*, 327 Wis.2d 222, 787 N.W.2d 926, 2010 WI App 85, ¶ 19.

The language of both Wis. Stat. §§ 281.11 and 281.12 is exceptionally clear, and supports the Court of Appeals' finding. Specifically, Wisconsin's Legislature names the DNR as the vanguard of Wisconsin's waters in Wis. Stat. §281.11 (entitled "Statement of Policy and Purpose"). Section 281.11 states, in pertinent part:

> The [DNR] shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private.

Wis. Stat. §281.11 (Wis. 2010). After naming the DNR as the central unit of government charged with protecting Wisconsin's waters, Wis. Stat. §281.11 sets forth that:

> The purpose of this subchapter is to grant necessary powers and to organize a comprehensive program under a single

> state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. **To the end that these vital purposes may be accomplished, this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed in favor of the policy objectives set forth in this subchapter.** In order to achieve the policy objectives of this subchapter, it is the express policy of the state to mobilize governmental effort and resources at all levels, state, federal and local, allocating such effort and resources to accomplish the greatest result for the people of the state as a whole.

Id. (emphasis added). By its terms, the delegation contained within Wis. Stat. §281.11 is expansive, and to be "liberally construed" in favor of "protect[ing], maintain[ing] and improv[ing] the quality and management of "Wisconsin's waters," both "ground and surface."

Wis. Stat. § 281.12 states that the DNR "shall" undertake those activities necessary to effectuate the clear legislative direction set forth in Wis. Stat. §281.11, stating:

> The [DNR] shall have general supervision and control over the waters of the state. It shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter.

Wis. Stat. §218.12(1) (Wis. 2010). The language of §281.12(1) is not limiting, and commands the DNR to act with

the purpose and policy set forth in Wis. Stat. §281.11 when implementing the policy and purpose of *this chapter.*

Because Wis. Stat. §§ 281.34 and 281.35 are contained within Chapter 281, they are necessarily subject to the DNR's expressly delegated duty to regulate and protect Wisconsin's surface and ground waters found within §§ 281.11 and 281.12.

III. WISCONSIN'S CANONS OF STATUTORY CONSTRUCTION COMPEL THAT WIS. STAT. §§ 281.34 AND 281.35 MUST BE READ TOGETHER AND IN HARMONY WITH WIS. STAT. §§ 281.11 AND 281.12.

Wis. Stat. §§ 281.34 and 281.35 cannot be read in a vacuum. In *Bank Mutual v. S.J. Boyer Construction, Inc.*, this Court affirmed that "We do not read the text of a statute in isolation, but look to the overall context in which it is used." 326 Wis.2d 521, 785 N.W.2d 462, 2010 WI 74, ¶ 24, *citing State ex rel. Kalal v. Circuit Court for Dane County*, 271 Wis.2d 633, 681 N.W.2d 110, 2004 WI 58, ¶45. The *Bank Mutual* Court continued: "When looking at the context, we read the text 'as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.'" *Id.*, *quoting Kalal*, 2004 WI 58 at ¶45.

In *Brunton v. Nuvell Credit Corp.*, this Court held that, "In construing a statute, we favor a construction that fulfills the purpose of the statute over one that

undermines its purpose." 325 Wis.2d 135, 785 N.W.2d 302, 2010 WI 50, ¶17, *citing County of Dane v. LIRC,* 315 Wis.2d 293, 759 N.W.2d 571, 2009 WI 9, ¶34. As such, "'[A] plain meaning interpretation cannot contravene a textually or contextually manifest statutory purpose.'" *Id.*, *quoting Kalal*, 2004 WI 58 at ¶49. Most importantly, the *Brunton* Court noted that "When the legislature states the purpose that underlies a statute, we are to interpret the statute in light of that purpose." *Id.* at ¶26, *citing Kalal*, 2004 WI 58 at ¶49.

There is no doubt that reading Wis. Stat. §§ 281.34 and 281.35 in isolation and as providing only two sets of circumstances in which high capacity wells may be reviewed would contravene the legislative purpose underlying Chapter 281 set forth in Wis. Stat. §§ 281.11 and 281.12. Such a reading would likewise wreak injury upon the Public Trust Doctrine by rendering impossible its protection by the DNR, as called for in Wis. Stat. §§ 281.11 and 281.12.

IV. WIS. STAT. §§ 281.34 AND 281.35 DO NOT FORECLOSE THE DNR FROM REVIEWING HIGH CAPACITY WELLS WHICH MAY ADVERSELY IMPACT WISCONSIN'S WATERS.

Even if Wis. Stat. §§ 281.34 and 281.35 were read in isolation, neither statue contains language which forecloses the DNR from reviewing high capacity well

permits in instances other than those enumerated. This is because a statute which commands that an agency "shall" undertake a minimum standard of care does not foreclose more robust agency action when required.

For example, in *Wisconsin Builders Association v. State Department of Commerce*, 316 Wis.2d 301, 762 N.W.2d 845, 2009 WI App 20, the Court of Appeals considered arguments concerning Wis. Stat. § 101.14(4m)(b), which involves sprinkler systems in multifamily dwelling units. There, the appellant argued that because Wis. Stat. § 101.14(4m)(b) lists specific instances in which sprinkler systems "shall" be required, the Department of Commerce was foreclosed from requiring sprinkler systems under any other circumstances (which is effectively the Petitioner's argument here). The *Wisconsin Builders* Court found such arguments unpersuasive, and held:

> Turning to an examination of the statutory language, we agree with Wisconsin Builders that the use of the word "shall" in § 101.14(4m)(b) means that the Department must require sprinkler systems in every multifamily dwelling that has more than twenty dwelling units or exceeds the specified floor areas. However, this paragraph is silent on whether the Department may require sprinkler systems in multifamily dwellings with fewer dwelling units or smaller floor areas. Had the legislature intended to remove the authority the Department has under other statutory

> provisions to require fire protection devices in multifamily dwellings with fewer dwelling units or smaller floor areas, we would expect that the legislature would have expressly stated that.

Id. at ¶11.

The same logic should apply here, but with added force, given the Constitutional mandate of the Public Trust Doctrine. There is no language contained within either Wis. Stat. §§ 281.34 or 281.35 which *precludes* DNR review of high capacity wells. Rather, there is only language which sets a *minimum standard* concerning when high wells *must* be reviewed. There is no language within either §§ 281.34 or 281.35 which prohibits the rational review process set forth by the Court of Appeals, and its decision should be accordingly upheld.

V. INTERPRETING WIS. STAT. §§ 281.34 AND 281.35 TO DISALLOW REVIEW OF WELLS WOULD LEAD TO POTENTIALLY DISASTROUS RESULTS.

It is axiomatic that Wisconsin's statutes should be interpreted reasonably, and to avoid absurd results. *See State v. Jensen*, 324 Wis.2d 586, 782 N.W.2d 415, 2010 WI 38, ¶14. Interpreting Wis. Stat. §§ 281.34 and 281.35 as precluding DNR review of high capacity wells would lead to potentially absurd and disastrous results.

Under Wis. Stat. §§ 281.34 and 281.35, a well which draws 2,000,000 gallons per day is subject to review. If the

Petitioner's interpretation is accepted, an identical well located in exactly the same location, which draws only 1,999,999 gallons per day may *not* be subject to any review. To use another example, a well which draws 1,999,999 gallons per day and which is located inside a groundwater protection zone may be subject to review. Using the Petitioner's interpretation, the same well drawing the same amount of water per day located 1 foot outside of a groundwater protection zone may *not* be subject to review.

Moreover, if the Petitioner's suggested reading of Wis. Stat. §§ 281.34 and 281.35 were to be accepted, a well drawing 99,999 gallons per day could be located in the middle of a groundwater protection zone and unquestionably have a direct and obvious adverse impact on a spring and would not be subject to any manner of review. Reading §§ 281.34 and 281.35 to completely disallow review of high capacity wells based upon 1 foot, or 1 gallon per day, and in some instances to completely ignore obvious adverse environmental effects, is clearly an unwarranted interpretation when considered within the policies embodied in Wis. Stat. §§ 281.11 and 281.12.

Although the legislature is frequently required to draw hard lines in statutes (e.g., $500 statute of frauds in the Uniform Commercial Code, Wis. Stat. §402.201(1); misdemeanor

crime limits, Wis. Stat. §939.51), the rational basis for doing so is found in the practical necessity of drawing a line somewhere. With high capacity wells there is also justification for creating categories of wells, based upon anticipated volume. But to avoid the arbitrariness that can be occasioned by line-drawing, the legislature has given the DNR the authority to go beyond the minimum examination where the peculiar circumstances of the proposed well could affect the public waters of the state. In other words, the over-arching responsibilities to enforce the public trust give the agency the ability to address individual circumstances where the line-drawing is not enough.

The reading of the statutes advocated by Petitioner could also lead to disastrous real-world results. In central Wisconsin, for example, un-reviewed "middling" high capacity wells have been implicated in completely dewatering streams such as the Little Plover (formerly a high quality trout stream), and Long Lake. *See* George Kraft and David Mechenich, *Groundwater Pumping Effects on Groundwater Levels, Lake Levels, and Streamflows in the Wisconsin Central Sands*, 2010. [2]

[2] *See also* Alley, W.M., T.E. Reilly and O.L. Frank, *Sustainability of Ground Water Resources*, Effects of Ground-Water Development on Ground-Water Flow to and from Surface-Water Bodies, U.S. Geological Survey Circular 1186, available at http://pubs.usgs.gov/circ/circ1186/index.html (stating "As development of land and water resources intensifies, it is

The potential dewatering of trout streams and other recreational waters will, in turn, have an exceptionally harmful economic impact on the State. In 2008, Trout Unlimited's Driftless Area Restoration Effort commissioned a report by Northstar Economics, Inc., to measure the economic impact of trout angling upon the four state Driftless Area.[3] The Northstar survey concluded that recreational trout angling produced direct economic benefits of $646,819,673, and indirect economic benefits of $464,691,659, creating a total yearly economic impact of $1,111,511,332 in the Driftless Area. *See The Economic Impact of Recreational Angling in the Driftless Area,* Northstar Economics, Inc., April, 2008.[4] So while the promotion of economic development that accompanies applications for high capacity wells is important to the business of this State, the protection of Wisconsin's water resources is also unarguably an important economic proposition, in addition to the self-sufficient goal of sound natural resources conservation.

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increasingly apparent that development of either ground water or surface water affects the other[.]")

[3] The Driftless Area is comprised of the unglaciated portions of southwest Wisconsin, northwest Illinois, northeast Iowa, and southeast Minnesota.

[4] Available at: http://www.tu.org/atf/cf/%7BED0023C4-EA23-4396-9371-8509DC5B4953%7D/TUImpact-Final.pdf

CONCLUSION

WITU believes that the Court of Appeals' decision correctly protects the sanctity of the Public Trust Doctrine, and gives effect to the full purpose and policy of Chapter 281. WITU believes that neither Wis. Stat. §§ 281.34 nor 281.35 contain any type of language which precludes the DNR from reviewing high capacity wells when evidence is presented that such wells may adversely impact Wisconsin' waters, and that interpreting them as such would violate Wisconsin's canons of construction and lead to potentially absurd and disastrous results. As such, WITU respectfully requests that this Court uphold the sound reasoning of the Court of Appeals, and its decision.

DATED: December 9, 2010.

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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 using monospaced font. The length of this brief is 13 pages.

DATED: December 9, 2010.

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CERTIFICATION OF DELIVERY

I certify that the foregoing brief was deposited in the United States Mail for delivery to the Clerk of the Wisconsin Supreme Court and all counsel of record, by first class regular mail, on December 9, 2010. I certify that the envelopes were correctly addressed and that proper postage was attached, prepaid.

DATED: December 9, 2010.

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By: /s/ Henry E. Koltz
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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2008AP003170

LAKE BEULAH MANAGEMENT DISTRICT

Petitioner-Appellant-Cross-Respondent, Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner-Co-Appellant-Cross-Respondent,
vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent-Respondent,

VILLAGE OF EAST TROY

Intervening Respondent-Respondent-Cross-Appellant; Petitioner.

JOINT NON-PARTY *AMICUS* BRIEF OF DAIRY BUSINESS ASSOCIATION, WISCONSIN MANUFACTURERS & COMMERCE, WISCONSIN PAPER COUNCIL, AND MIDWEST FOOD PROCESSORS ASSOCIATION

On Appeal from a Decision of the Court of Appeals, District II,
dated June 16, 2010, relating to a Final Order Entered
in The Walworth County Circuit Court on September 20, 2008
The Honorable Robert J. Kennedy, Judge
Walworth County Circuit Court Case Nos. 06-CV-172

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January 25, 2011

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INTRODUCTION

This case involves the question of whether the Department of Natural Resources (DNR) has the broad authority to regulate high capacity wells beyond the specific statutory language enacted by the legislature. The court of appeals' decision, which granted DNR authority to regulate high capacity wells under Chapter 281 general duties provisions, violates basic principles of separation of powers. In addition, the lower court's decision greatly expands DNR's regulatory authority by concluding that the public trust doctrine applies to high capacity wells. This decision adversely affects more than the parties involved in this case; therefore, *amici* Dairy Business Association, Midwest Food Processors Association, Wisconsin Manufacturers and Commerce, and the Wisconsin Paper Council (hereinafter referred to as "*Amici*") file this non-party brief.

If the court of appeals' decision is upheld, specific statutory language enacted by the legislature regulating high capacity wells will be rendered meaningless. In essence, the legislature will become irrelevant and subservient to agency bureaucrats. The Court has the opportunity to place a meaningful check on the regulatory authority of state agencies by declaring that a statute's general powers and duties provisions do not grant state agencies unbridled regulatory authority.

This Court should make clear that DNR, and other state agencies, do not have the plenary authority under their general delegation of authority statutes to

regulate activities beyond the specific statutory language enacted by the legislature. In addition, the Court should clarify that the legislature has not delegated DNR the authority to regulate high capacity wells under the public trust doctrine.

ARGUMENT

I. THE COURT OF APPEALS' DECISION VIOLATES BASIC SEPARATION OF POWERS PRINCIPLES BY GRANTING THE DEPARTMENT OF NATURAL RESOURCES REGULATORY AUTHORITY NOT DELEGATED BY THE LEGISLATURE

The court of appeals concluded that the general statutes (Wis. Stat. §§ 281.11 and 281.12) grant DNR additional authority to regulate high capacity wells beyond the specific statutes (Wis. Stat. §§ 281.34 and 281.35) regulating high capacity wells. According to the court of appeals, the source of this authority is the public trust doctrine through the general duties provisions of Chapter 281. As demonstrated below, neither the general duties provisions (281.11 and 281.12) nor the public trust doctrine confer to DNR sweeping regulatory authority.

A. High Capacity Well Statutes Do Not Expressly Confer DNR the Power to Regulate Beyond Legislatively Established Thresholds

Wisconsin courts have long recognized that administrative agencies are creations of the legislature and that they can exercise only those powers granted by the legislature. *Thomson v. Racine,* 242 Wis. 591, 597, 9 N.W.2d 91 (1943). Legislative power may be delegated to an administrative agency as long as adequate standards for conducting the allocated power are in place to preserve the

separation of powers doctrine. *See J.F. Ahern v. Bldg. Comm'n,* 114 Wis. 2d 69, 88, 336 N.W.2d 679 (Ct. App. 1983).

Under the separation of powers doctrine, "[a]n administrative agency has only those powers which are expressly conferred or can be fairly implied from the statutes under which it operates." *Oneida County v. Converse,* 180 Wis. 2d 120, 125, 508 N.W.2d 416 (1993). "Any reasonable doubt as to the existence of an implied power in an agency should be resolved against the exercise of such authority." *Kimberly-Clark Corp. v. PSC,* 110 Wis. 2d 455, 462, 329 N.W.2d 143 (1983).

The legislature conferred DNR limited authority to regulate high capacity wells under Wis. Stat. §§ 281.34 and 281.35. Those sections establish a comprehensive, three-tiered permitting framework based on specific criteria. *See* Wis. Stat. §§ 281.34 and § 281.35. Neither by statute, nor by implication, has the legislature granted DNR any further regulatory authority over high capacity wells.

Yet, despite the clear statutory language, the court of appeals concluded that DNR had the authority under the general delegation statutes (Wis. Stat. §§ 281.11 and 281.12) to regulate high capacity wells beyond those powers expressed in the more specific statutes (Wis. Stat. §§ 281.34 and 281.35).

Not only did the court of appeals hand DNR newfound regulatory authority under a nebulous reading of general authority statutes (Wis. Stat. §§ 281.11 and 281.12), it gave DNR unlimited discretion in deciding when to use that power to

"investigate public trust concerns." According to the lower court, since DNR is the "central unit of state government in charge of water quality and management matters," it would "leave it to DNR to determine the type and quantum that it deems enough to investigate." This decision violates traditional principles of separation of powers by stripping the authority to legislate and provide oversight from the legislature.

Accordingly, the Court should reverse the court of appeals and reject this unbridled expansion of DNR power.

B. The Court of Appeals' Decision Granting DNR Sweeping Regulatory Authority Has Broad Ramifications Beyond this Particular Case

The Court's decision will have an impact beyond the parties involved in this case because numerous other state agencies have general powers and duties provisions similar to those contained in Wis. Stat. §§ 281.11 and 281.12. Those agencies include: Department of Workforce Development (Wis. Stat. § 103.005); Government Accountability Board (Wis. Stat. § 5.05); Department of Administration (Wis. Stat. §§ 16.001 & 16.004); Department of Employee Trust Funds (Wis. Stat. §§ 40.01 & 40.03); Department of Agriculture, Trade and Consumer Protection (Wis. Stat. §§ 93.06 & 93.07); Department of Public Instruction (Wis. Stat. §§ 115.28 & 115.29); Department of Health Services (Wis. Stat. § 250.04); Department of Military Affairs (Wis. Stat. §§ 321.02 – 321.04); and Public Service Commission (Wis. Stat. § 196.02).

Moreover, the Court's decision will clarify conflicting case law concerning an agency's authority to regulate based on those general duties and powers provisions.

For example, in *Elroy-Kendall-Wilton Schools, v. CESA, Dist. 12*, 102 Wis. 2d 274, 306 N.W.2d 89 (Ct. App. 1981), the court of appeals concluded that the legislature did not delegate the cooperative educational service agency the authority to expend money to purchase real estate under the general duties statute. *Id.* At 279-280. *But see Maple Farms, Inc. v. State Dep't of Natural Res.*, 247 Wis. 2d 96, 633 N.W.2d 720 (Ct. App. 2001), (court finding that the statute's broad statement of policy and purpose provision (Wis. Stat. § 283.001) did grant the agency authority to regulate groundwater beyond the statute enacted by the legislature.)

In addition, the Court has an opportunity to confirm that "[i]f a specific statutory grant of authority to a state agency conflicts with a more general grant to the agency, the specific statute controls." *Martineau v. State Conservation Comm'n*, 46 Wis. 2d 443, 449, 175 N.W.2d 206 (1970); s*ee also Rusk County Citizen Action Group, Inc. v. Wisconsin Dep't of Natural Res.*, 203 Wis. 2d 1, 10, 552 N.W.2d 110 (1996) (holding that "when a specific grant of authority to an agency conflicts with a more general grant of authority, the specific statute controls.").

As highly regulated entities, *Amici* urge the Court to clarify that state agencies do not have broad regulatory authority through their general duties provisions.

II. THE COURT OF APPEALS INCORRECTLY DETERMINED THAT THE PUBLIC TRUST DOCTRINE GRANTS DNR AUTHORITY TO REGULATE HIGH CAPACITY WELLS

The court of appeals concluded that DNR's authority was not restricted to the specific statutory scheme contained under Wis. Stat. §§ 281.11 and 281.12. Specifically, the court held that "the legislature's mandate that the DNR complete a formal environmental review for only certain wells does not prohibit or rescind the DNR's authority to review middling wells under Wis. Stat. §§ 281.11 and 281.12." The court determined this newfound authority is contained in Wis. Stat. §§ 281.11 and 281.12 under the public trust doctrine.

The court of appeals' interpretation of the public trust doctrine is erroneous and should be reversed.

A. The Legislature Has Not Delegated DNR the Authority to Regulate High Capacity Wells Under the Public Trust Doctrine

When the state legislature is delegating authority based on the public trust doctrine, "such delegation of authority should be in clear and unmistakable language and cannot be implied from the language of a general statute…" *City of Madison v. Tolzman*, 7 Wis. 2d 570, 575, 97 N.W.2d 513 (1959).

Moreover, the legislature has the "primary authority to administer the public trust for the protection of the public's rights, and to effectuate the purposes

of the trust." *Hilton v. Dep't of Natural Res.*, 717 N.W. 2d 166, 173, 2006 WI 84 (2005). In fact, this Court has held that the public trust doctrine does not itself create any substantive rights. *State v. Deetz*, 66 Wis. 2d 1, 11, 224 N.W. 2d 407 (1974).

Contrary to DNR's position, neither Wis. Stat. § 281.11 nor Wis. Stat. § 281.12 clearly grant the agency specific authority to regulate high capacity wells. Nor can it be implied from these general statutes that the legislature intended to delegate to DNR authority to regulate high capacity wells under the public trust doctrine.

There are specific instances where the legislature has in fact delegated DNR authority under the public trust doctrine. *See e.g.*, Wis. Stat. § 281.31 (authorizing shoreland zoning); Wis. Stat. § 281.33 (authorizing municipal construction site erosion control and storm water management). However, a plain reading of Wis. Stat. §§ 281.11 and 281.12 reveal that in no way did the legislature delegate to DNR through these provisions regulatory authority based on the public trust doctrine.

Accordingly, the Court should clarify that absent express delegation, the legislature has not conferred DNR broad authority to regulate based on the public trust doctrine, and has not provided such authority within the framework of high capacity well regulation. In addition, the Court should reject the argument that the

legislature impliedly granted DNR such regulatory authority under the public trust doctrine.

B. The Public Trust Doctrine Applies Only to Navigable Waters and Therefore Should Not Apply to High Capacity Wells

Under the public trust doctrine, the definition of navigability is central to the determination of public rights because the doctrine traditionally applies only to navigable waters. The court of appeals' decision is the first case expanding the public trust doctrine to groundwater and wells.

To be navigable, a waterway must have regularly recurring periods when it is possible to float a canoe or small recreational craft on that waterway, or have navigable periods lasting long enough to allow for recreational use. *DeGayner & Co., Inc. v. Dep't of Natural Res.*, 70 Wis. 2d 936, 942–46, 236 N.W.2d 217 (1975); *Village of Menomonee Falls v. Dep't Natural Res.*, 140 Wis. 2d 579, 412 N.W.2d 505 (Ct. App. 1987).

"Navigable waterway" has been defined by DNR to mean "any body of water with a defined bed and bank that is navigable under Wisconsin law. In Wisconsin a body of water is navigable if it is capable of floating on a regularly recurring basis the lightest boat or skiff used for recreation or any other purpose." Wis. Admin. Code § NR 310.03(5).

Although Wisconsin courts have considered expanding the definition of navigability, to date they have not done so. *See, e.g., DeGayner*, 70 Wis. 2d at 949. In fact, the parties in this case fail to cite a Wisconsin case that supports the

proposition that the public trust doctrine applies beyond navigable waters, or to groundwater or the regulation of high capacity wells, as in this case. Such a reading of the law would expand the public trust doctrine in a manner not envisioned by the legislature.

CONCLUSION

Amici urge the Court to affirm that state agencies only possess those powers expressly conferred by the legislature. The Court should further clarify that general duties provisions do not confer plenary regulatory authority to a state agency, especially where the legislature has enacted a specific legislative scheme regulating high capacity wells. Last, the Court should recognize the public trust doctrine does not grant authority under DNR's general delegation statutes (Wis. Stat. §§ 281.11 and 281.12) or apply beyond navigable waterways.

DATED this 25th day of January, 2011.

Respectfully submitted,
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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(7), (8)(b) and (c) for a brief and appendix produced with Times New Roman, 13 point font. The length of this brief is 1,964 words.

Dated this 25th day of January, 2011.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 80.19(12). I further certify that:

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

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

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CERTIFICATE OF SERVICE

I, Andrew Cook, hereby certify that I caused three true and correct copies of this Joint Amicus Curiae Brief of Wisconsin Manufacturers & Commerce, Inc., Wisconsin Paper Council, Inc. and Midwest Food Processors Association, Inc. in Support of the Village of East Troy's Petition for Review to be served on counsel by placing the same in U.S. mail, first class postage, on this date:

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SUPREME COURT OF WISCONSIN

Appeal No. 2008-AP-3170

LAKE BEULAH MANAGEMENT DISTRICT,
Petitioner-Appellant-Cross-Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,
Co-Petitioner-Co-Appellant-Cross-Respondent,

v.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondent-Respondent,

VILLAGE OF EAST TROY,
Intervening-Respondent-Respondent-Cross-Appellant-Petitioner.

On Appeal From A Decision of the Court of Appeals, District II, dated June 16, 2010, Relating to a Final Order Entered in the Walworth County Circuit Court Case No. 06-CV-172, on September 20, 2008, Honorable Robert J. Kennedy Presiding

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QUESTIONS PRESENTED

1. Does the public trust doctrine apply to groundwater?

2. Would the expansion of the public trust doctrine to groundwater run afoul of the protections afforded to property rights under the Takings Clause and Due Process Clause of the Fifth Amendment of the United States Constitution?

3. Does sound public policy support the expansion of the public trust doctrine to include groundwater?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is the oldest and largest public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Thousands of individuals across the country—including residents of Wisconsin—support PLF, as do numerous organizations and associations nationwide. PLF is headquartered in Sacramento, California, and has offices in Washington and Florida. PLF appears in this action to offer guidance to the Court on background principles of the ancient public trust doctrine, its constitutional dimensions, and its policy implications.

SUMMARY OF ARGUMENT

The common law public trust doctrine, incorporated in Wisconsin Constitution art. IX, § 1, imposes a public trust only on surface waters and may not be expanded to include groundwater because such an expansion would violate the Takings Clause and the Due Process Clause of the Fifth Amendment of the United States Constitution. In addition, the public trust doctrine is an inappropriate tool for making groundwater permitting decisions

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amicus Curiae, its members or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

because it was specifically designed by courts to apply to surface water only and not to groundwater. Applying the public trust doctrine to groundwater in this case would turn the doctrine on its head from a doctrine limiting government power to a doctrine expanding government power.

ARGUMENT

I

THE PUBLIC TRUST DOCTRINE DOES NOT APPLY TO GROUNDWATER RESOURCES

A. The Public Trust Doctrine Embedded in the Wisconsin Constitution Is Rooted in a Provision in the Northwest Ordinance of 1787, Which Traces Its History to English Common Law

Because the original 13 states could not pay their debts after the Revolutionary War, Virginia ceded its vast northwest territory to the new nation, so that the land could be sold to generate funds. *Diana Shooting Club v. Husting*, 156 Wis. 261, 267, 145 N.W. 816, 818 (1914). A condition of the grant required that the Mississippi and St. Lawrence rivers, and associated navigable waters, be free public highways in perpetuity, a mandate incorporated into the Northwest Ordinance of 1787.[2] *Id.* Section 12 of the Act

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[2] The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States . . . without any tax, impost, or duty therefor.

Act of July 13, 1787, art. IV, 1 Stat. 51.

of April 20, 1836, establishing the territorial government of Wisconsin, provided that inhabitants of the territory should be subject to all the conditions contained in the Northwest Ordinance of 1787. *Id.* The Act of August 6, 1846, which enabled the Wisconsin territory to become a state, provided that its navigable waters "shall be common highways and forever free,"echoing the language of the Northwest Ordinance of 1787 and the Act of April 20, 1836. *Id.* In turn, art. IX, § 1, of the Wisconsin Constitution, adopted by the territorial convention on February 17, 1848, and approved by the act of Congress admitting Wisconsin into the Union, incorporated the precise wording of the Northwest Ordinance regarding navigable waters.[3] *Muench v. Pub. Serv. Comm'n*, 261 Wis. 492, 499, 53 N.W.2d 514, 516 (1952).

In its decision below, the Court of Appeals correctly noted that art. IX, § 1, embodies the common law public trust doctrine, but it was mistaken in holding that the doctrine encompasses groundwater resources. The ancient doctrine is based on the English tradition limiting the King's title to navigable waters and soils thereunder by imposing a trust on the sovereign to ensure the general populace access for the purpose of navigation and fishing. *Martin v.*

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[3] [T]he river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between same, shall be common highways and forever free, as well as to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

Wis. Const. art. IX, § 1.

Lessee of Waddell, 41 U.S. 367, 412-13 (1842). Even if the sovereign were to convey the navigable water or land beneath it to grantees, the public trust survived the conveyance. *Id.* Thus, the English public trust doctrine imposed a servitude on the property in perpetuity for navigation and fishing.

In North America, such servitudes were applied to "the bays, rivers and arms of the sea, and the soils under them," title to which was granted by the English Crown to settlers. *Id.* at 414 ("[T]he previous habits and usages of the colonists have been respected, and they have . . . enjoy[ed] in common, the benefits and advantages of the *navigable waters for the same purposes, and to the same extent*, that they have been used and enjoyed for centuries in England.") (emphasis added). The Supreme Court could not have made the point any clearer: the public trust doctrine imposed a trust only on navigable surface waters and soils thereunder.

B. The Public Trust Doctrine Protects Navigation, Commerce, and Fishing in Surface Waters

1. The United States Supreme Court Has Fully Defined the Scope and Limitations of the Public Trust Doctrine as of the Time the Doctrine Was Incorporated Into the Wisconsin Constitution

To understand the limitations of Wisconsin Constitution, art. IX, § 1, it is important to understand the scope of the public trust doctrine at the time the doctrine was incorporated into the Wisconsin Constitution. Although some early English common law decisions limited the public trust doctrine to

navigable waters influenced by tides, three important decisions of the United States Supreme Court defined the American rule differently.

In a landmark 1871 decision, the United States Supreme Court defined the term "navigable waters" as waters that are "used, or are susceptible of being used, in their ordinary condition, as *highways for commerce*, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. 557, 563 (1871) (emphasis added). Thus, the Court focused on commerce as the touchstone of navigability.

Five years later, the Court set forth the contours of the public trust doctrine in navigable waters:

> [I]n England . . . the [public trust] rule was often expressed as applicable to tide-waters, only, although the reason of the rule would equally apply to navigable waters above the flow of the tide; that reason being, that the public authorities ought to have entire control of the great *passageways of commerce* and navigation, to be exercised for the public advantage and convenience.

Barney v. Keokuk, 94 U.S. 324, 337-38 (1877) (emphasis added).

Sixteen years later, the Supreme Court set forth the full extent and limitations of the American public trust doctrine, citing the free flow of commerce, navigation, and fishing as the three historical, and the only, bases for the doctrine. "It is a title held in trust for the people of the State that they may enjoy the *navigation* of the waters, *carry on commerce* over *them*, and have liberty of *fishing therein* freed from the obstruction or interference of

private parties." *Ill. Cent. R.R. Co. v. Ill.*, 146 U.S. 387, 452 (1892). Thus, the public trust doctrine historically did not encompass groundwater, and this applies both to the original thirteen states adopting the Federal Constitution in 1787 and to states admitted thereafter that had been territories subject to the Northwest Ordinance of 1787.

Taken together, these three cases stand for the proposition that, as of the effective date of Wisconsin Constitution art. IX, § 1, and its antecedents, the scope of the public trust doctrine was limited to a servitude over navigable surface waters to provide the public with access for the purpose of navigation, commerce, and fishing, and did not encompass groundwater.

2. The Wisconsin Supreme Court Has Never Applied the Public Trust Doctrine to Groundwater

The early Wisconsin case of *Olson v. Merrill*, 42 Wis. 203 (1877), established that a stream is subject to a public trust of open navigability if it has "sufficient capacity to float logs to market," thereby infusing the protection of commerce into Wisconsin's navigability test, in a vein similar to the federal rule. *Id.* at 212. Since then, the Wisconsin Supreme Court has applied the commerce/navigability test to include public trust protection for (1) navigation access for water craft of all types, *Diana Shooting Club v. Husting*, 156 Wis. at 266-67, 145 N.W. at 818; *DeGayner & Co. v. Dep't of Natural Res.*, 70 Wis. 2d 936, 946-47, 236 N.W.2d 217, 222 (1975); *Muench*, 261 Wis. at 504-05, 53 N.W.2d at 519, (2) artificial navigable waters "directly and inseparably

connected to natural navigable waters," *Just v. Marinette County*, 56 Wis. 2d 7, 16-20, 201 N.W.2d 761, 768-69 (1972), and (3) certain nonnavigable surface waters that could affect navigability downstream, *Omernik v. State*, 64 Wis. 2d 6, 12-14, 218 N.W.2d 734, 739 (1974). In such cases, the Wisconsin Supreme Court has focused on prohibiting property owners subject to the trust from interfering with commerce. *Just*, 56 Wis. 2d at 18-20, 201 N.W.2d at 769 (public trust doctrine applied where the disturbance of shore lands may adversely impact commerce). *See generally State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 403-06, 577 N.W.2d 813, 818 (1998).

Significantly, this Court without exception has limited the applicability of the public trust doctrine to only the following natural resources: (1) navigable waters and soils thereunder, (2) nonnavigable surface waters directly connected to navigable waters with a potential to impact navigability, (3) surface lands immediately abutting navigable waters (especially wetlands) the drainage or destruction of which could impact navigability. *See Priewe v. Wis. State Land & Improvement Co.*, 93 Wis. 534, 67 N.W. 918 (1896) (drainage of navigable Lake Muskego violates public trust in navigable waters); *Willow River Club v. Wade*, 100 Wis. 86, 76 N.W. 273 (1898) (tributary of the Mississippi River subject to public trust); *In re Trempealeau Drainage Dist.*, 146 Wis. 398, 131 N.W. 838 (1911) (drainage of swamp and marsh lands abutting Mississippi River implicates public trust doctrine);

In re Crawford County Levee & Drainage Dist., 182 Wis. 404, 196 N.W. 874 (1924) ("bottom land" immediately adjacent to the Mississippi River cannot be converted to private farmland because of adverse impact on navigability); *City of Milwaukee v. State*, 193 Wis. 423, 214 N.W. 820 (1927) (the project would not restrict navigation but promote it); *State v. Pub. Serv. Comm'n*, 275 Wis. 112, 81 N.W.2d 71 (1957) (navigation in general would be promoted); *City of Madison v. State*, 1 Wis. 2d 252, 83 N.W.2d 674 (1957) (the project would not materially interfere with boating); *City of Madison v. Tolzmann*, 7 Wis. 2d 570, 97 N.W.2d 513 (1959) (city requirement of license fee for boats unconstitutional because navigability is a statewide public trust concern).

Never has this Court extended the public trust doctrine to groundwater, and with good reason.

II

EXPANSION OF THE PUBLIC TRUST DOCTRINE TO GROUNDWATER RESOURCES WOULD EXTINGUISH PROPERTY RIGHTS PROTECTED BY THE TAKINGS CLAUSE AND WOULD DENY DUE PROCESS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Although property rights generally are determined by state law, *Barney v. Keokuk*, 94 U.S. at 338, such laws are subject to the United States Constitution. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 1031-32 (1992). In a recent United States Supreme Court case, a plurality of Justices

stated that a state court's judicial redefinition of the "background principles" of a state's property law requires compensation under the Takings Clause of the Fifth Amendment, while two additional Justices stated that eliminating established property rights could be set aside under the Fifth Amendment as a deprivation of property without due process. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2601, 2614 (2010). Here, common law history and federal constitutional principles intertwine.

The English common law public trust doctrine passed to the original thirteen states upon their achieving independence from England and in due course passed to Wisconsin, making Wisconsin a successor trustee of the public trust in navigable waters within the state. According to *Illinois Central*, the scope of the public trust to which Wisconsin succeeded was no greater than the scope of the public trust recognized at common law at the time the United States Constitution was ratified in 1787. *Ill. Cent.*, 146 U.S. at 434-37 (public trust in the Great Lakes is subject to the same limitations as the public trust had always been at common law).

At it's furthest reaches, the public trust doctrine as of 1787 extended only to navigable waters and soils underneath navigable waters for the protection of commerce, navigation, and fishing. *Id.* at 452; *Martin*, 41 U.S. at 412-13. Because groundwater was not subject to the common law public trust servitude as of 1787, property titles in Wisconsin were not encumbered

by such a servitude when Wisconsin entered the Union, at which time art. IX, § 1, of the Wisconsin Constitution took effect. Since then, the Wisconsin Supreme Court has never extended the public trust doctrine to include groundwater.

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, protects against abrogation of property rights without just compensation. If a servitude under the public trust doctrine applies to groundwater, then denial of the use of the groundwater in accordance with the trust does not require just compensation under the Takings Clause, since title would have been taken subject to the servitude. But if, as here, groundwater is not, and has never been, covered by a servitude under the Wisconsin public trust doctrine, then just compensation is required if the state is to deny its use and enjoyment to owners.

The Petitioners would have this Court for the first time expand the public trust doctrine to include a servitude on groundwater resources. Doing so in this case would constitute an assault on the "background principles" of Wisconsin's property law and, therefore, would run afoul of the Takings Clause of the Fifth Amendment, as such an interpretation would deprive Wisconsin's residents of property rights that have never been subject to the public trust doctrine. *See Stop the Beach Renourishment*, 130 S. Ct. at 2601.

In addition, as two Justices of the Supreme Court observed, such an expansion would be a denial of due process under the Due Process Clause of the Fifth Amendment. *Id.* at 2614 ("[A] judicial decision . . . eliminating an established property right [may be] set aside as a deprivation of property without due process of law.").

III

CONVERTING A RESOURCE THAT HAS LONG BEEN VIEWED AS PRIVATE INTO A PUBLIC RESOURCE RUNS COUNTER TO GOOD PUBLIC POLICY AND TO THE RATIONALE UNDERLYING THE PUBLIC TRUST DOCTRINE

Making private resources public without compensation is not only unconstitutional, it is bad public policy. The public trust doctrine applicable to surface waters historically served as a constraint on government power over a natural resource. Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 Cal. W. L. Rev. 239, 258 (1992). In the instant case, expansion of the public trust doctrine to groundwater would do just the opposite. It would increase the power of the Wisconsin Department of Natural Resources (DNR) over groundwater. This turns the public trust doctrine on its head from a restraint on government to an expansion of government.

Over many years, the common law has carefully developed the relationship between private and public rights in water. James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public*

Trust and Reserved Rights Doctrines at Work, 3 J. Land Use & Envtl. L. 171, 180-97 (1987). This Court should not upset that delicate balance by holding for the first time that Wisconsin Constitution art. IX, § 1, applies to groundwater, because to do so would contravene years of federal and Wisconsin precedent.

Wisconsin's legislature has enacted groundwater protection statutes setting forth precise criteria under which the DNR must make decisions regarding whether to issue permits for groundwater pumping wells. Wis. Stat. §§ 281.34, 281.35. The Wisconsin legislature is in a better position to determine how groundwater resources in the state should be managed than is a court applying an ancient common law doctrine that was never intended to address groundwater resource management issues at any time, or any where, let alone in 21st Century Wisconsin. In short, cutting edge, technical criteria set forth in groundwater legislation addressing the permitting of groundwater pumping wells are far better tools for making groundwater permitting decisions than are the blunt edged, judicial criteria of navigability, commerce, and fishing attached to the public trust doctrine.

This is not a case involving new resources or technologies that could not have been contemplated by early common law. To the contrary, for centuries groundwater has been a well known natural resource, and there is no

reason for this Court to expand the public trust doctrine to include groundwater now.

CONCLUSION

For these reasons, Pacific Legal Foundation respectfully urges this Court to decide that the public trust doctrine embedded in Wisconsin Constitution art. IX, § 1, does not apply to groundwater and that DNR may not apply common law public trust criteria in making groundwater permitting decisions under the applicable groundwater permitting statutes.

DATED: January 24, 2011.

Respectfully submitted,

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I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date, and that a copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

DATED: January 24, 2011.

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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2008AP003170

LAKE BEULAH MANAGEMENT DISTRICT

Petitioner-Appellant-Cross Respondent, Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner-Co-Appellant-Cross-Respondent,

vs. Circuit Court Case No. 06-CV-172

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent-Respondent,

VILLAGE OF EAST TROY

Intervening Respondent- Respondent-Cross Appellant; Petitioner.

JOINT *AMICUS CURIAE* BRIEF OF THE WISCONSIN REALTORS® ASSOCIATION AND WISCONSIN BUILDERS ASSOCIATION

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INTRODUCTION

The court of appeals' decision in *Lake Beulah Mgmt. District v. Wis. Dept. of Natural Resources* gives the Wisconsin Department of Natural Resources (DNR) seemingly unlimited authority to regulate activities that could affect surface and ground waters under the public trust doctrine and general enabling statutes (such as Wis. Stat. §§ 281.11 and 281.12), even if such authority would exceed the specific regulatory framework for various activities found in state statutes (such as Wis. Stat. §§ 281.34 and 281.35). If allowed to stand, the court of appeals' decision would be in conflict with the separation of powers doctrine under Wisconsin's Constitution and well-established state law. Furthermore, the decision would create tremendous uncertainty for developers, builders and property owners in Wisconsin.

LAW AND ARGUMENT

I. THE PUBLIC TRUST DOCTRINE DOES NOT APPLY IN THIS CASE

Wisconsin's Constitution provides the state with authority over navigable waters pursuant to the public trust doctrine. *See* Wis. Const. art., IX, § 1. The body of the trust, however, does not include groundwater, which is the subject matter of this case. In addition, Wis. Stat. §§ 281.11 and 281.12 are not a public trust grant of authority to regulate groundwater in order to protect navigable waters. Moreover, the public trust doctrine is not a grant of regulatory authority beyond the authority specifically set forth in statutes.

A. The Public Trust Doctrine Does Not Apply to Groundwater

In analyzing the DNR's authority under Wis. Stat. §§ 281.11 and 12, the court of appeals inaccurately suggested that groundwater is subject to the public trust doctrine. The court of appeals stated the DNR has a duty under the public trust doctrine "when it has evidence suggesting that waters of the state may be affected by a well." *Lake Beulah Mgmt. District v. Wis. Dept. of Natural Resources*, 2010 WI App 85, ¶ 29, 327 Wis.2d 222, 787 N.W 2d 926. Moreover, in discussing how the DNR's public trust duty is triggered, the court of appeals stated that "'scientific evidence' suggesting an adverse affect to waters of the state should be enough to warrant further, independent investigation." *Id.* at ¶ 31.

Both Wis. Stat. §§ 281.11 and 281.12 contain the phrase "waters of the state", as is referenced by the court of appeals. Wis. Stat. § 281.11 indicates that the DNR is the central state agency responsible for protecting "the quality and management of the waters of the state, ground and surface, public and private." In addition, Wis. Stat. §281.12(1) indicates the DNR has "general supervision and control over the waters of the state." Wis. Stat. § 281.01(18) defines "waters of the state" as follows:

> [T]hose portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction.

The phrase "waters of the state" incorporates waters, such as groundwater, which are not navigable and therefore outside the scope of the public trust doctrine.

In contrast to the expansive list of waters in Wis. Stat. § 280.01(18), the public trust doctrine requires that the state hold only navigable waters in trust for the public. *Hilton v. Department of Natural Resources*, 2006 WI 84, ¶ 18, 293 Wis. 2d 1, 717 N.W. 2d 166. A water body is navigable for the purposes of the public trust doctrine if it "is capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes." *Muench v. Public Service Commission*, 261 Wis. 2d 492, 506, 53 N.W 2d 514, 519 (1952). Furthermore, waters are considered navigable only if these conditions reoccur from year to year. *DeGayner & Co. v. Department of Natural Resources,* 70 Wis. 2d 936, 945-46, 236 N.W. 2d 21 (1975).

The definition of "waters of the state" contained in Wis. Stat. § 281.01(18) is comprehensive and certainly encompasses many waters that are not navigable, and therefore not part of the corpus of the public trust. This case involves the direct regulation of groundwater. It is not possible to float a small boat, skiff or canoe in groundwater. Therefore, groundwater is not navigable, and not subject to the public trust doctrine. Consequently, Wis. Stat. §§ 281.11 and 281.12 cannot delegate public trust responsibility to DNR for groundwater.

B. Wis. Stat. §§ 281.11 and 281.12 are not a delegation of Public Trust Authority to Regulate Groundwater in Order to Protect Navigable Waters

As mentioned above, groundwater is not a navigable body of water, and therefore is not part of the waters subject to the public trust. Furthermore, Wis.

Stat. §§ 281.11 and 281.12 are not a delegation of public trust authority to regulate groundwater to address potential impacts on navigable bodies of water.

When the legislature has created statutory authority to regulate waters or lands outside the public trust in order to protect navigable waters, it has specifically said so. For example, Wis. Stat. § 281.31 authorizes municipal shoreland zoning regulation, in part to "aid in the fulfillment of the state's role as trustee of its navigable waters." Similarly, Wis. Stat. § 281.32 authorizes the creation of erosion control and storm water ordinances in part to help the state fulfill its "role as trustee of its navigable waters." Neither shorelands nor storm water are navigable waters.

In this case, as mentioned above, groundwater is outside the public trust doctrine. Unlike the statutes referenced above, nothing in Wis. Stat. §§ 281.11 and 281.12 indicates the statutes were intended to delegate regulatory authority over groundwater in order to protect navigable waters subject to the public trust.[1] If the legislature wanted to delegate to the DNR public trust responsibility to regulate groundwater to protect navigable waters, it would have said so as it did in Wis. Stat. §§ 281.31 and 281.32. Thus, Wis. Stat. §§ 281.11 and 281.12 do not delegate public trust responsibility to the DNR to regulate groundwater to protect navigable waters.

[1] Rather, Wis. Stat. §§ 281.34 and 281.35 reflect the choices that the legislature made in regulating high capacity wells, including those made to ensure public rights in navigable waters were protected. *See e.g.*, Wis. Stat. 281.35(5)(d)(1) (requiring DNR to determine before approving an application for withdrawal of more than 2,000,000 gallons per day that "no public water rights in navigable waters will be adversely affected").

C. The Public Trust Doctrine Does Not Expand Regulatory Authority Beyond that Contained in the Statutes

The court of appeals relied on Wis. Stat. §§ 281.11 and 281.12 to determine that the DNR has a public trust responsibility to conduct an environmental review of a well when there was evidence indicating that the "waters of the state" may be impacted by the well, even though such a review is not specified in Wis. Stat. § 281.34(4). *Lake Beulah Mgmt. District*, 2010 WI App. at ¶ 29. The application of the doctrine, however, does not change the regulatory authority granted to the DNR under Wis. Stat. §§ 281.11 and 281.12, or under Wis. Stat. §§ 281.34 or 281.35.

The court of appeals correctly noted that the "public trust doctrine found in our state constitution does not have any self-executing language authorizing the DNR to do anything -- the statutes do that." *Lake Beulah Mgmt. District*, 2010 WI App at ¶ 39. The public trust doctrine by itself does not establish any legal rights. *Borsellino v. Wisconsin Department of Natural Resources*, 2000 WI App 27, ¶18, 232 Wis. 2d. 430, 606 N.W. 2d 255. The public trust doctrine "merely establishes standing for the state, or any person suing in the name of the state for the purposes of vindicating the public trust, to assert a cause of action recognized by the existing law of Wisconsin." *Id.* (quoting *State v. Deetz*, 66 Wis. 2d 1, 13, 224 N.W. 2d 407 (1974)). The legislature has the authority to administer the public trust and has the power of regulation to accomplish the purposes of the trust. *Gillen v. City of Neenah*, 219 Wis. 2d 806, 820-21, 580 N.W. 2d 628 (1998).

Moreover, in administering the public trust, the legislature may authorize some encroachments on navigable waters. *Borsellino,* 2000 WI App at ¶ 17.

Thus, the public trust doctrine does not expand the regulatory authority granted pursuant to that statute. In this case, the question is whether the DNR has regulatory authority under Wis. Stat. §§ 281.11 and 281.12 to conduct environmental reviews of wells not subject to the extensive statutory framework contained in Wis. Stat. §§ 281.34 and 281.35. The resolution of this question is based upon an analysis of the relevant statutory provisions, and not whether the public trust doctrine applies. Simply put, the public trust doctrine does not create any independent regulatory authority for the DNR beyond that which is contained in the statutes.

II. THE COURT OF APPEALS' DECISION CREATES REGULATORY UNCERTAINTY

The court of appeals determined that the DNR's regulatory authority over high capacity wells was not limited to the specific regulatory structure set forth in Wis. Stat. §§ 281.34 and 281.35. *See Lake Beulah Mgmt. District*, 2010 WI App at ¶¶ 25-28. Rather, the court of appeals examined the general authority of the DNR contained in Wis. Stat. §§ 281.11 and 281.12 and indicated the DNR has a duty under the public trust doctrine to conduct an environmental review of a well when it has "evidence suggesting that waters of the state may be impacted by a well." *Id.* at ¶ 29. Moreover, the court of appeals noted that there was "no standard set by statute or case law" specifying the kind of evidence that would trigger an

investigation of a well's environmental impacts "or to condition or deny a well permit." *Id.* at ¶ 31.

Disturbingly, the court of appeals went on to indicate that its conclusion was not only relevant to high capacity wells, but also to the regulation of wells with a capacity of less than 100,000 gallons per day. *Id.* at ¶ 23, fn 9. Thus, even though the legislature specifically chose not to regulate these smaller wells under Wis. Stat. §§281.34 and 281.35, the court of appeals' decision indicates the DNR may do so. *See* Wis. Stat. §281.34(1)(b) (defining "high capacity well" as a well, in combination with other wells on the property, that has a capacity of 100,000 gallons per day).

Water is essential for residential, as well as other types of development. The DNR has indicated that 75% of Wisconsinites use groundwater for their domestic needs and 95% of local governments use groundwater for their public water supplies. Petition for Review at 2. As additional groundwater resources are needed to meet Wisconsin's future growth needs, this decision creates uncertainty as to what resources will be available for use. Moreover, this uncertainty is created for both high capacity wells, which municipalities would likely use to provide water for domestic use in urban areas, as well as for smaller wells that may be serving property owners in rural areas.

In addition, while this case specifically deals with the regulation of wells, the decision of the court of appeals has the potential to dramatically expand the DNR's regulatory authority in other areas, without any corresponding legislative

action. The court of appeals decision ignores the regulatory thresholds and standards contained in the high capacity well law by requiring environmental reviews for wells not covered under Wis. Stat. §§ 281.34 and 281.35. *See Lake Beulah Mgmt. District,* 2010 WI App at ¶¶ 23, fn 9; 27. The establishment of regulatory threshold levels and standards in regard to water regulation, however, is not unique to the regulation of high capacity wells. Consequently, the question that arises under the court of appeals' decision is whether the DNR has the authority to regulate other matters that are below statutory thresholds.

Take, for example, Wisconsin's shoreland zoning requirements. State statute provides it is in the public interest to establish municipal shoreland zoning ordinances applicable to lands abutting navigable waters. Wis. Stat. § 281.31(1). This provision specifies that the purpose of these regulations is to, among other things, "prevent and control water pollution; control spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty." *Id.* To "effect the purposes of 281.31 and to promote the public health, safety and general welfare," counties are required to adopt shoreland zoning ordinances in unincorporated areas. Wis. Stat. §59.692 (1m). "Shorelands" are defined as the area within 1000 feet of the ordinary high water mark of a lake, or within 300 feet of a river or stream or the landward side of the floodplain, whichever is a greater distance. *Id.* at § 59.692 (1)(b). County shoreland zoning ordinances must comply with shoreland zoning

standards promulgated by the DNR through rulemaking. *See id.* at §§ 59.692(1)(c), 59.692(6).

Under the court of appeals decision, does the DNR have the authority to regulate beyond the statutorily defined shorelands if it determines there is a public trust issue? If so, this in essence renders meaningless the regulatory choices and limitations made by the legislature that are contained in Wis. Stat. § 59.692.

The type of open-ended and undefined regulation allowed under the court of appeals decision creates uncertainty. Regulatory uncertainty stifles economic development. If a potential permittee is unable to identify the standards that must be met to obtain a permit, the permittee by definition will not know how long it will take to obtain a permit and at what cost. Such uncertainty discourages economic development and investment in Wisconsin. Wisconsin's citizens benefit from, and fairness demands, a defined regulatory system.

III. THE COURT OF APPEALS VIOLATED THE SEPARATION OF POWERS DOCTRINE BY GIVING THE DNR REGULATORY AUTHORITY EXCEEDING THAT GIVEN TO THEM BY THE LEGISLATURE

The Wisconsin Constitution creates three separate, but equal branches of government, with "no branch to exercise the power committed by the constitution to another." *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1981). In other words, one branch of government may not exercise its power in a manner that would unduly burden or substantially interfere with another branch's exercise

of power. *See Complaint Against Grady*, 118 Wis. 2d 762, 776, 348 N.W.2d 559 (1984).

Under the separation of powers doctrine recognized by the Wisconsin Constitution, the Wisconsin Legislature is solely responsible for creating the public policies for the state.[2] *See* Wis. Stat. § 15.001(1); *see also*, *Flynn v. DOA*, 216 Wis. 2d 521, 539, 576 N.W.2d 245 (1998); *Hengel v. Hengel*, 122 Wis. 2d 737, 742, 365 N.W.2d 16 (Ct. App. 1985). As part of the executive branch of government, an administrative agency is responsible for carrying out the programs and policies established by the legislature. *See* Wis. Stat. § 15.001(1). Moreover, an administrative agency has "only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates." *Kimberly-Clark Corp. v. PSC*, 110 Wis. 2d 455, 461-62, 329 N.W.2d 143 (1983). When determining the authority of an agency, courts are to strictly construe the agency's enabling statute. *Id.* If any reasonable doubt exists regarding an agency's implied authority, courts are to resolve such doubt against the exercise of such authority. *See Froebel v. Wis. Dept. of Nat. Resources*, 217 Wis. 2d 652, 663, 579 N.W.2d 774 (Ct. App. 1998) (citations omitted).

Like administrative agencies, courts are not charged with establishing public policy for the state. *See* Wis. Stat. § 15.001(1) Courts are responsible for determining "the validity of legislation in light of the constitution, [but] not in

[2] While not expressly established in the Wisconsin Constitution, the separation of powers doctrine is embodied in the constitutional provisions related to legislative, executive and judicial powers in the three branches of government. *See State v. Borrell*, 167 Wis. 2d 749, 763, 482 N.W.2d 883 (1992).

light of its own wisdom." *See Wis. Solid Waste Recycling Auth. v. Earl*, 70 Wis. 2d 464, 478, 235 N.W.2d 648 (1975). If the legislature and courts "differ on the appropriate public policy, the legislative view prevails." *Hengel*, 122 Wis. 2d at 742 (citations omitted).

In this case, the court of appeals violated the separation of powers doctrine by giving the DNR authority that exceeds the regulatory framework set forth by the Wisconsin Legislature in Wis. Stat. §§ 281.34 and 281.35. Specifically, by directing the DNR to consider "evidence suggesting that waters of the state might be affected by a well," the court effectively created a new permit standard and thus authorized the DNR to go beyond the explicit permitting framework for high capacity wells set forth in Wis. Stat. §§ 281.34 and 281.35. *See Lake Beulah Mgmt. District*, 2010 WI App at ¶ 29.

Similarly, the court of appeals' determination that the public trust doctrine requires the DNR to review such evidence is also beyond the court's authority. The legislature, not the courts, is empowered to administer the public trust doctrine and delegate to the DNR any authority to "protect[] the public's rights, and effectuate the purpose of the trust." *Hilton,* 293 Wis.2d at ¶¶ 19-20.

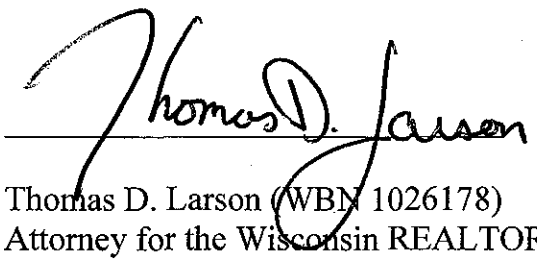
Wis. Stat. §§ 281.11 and 281.12 are not a delegation of public trust authority to regulate groundwater, nor has the legislature delegated to the DNR the authority to regulate high capacity wells beyond the framework expressly provided in Wis. Stat. §§ 281.34 and 281.35. As this Court has recognized, if the legislature

intended to do either, the legislature would have expressly done so in the statutes. *See e.g., State v. MacArthur*, 2008 WI 72, ¶ 32, 310 Wis. 2d 550, 750 N.W.2d 910.

CONCLUSION

The WRA and WBA respectfully request that this Court reverse the court of appeals' decision and determine that (1) the public trust doctrine does not apply to groundwater, and (2) the court of appeals violated the separation of powers doctrine by giving the DNR regulatory authority that exceeds the regulatory framework established by the Wisconsin Legislature in Wis. Stat. §§ 281.34 and 281.35.

Dated this 24th day of January, 2011.



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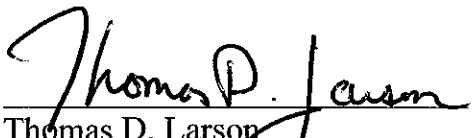
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2990 words.



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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding any appendix, that complies with the requirements of Wis. Stat. § 809.19(12).

The content, text and format of the electronic copy of the brief are identical to the original paper copy of the brief filed with the Court on today's date.

A copy of this certification was included with the paper copies of this brief filed with the court and served on all parties and counsel of record.

Dated this 24th day of January, 2011.

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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2008AP003170

LAKE BEULAH MANAGEMENT DISTRICT,
Petitioner- Appellant-Cross-Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,
Co-Petitioner-Co-Appellant-Cross-Respondent,

v.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondent-Respondent,

VILLAGE OF EAST TROY,
Intervening-Respondent-Respondent-Cross-Appellant-Petitioner.

JOINT *AMICUS CURIAE* BRIEF OF WISCONSIN WILDLIFE FEDERATION, RIVER ALLIANCE OF WISCONSIN AND CLEAN WISCONSIN

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January 24, 2011

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INTEREST OF THE AMICUS

This amicus curiae brief is submitted by Wisconsin Wildlife Federation, River Alliance of Wisconsin, and Clean Wisconsin ("Amici").

Wisconsin Wildlife Federation ("WWF") is a Wisconsin non-profit organization comprised of 174 hunting, fishing, trapping and forestry-related organizations in Wisconsin, with a combined membership exceeding 100,000 individuals. WWF is dedicated to conservation education and the advancement of sound conservation policies on the state and national level. Members of WWF use Wisconsin waters for recreation and aesthetic enjoyment including but not limited to, fishing, boating and swimming. Members of WWF have a substantial interest in maintaining and protecting Wisconsin's groundwater and groundwater-dependent surface waters.

River Alliance of Wisconsin is a Wisconsin non-profit organization, whose mission is to advocate for the protection, enhancement and restoration of Wisconsin's rivers and watersheds. With a membership comprised of over 3,200 individual, organizational and business members, River Alliance includes Wisconsin residents who use Wisconsin waters for recreation and aesthetic enjoyment, including but not limited to canoeing,

kayaking, fishing and swimming. Members of River Alliance have a substantial interest in protecting Wisconsin groundwater and groundwater-dependent surface waters.

Clean Wisconsin is a Wisconsin non-profit corporation whose purpose is to advocate on behalf of its members for clean air, water and energy in the legislature, before regulatory agencies, and in the courts. Clean Wisconsin members include Wisconsin residents who are affected by high-capacity well withdrawals and actions undertaken by the Wisconsin Department of Natural Resources ("DNR") relating thereto, due to their use and enjoyment of Wisconsin groundwater-dependent surface waters.

INTRODUCTION

Wisconsin has long recognized the vital role its water resources play in developing healthy communities and economies and sustaining the ecological viability of the natural places cherished across the generations. The public trust doctrine is intended to protect the precious waters of our state for the use and enjoyment of Wisconsin citizens, now and into the future. The Court of Appeals decision in this case properly upheld a rational interpretation of the public trust doctrine within the framework of Wisconsin's high capacity well permitting statutes in keeping with the State

of Wisconsin's Constitution. In finding that the DNR has the expressly granted authority to consider evidence of adverse impacts to state waters, including those affected by high capacity well withdrawals, the Court of Appeals articulates the harmonious relationship between Wis. Stat. §§ 281.11 and 281.12 and Wis. Stat. §§ 281.34 and 281.35 and, in doing so, protects vital economic and ecological interests while avoiding a regulatory void that would place said interests in jeopardy.

ARGUMENT

I. THE COURT OF APPEALS DECISION ARTICULATES THE HARMONIOUS RELATIONSHIP BETWEEN WIS. STAT. §§ 281.11 AND 281.12 AND WIS. STAT. §§ 281.34 AND 281.35.

A. Wis. Stat. §§ 281.34 and 281.35 are harmonious with the general DNR duties found in Wis. Stat. §§ 281.11 and 281.12.

As the Court of Appeals rightly held, the general authority sections of Wis. Stat. §§ 281.11 and 281.12 that grant DNR powers to regulate high capacity wells are harmonious with Wis. Stat. §§ 281.34 and 281.35 that require DNR's environmental review of certain categories of wells. Courts are to interpret statutory language "in the context in which it is used; not in isolation but as part of a whole . . . to avoid absurd or unreasonable results."

State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

Chapter 281, when viewed as a whole, clearly gives DNR discretion to determine the proper weight given to environmental and economic concerns when evaluating high capacity wells. The Village is asking this Court to read §§ 281.34 and 281.35 in isolation, even though the sections lack any limiting language. The Village's argument ignores the express grant of authority to DNR in § 281.11 of "necessary powers…for the enhancement of the quality management and protection of all waters of the state." Further, as the Court of Appeals properly noted, § 281.11 commands that the regulations of the chapter be "liberally construed" in favor of the policies therein. *Lake Beulah Management District v. DNR*, 2010 WI App 85, ¶26, 327 Wis. 2d 222, 787 N.W.2d 926**.** "It is [this Court's] duty to attempt to harmonize statutes that are allegedly in conflict, if it is possible, in a way which will give each full force and effect." *State Dept. of Corrections v. Schwarz*, 2005 WI 34, ¶28, 279 Wis. 2d 223, 693 N.W.2d 703 (internal quotations omitted). The statutes alleged by the Village as in conflict are, quite plainly, harmonious on their face. §§ 281.11 and 281.12 give DNR general authority and duty to manage and

protect the waters of the state, while §§ 281.34 and 281.35 require DNR to perform environmental reviews of high capacity wells to protect vulnerable water resources in specific situations. There is no conflict in the statutory language that prevents either section from realizing its full force and effect. The Village's argument that those sections are surplusage is not credible because §§ 281.34 and 281.35's requirement for conditional environmental review remains intact. Interpreting the statutes as the Village suggests would establish a conflict where one does not exist.[1]

When interpreting statutes with a potential for conflict, this Court "will read the statutes to avoid such a conflict if a reasonable construction exists." *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶28, 303 Wis. 2d 258, 735 N.W.2d 93. The Court of Appeals did just that, finding that the Legislature's explicit grant of authority to DNR to create a

[1] The Village wrongly applies the *Rusk County* analysis to the present case, as the statutes in *Rusk* are in clear conflict whereas in this case they are not. In *Rusk County Citizen Action Group, Inc. v. DNR*, the Court's analysis depended on the language of the Mining Act, which specifically stated "the department *shall* issue the mining permit" if certain conditions have been met. 203 Wis. 2d 1, 552 N.W.2d 110 (Ct. App. 1996) (quoting Wis. Stat. 144.85(5)(a)) (emphasis added). By contrast, §§ 281.34 and 281.35 do not *require* approval of any high capacity well, regardless of whether stated criteria are met. The Court of Appeals decision thus reaffirms the clear meaning of the statutory framework whereby DNR is provided a general grant of authority and duty in §§ 281.11 and 281.12, with specific criteria in §§ 281.34 and 281.35 for when an environmental review is required.

regulatory program to improve and protect Wisconsin's waters was not abrogated by more recent statutes that simply required environmental review under certain conditions. *Lake Beulah*, 2010 WI App at ¶25. Thus, the Court of Appeal's interpretation of the statutory framework is both reasonable and proper, as it allows DNR to continue to exercise its experienced discretion in managing the waters of the state while still meeting the Legislature's intent to require review for sensitive water resources.

B. Wis. Stat. §§ 281.34 and 281.35 do not comprise a comprehensive statutory framework.

For the Village's arguments to succeed, the Village must demonstrate that §§ 281.34 and 281.35 create a comprehensive framework for high-capacity well approval within which DNR can sufficiently protect the waters of the state in keeping with its public trust duties. This the Village cannot do under any reasonable construction of Chapter 281. First of all, the text of § 281.11 specifically provides that the purpose of all of Chapter 281 is to "organize a *comprehensive* program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private." Wis. Stat. § 281.11 (emphasis added). Nothing in the text of Chapter 281 restricts or

otherwise limits DNR to considering only § 281.34 criteria when reviewing high capacity well applications. Rather, DNR is to look to the entirety of Chapter 281 for its regulatory authority, including the general powers and duties under § 281.12, which necessarily encompass the regulation of groundwater withdrawals by wells. As plainly stated by the Court of Appeals, "wells have everything to do with the waters of the state—they withdraw groundwater, one type of water which comprises the definition of waters of the state…" *Lake Beulah,* 2010 WI App at ¶19**.**

As the Court of Appeal's reasonable construction of the statutes makes evident, §§ 281.34 and 281.35 do not create a comprehensive framework for high-capacity well approval. Rather, these sections requiring mandatory environmental review for certain types of wells fit *within* Chapter 281's statutory framework, which provides the DNR a broad grant of regulatory authority to conduct environmental reviews of wells, as conditions warrant, to meet its duty to protect all waters of the state.

C. Wis. Stat. §§ 281.34 and 281.35's legislative history is in accord with the Court of Appeals ruling.

The Village's characterization of the legislative history is misleading, as the statutory charge and proceedings of the Groundwater Advisory Committee created under "Act 310"[2] plainly demonstrate early and ongoing recognition of the fact that Wis. Stat. §§ 281.34 and 281.35 do not comprise a comprehensive regulatory framework for high-capacity well approvals. As explicitly stated in the Committee's initial scoping statement, Act 310 was envisioned by its legislative sponsors as a "first step" in groundwater protection.[3]

Water resources outside Act 310's protected categories and less than Act 310's statutory thresholds, e.g. "springs" defined as those discharging at least one cubic foot per second 80 percent of the time, would not fall within the statute's mandatory environmental review process.[4] Much

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[2] These statutes, created in 2003 Wis. Act 310, comprising the groundwater protection law enacted in 2004, were referred to throughout the Groundwater Advisory Committee's term as "Act 310."

[3] See March 11, 2005 Letter of DNR Secretary Scott Hassett, http://www.dnr.state.wi.us/org/water/dwg/gac/GACcharge.pdf

[4] See Wisconsin Groundwater Advisory Committee, 2007 Report to the Legislature, available at http://dnr.wi.gov/org/water/dwg/gac/GACFinalReport1207.pdf.

discussion and many presentations ensued before the Advisory Committee, which documented the many thousands of springs in Wisconsin *not* meeting Act 310's definition of springs and demonstrated the many thousands of lakes, rivers and streams falling outside Act 310 purview.[5] Thus, it was well understood, by those seeking an expansion of mandatory review and those in opposition alike, that Act 310 did not offer regulatory protection, much less a comprehensive regulatory framework, to the majority of Wisconsin waters of the state.[6]

The Village's reply brief is silent on this critical point, and entirely ignores the array of high-caliber scientific and technical presentations

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[5] See Meyer and Macholl, Wisconsin Springs Flow Analysis, Groundwater Advisory Committee, August 2, 2007, http://www.dnr.state.wi.us/org/water/dwg/gac/080207.htm; Ken Bradbury, Inadequacy of 1200 foot radius criterion, Groundwater Advisory Committee, May 3, 2007, http://www.dnr.state.wi.us/org/water/dwg/gac/presentations/Bradbury050307.pdf.

[6] While there persisted a concerted effort by a number of committee members, including Jodi Habush Sinykin, of counsel, Midwest Environmental Advocates, to recommend amendments to Act 310 in order to expand the scope of water resources that would trigger a mandatory environmental review process, such as smaller size springs and non-ERW/ORW waters, the Advisory Committee's focus remained on the statutory parameters of Act 310, not the general statutes bestowing DNR with the duty to manage the public trust doctrine. See, e.g, Habush Sinykin proposal, November 1, 2007, http://www.dnr.state.wi.us/org/water/dwg/gac/presentations/HabushSinykin110107.pdf.

before the Groundwater Advisory Committee and subsequent legislative Groundwater Workgroup acknowledging the extensive water resources outside Act 310's regulatory purview. Equally disingenuous is the Village's contention that the Legislature's failure to take action following the 2007 Groundwater Advisory Committee Report is an indication of legislative intent. In truth, the Legislature at large never considered the committee's reports and never even had the opportunity to vote on last session's groundwater bills, which failed to proceed out of committee before the session's end.

II. THE COURT OF APPEALS DECISION UPHOLDS A RATIONAL INTERPRETATION OF THE PUBLIC TRUST DOCTRINE WHICH PROTECTS VITAL ECONOMIC AND ECOLOGICAL INTERESTS AND AVOIDS A REGULATORY VOID THAT WILL PLACE SAID INTERESTS IN JEOPARDY.

A. The Court of Appeals interpretation of the public trust doctrine protects vital economic and ecological interests.

A constitutionally enshrined doctrine ensuring the protection of public rights in navigable waters, the public trust doctrine has been a cornerstone of Wisconsin economic and environmental well-being over the past one hundred years. This Court has guided the development of the doctrine, rooted in the Wisconsin Constitution, over time and has

recognized the important role the public trust plays in securing and supporting the commercial and recreational interests of the state. *See, e.g., Diana Shooting Club v Husting*, 156 Wis. 261, 145 N.W. 816 (1914); *Muensch v. PSC*, 261 Wis. 492, 53 N.W.2d 514 (1952); *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

Here, too, the Court of Appeals recognizes DNR's important role in the development and implementation of the public trust doctrine and the agency's competence and experience over the years in balancing the interconnected economic and environmental concerns of the citizens of Wisconsin. Indeed, there is no denying that high capacity wells, like the one at issue in this litigation, are capable of significantly affecting the navigable waters of our state due to the hydraulic connection between groundwater and surface waters.[7]

Beyond their ecological and aesthetic value, navigable waters comprise a key component of our state's economy. Each year, recreational activities associated with public waters, including boating, waterskiing,

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[7] Bradbury and Krohelski, *Groundwater Use and Its Consequences in Wisconsin*, GWAC presentation April 1, 2005, http://www.dnr.state.wi.us/org/water/dwg/gac/presentations/bradbury040105.pdf.

fishing, water fowl hunting, canoeing and camping, drive tourism dollars across the state and provide a tremendous economic benefit to Wisconsin in terms of sales, jobs and revenues. Fishing alone generates a $2.75 billion economic impact in Wisconsin, inclusive of fees, revenues, and related expenditures for food, lodging and equipment, and supports more than 30,000 jobs.[8]

High capacity wells are also capable of adversely affecting other valuable groundwater-dependent ecosystems. Unmitigated alterations in base-flow and groundwater inputs to state streams and rivers pose a significant threat to Wisconsin species sensitive to changes in flow, levels, temperature or chemical attributes of groundwater, including federally endangered species like the Hines Emerald Dragonfly and Fassett's Locoweed.[9] Likewise, cold water trout species rely upon cold groundwater

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[8] *See* Wisconsin Department of Natural Resources, http://dnr.wi.gov/org/caer/cs/licenses.htm; http://www.bobberstop.com/WDNR_Information.html. *See also* the National Survey of Fishing, Hunting and Wildlife-Associated Recreation—Wisconsin, documenting fishing-related expenditures (food, lodging, equipment) totaling $1.6 billion in 2006. http://www.census.gov/prod/2008pubs/fhw06-wi.pdf.

[9] *See, e.g.,* Brown, Jenny et al., *Groundwater and Biodiversity Conservation*, The Nature Conservancy, Dec. 2007, http://www.waconservation.org/data/collins/GroundwaterMethodsGuideTNC_Jan08.pdf.

inputs into groundwater-fed tributaries and rivers to maintain the cooler temperatures they require to reproduce and thrive.[10]

The Court of Appeals interpretation of the public trust doctrine, and the DNR's authority thereunder to protect against public trust violations arising from groundwater withdrawals, should be upheld as it maintains the general authority the DNR has exercised with expertise and discretion for decades and protects vital economic and ecological interests.

B. The Village would have the Court interpret Chapter 281 in a way that violates the Wisconsin Constitution and create a regulatory void.

Notwithstanding the importance and complexity of the economic and environmental interests at issue, the Village is asking this Court to interpret §§ 281.34 and 281.35 as a comprehensive statutory framework that categorically prohibits the DNR from considering environmental impacts of wells outside a small defined group. Taken to its logical conclusion, the Village's interpretation suggests that the Legislature intended to prevent DNR environmental review even in those circumstances where the DNR is presented with substantial evidence that a

[10]Mitro, Matt, "Groundwater Key for Trout as Our Climate Warms," *Wisconsin Trout*, January 2010, available at http://www.wicci.wisc.edu/resources/mitro_wi_trout_2010_01.pdf.

high-capacity well would adversely affect public trust waters. However, the Legislature cannot—and did not—legislate away its fiduciary duty to protect public waters held in trust for the people of Wisconsin. As this Court has stated, "it is the legislature's function to weigh all relevant policy factors to obtain the fullest public use of such waters." *State v. Bleck*, 114 Wis. 2d at 465-66. In the present case, the Court of Appeals properly held that the DNR has the expressly granted authority to consider evidence of adverse impacts to state waters, including those affected by high capacity well withdrawals.

Moreover, the alternative remedies offered by the Village fail to provide adequate protection against public trust violations by high capacity wells. As contended by the Village, DNR lacks authority to review environmental impacts before permit approval, yet can bring legal action to prevent future harm. The Village argues that DNR can bring a Wis. Stat. § 30.03 enforcement action or, alternatively, DNR or the public can bring nuisance abatement actions. But in all but one of the cases cited by the Village in support of these alternative remedies, the action taken by DNR or public citizens to remedy public trust violations occurred *after* public waters had already incurred damage. *See Baer v. DNR,* 2006 WI App 225,

297 Wis. 2d 232, 724 N.W.2d 638; *State v. Michels Pipeline Construction, Inc.,* 63 Wis. 2d 278, 219 N.W.2d 308 (1974); *State v. Deetz,* 66 Wis. 2d 1, 224 N.W.2d 407 (1974); *Gillen v. City of Neenah*, 219 Wis. 2d 806, 580 N.W.2d 628 (1998).

These after-the-fact enforcement cases belie the Village's arguments that its suggested remedies are sufficient to protect and preserve public waters from potential public trust violations arising from high capacity wells impacts. Equally unconvincing and worrisome are the Village's arguments that DNR's obligation to prevent harm to public waters is less compelling in groundwater withdrawal situations on the basis that harm to surface waters is "likely" to occur gradually over time. Village Reply Br. at 10. Also without any scientific or ecological support, the Village claims that impacts from pumping groundwater are "able to be reversed." Village Reply Br. at 10. Yet, both ecologically and economically speaking, as documented above, groundwater impacts can result in permanent, costly harms to surface waters. Thus the Village's arguments illustrate the regulatory void that would result if DNR's general authority were to be categorically denied in all instances involving high capacity well withdrawals.

CONCLUSION

Accordingly, Amici respectfully request that this Court affirm the decision of the Court of Appeals in this case.

Respectfully submitted this 24th day of January, 2011.

MIDWEST ENVIRONMENTAL ADVOCATES, INC.
Attorneys for Amici Wisconsin Wildlife Federation, River Alliance of Wisconsin and Clean Wisconsin

Signed: __/s/_____

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CERTIFICATION OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(8)b and c

I 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 3,000 words.

Dated this 24th day of January, 2011.

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CERTIFCATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(2)

I certify that:

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

I further certify that:

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

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

Dated this 24th day of January, 2011.

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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2008AP003170

LAKE BEAULAH MANAGEMENT DISTRICT,

Petitioner-Appellant-Cross-Respondent, Respondent

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner-Co-Appellant-Cross-Respondent,

vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent-Respondent,

VILLAGE OF EAST TROY

Intervening Respondent-Respondent-Cross-Appellant; Petitioner.

LEAGUE OF WISCONSIN MUNICIPALITIES' AND WISCONSIN RURAL WATER ASSOCIATION'S JOINT AMICUS BRIEF

On Appeal from a Decision of the Court of Appeals, District II , dated June 16, 2010 relating to a Final Order Entered In on September 20, 2008, The Honorable Robert J. Kennedy, Judge, Walworth County Circuit Court Case No. 06-CV-172.

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INTRODUCTION

The League of Wisconsin Municipalities (League), created in 1898, is a non-profit association of cities and villages working together to improve and aid the performance of local government. The League's members include 583 Wisconsin municipalities (190 cities and 393 villages). The League is governed by a board of directors comprised of municipal officials from member municipalities, and has long been recognized by the legislative and executive branches as a principal voice for municipal interests. As part of its service to its members, the League monitors legislation and appellate case law that has the potential to significantly impact local government interests.

The Wisconsin Rural Water Association, Inc., (WRWA) is a non-profit organization supporting water and wastewater treatment systems throughout Wisconsin. WRWA has nearly 1,200 members which include: public and private water and wastewater systems, corporate members, associate members and individuals. Wisconsin Rural Water provides a variety of services to the water industry including on-site technical assistance, training sessions for operators, managers, personnel and decision makers, emergency assistance, public relations. It also maintains an extensive list of loaner equipment to benefit its membership.

Both organizations' members, like the Village of East Troy, are responsible for ensuring that the public they serve has an adequate and safe

water supply. The League and WRWA sought permission to submit an *amicus* brief in this case because we believe the court of appeals' decision is erroneous and will negatively impact League and WRWA members and the public that relies on water and wastewater treatment systems. The court's decision greatly expands the scope of DNR authority and has broad implications for the public water supply and those responsible for providing it. The court's decision essentially abrogates the legislature's statutory framework for regulation of high capacity wells and subjects providers to a permit process with unclear boundaries and unarticulated standards. Having to negotiate such a permit process will subject our members, and the public they serve, to increased expense, delay and uncertainty.

FACTS REGARDING MUNICIPAL WATER SUPPLY

Wisconsin municipalities face a number of challenges in providing an adequate supply of drinking water to the public. As the DNR notes on its website,

> Part of the responsibility of a public water system owner is ensuring that customers get safe water to use and drink. Public water system owners face many distinct challenges in managing a public water supply, among them, providing adequate supplies to all users, preventing contamination, and planning for a system's future needs.

www.dnr.state.wi.us/org/water/dwg/wells.htm These challenges arise from three basic facts.

1. Most Wisconsin Municipalities Depend On Groundwater For Drinking Water.

According to the Wisconsin Public Service Commission's 2010 Wisconsin Water Fact Sheet,[1] 89.3% of Wisconsin water utilities rely on groundwater as their primary source of water supply. Comprehensive information on Wisconsin's water use is found in reports created by the U.S. Department of the Interior's Geological Survey (USGS) as part of the National Water-Use Information Program. Every 5 years, since 1950, the USGS has collected Wisconsin water use data and published it in a National circular. The most recent report compiles data through 2005. See, C. Buchwald, "Water Use in Wisconsin 2005", U.S.G.S. Open File Report 2009-1076. [2]

The USGS report (p. 16) notes that the vast majority of Wisconsin municipalities rely on groundwater to supply drinking water:

> In 2005, 1,806 of the 1,851 communities on public supply relied on ground-water sources and 45 communities relied on surface-water sources; in terms of the 611 water utilities, 587 utilities were on ground-water sources while 24 utilities were on surface-water sources.

USGS also evaluated the relative withdrawals of groundwater from various sources. Municipal public water supply accounts for 31.1% of groundwater withdrawals. Agriculture accounts for 49.9%, industrial and commercial uses 8.3%, and domestic use other than public water supply accounts for another

[1] This fact sheet is available at http://psc.wi.gov/conservation/documents/WaterFactSheet.pdf.
[2] The report is available online at http://pubs.usgs.gov/of/2009/1076/pdf/ofr20091076.pdf.

8.9%.[3] In short, groundwater is a significant and essential source of public drinking water and vital for public health and safety.

2. Finding Adequate Sources of Drinking Water is Increasingly Difficult.

In 1984, the Legislature enacted 1983 Wis. Act 410 to improve the management of the state's groundwater, particularly groundwater quality. As part of that act the legislature created the Groundwater Coordinating Council which is charged with providing an annual report to the Legislature. See, Wis. Stat. §§15.347(13)(g) and 160.50. The "Fiscal Year 2010 Report to the Legislature" was released August 2010 (FY2010 Report).[4] The FY2010 Report summarizes a number of threats to Wisconsin's groundwater resource that impacts the ability to use groundwater for public water supply purposes. Those threats include:

- Volatile Organic Compounds from landfills, underground storage tanks and spills;
- Pesticides and nitrates in agricultural areas;
- Microbial agents;
- Radionuclides, particularly in eastern Wisconsin; and
- Arsenic.

See FY2010 Report at 4-6.

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[3] Id. at p. 15.
[4] The report is available on DNR"s website at:
http://dnr.wi.gov/org/water/dwg/gcc/rtl/2010/gccreport2010.pdf

The federal Safe Drinking Water Act implemented by the DNR requires and encourages programs such as Wellhead and Sourcewater Protection to safeguard drinking water sources, but challenges remain. As DNR's Director of the Bureau of Drinking Water and Groundwater Jill Jonas recently testified before the Wisconsin Legislature,

> Today we have fewer areas with adequate and/or clean water. In some cases, problems are caused by too many pumping wells too close together. In other cases, how we use the land and the water diminishes aquifer infiltration and degrades water quality.[5]

Siting a municipal well is not a simple proposition.

3. Providing Public Water Supplies is Highly Regulated.

It is not surprising that a function as critical as providing safe drinking water is a highly regulated activity. In addition to obtaining a high capacity well permit such as the one at issue in this case, municipalities must also comply with a host of other regulatory requirements administered by the DNR and the Public Service Commission (PSC). A municipality must work its way through three separate DNR rules: The facilities planning process in Wis. Admin Code ch. NR 108, the Safe Drinking Water provisions in Wis. Admin Code ch. NR 809, and the requirements for the Operation and Design of Community Water Systems in Wis. Admin Code ch. NR 811.

In addition to these requirements, water utilities are regulated by the PSC. The PSC has a facilities review process for new wells set forth in

[5] http://legis.wisconsin.gov/senate/sen16/news/Issues/groundwater/072909_Jill-Jonas.pdf

Wis. Admin. Code ch. PSC 184. Furthermore, there are standards for public water utility service and rates in Wis. Admin Code ch. PSC185. Siting a municipal well is not just about the high capacity well permit. Many factors, including water quality, cost-effectiveness and well design, must be considered.

ARGUMENT

I. A MUNICIPALITY SHOULD BE ABLE TO RELY ON THE STANDARDS FOR OBTAINING A HIGH CAPACITY WELL APPROVAL THAT WERE ESTABLISHED BY THE LEGISLATURE.

In this case, the Village of East Troy submitted applications to the DNR based on the statutory standards and applicable administrative codes. Having clearly met all of those standards, DNR granted an approval. That should have been the end of this case. After the fact, the District and others argued that DNR should use its "general authority" to impose additional considerations on the Village's high capacity well application.

As detailed in the Village of East Troy's Reply brief at pp 15-16, there are many instances where the Legislature has created a statutory framework with minimum standards. The standards set forth in the high capacity well statutes are not minimum standards. Sound public policy dictates that municipalities must be able to rely on the standards set by the Legislature and DNR. To allow the DNR to impose additional review requirements and standards in its discretion creates confusion, delay and additional expense in a

process that is already difficult and expensive to navigate. This is particularly unfortunate in this case, where the DNR has decided it can impose additional standards above and beyond those imposed by the Legislature and long after the applications were submitted and approved.

If there are additional changes that need to be made to Wisconsin's high capacity well statute, then the Legislature should make those changes so that applicants know what standards they must meet at the time their application is submitted.

II. THE LEGISLATIVE PRIORITY ON MUNICPAL WATER SUPPLIES SHOULD NOT BE DISREGARDED.

The Legislature has consistently recognized that public water supplies should be given additional priority in the high capacity well siting process. In fact, protecting municipal water supplies was the first standard enacted by the legislature for approving high capacity wells. That standard is currently found in Wis. Stat. § 281.34(5)(a). More significantly, however, when the Legislature moved to expand the review process in 2003 Wis. Act 310 for wells in groundwater protection areas and that impact springs, it did so expressly recognizing the need to address municipal wells differently. The additional requirements do not apply and instead there is a specific balance required that takes into account the "public benefit of the well related to public health and safety." See, Wis. Stat. §§ 281.34(5)(b)2.; 281.34(5)(d)2.

This balance and all of the other standards in Wis. Stat. § 281.34 are cast aside by the Court of Appeals' decision when it gives complete discretion to DNR to consider other factors in deciding whether to issue a high capacity well approval. This Legislative policy choice should not be disregarded.

Any suggestion that a preference for public water supplies cannot be reconciled with the public trust doctrine is unwarranted. The need for adequate public water supplies is clearly in the public interest and, as such, protecting that interest is consistent with the public trust. See, e.g. *R.W. Docks & Slips v. State*, 244 Wis.2d 497, 510, 626 N.W. 2d 781 (2001) ("The legislature administers the trust for the protection of the public's rights, and it may use the power of regulation to effectuate the intent of the trust.")

III. TREATING NAUTA'S AFFIDAVIT AS PART OF THE AGENCY RECORD CREATES POTENTIAL FOR CONFUSION, UNFAIRNESS, AND UNCERTAINTY REGARDING WHAT'S PROPERLY CONSIDERED PART OF AN ADMINISTRATIVE RECORD.

In its request to file an amicus brief, the League and WRWA noted this issue was of importance to its members. Because the parties' briefs address this issue and because this issue will be the focus of the Wisconsin State Attorneys Association's *amicus* brief, we believe further legal briefing on the issue is unnecessary. However, it's our position that this issue is an important one and the court of appeals' decision to impute the affidavit that was submitted by the conservancies in their Motion for Reconsideration but not otherwise to the DNR, creates tremendous opportunities for confusion, uncertainty and

unfairness. Those who participate in administrative review need clear rules and understanding regarding how information becomes part of a record for purposes of administrative review.

CONCLUSION

The Court of Appeals' decision improperly expands the DNR's discretionary authority over high capacity wells and abrogates the statutory framework established by the legislature. The decision leaves providers to negotiate a permit process with unclear boundaries and unarticulated standards. For the good of the public and the safe and cost-effective delivery of municipal water and wastewater treatment systems, we respectfully request that this Court reverse the court of appeals' decision in this case.

Submitted this 25th day of January, 2011.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 1,856 words.

I further certify that I have submitted an electronic copy of this brief which complies with the requirements of sec. 809.19(12) and that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated: January 25, 2011.

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STATE OF WISCONSIN
IN SUPREME COURT
Appeal Number 2008AP003170

LAKE BEULAH MANAGEMENT DISTRICT,

Petitioner-Appellant-Cross-Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner-Co-Appellant-Cross-Respondent,

v.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent,

VILLAGE OF EAST TROY,

Intervening-Respondent-Respondent-Cross-Appellant-Petitioner.

NONPARTY BRIEF OF THE WISCONSIN ASSOCIATION OF LAKES

ON APPEAL FROM A DECISION OF THE COURT OF APPEALS, DISTRICT II, DATED JUNE 16, 2010, AFFIRMING IN PART AND REVERSING IN PART A JUDGMENT OF THE WALWORTH COUNTY CIRCUIT COURT ENTERED ON SEPTEMBER 30, 2008, THE HONORABLE ROBERT J. KENNEDY, PRESIDING, IN CASE NO. 06-CV-172

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INTRODUCTION

Navigable waters hold a unique status under Wisconsin's Constitution, which recognizes them as public resources held in trust by the State for all people. WI. CONST., Art. IX, § 1. The Legislature and this Court have repeatedly recognized a duty to ensure that the public trust in navigable waters is honored and enforced:

> [T]he public concern and interest in preventing pollution goes beyond the accommodation of users, actual or potential. It extends to what is reasonable in the preservation or restoration of a lake as a valuable natural resource of the state and its people.

Menzer v. Elkhart Lake, 51 Wis. 2d 70, 74, 186 N.W.2d 290 (1979). This Court has "jealously guarded the navigable waters of this state and the rights of the public to use and enjoy them." *State ex rel. Chain O'Lakes Ass'n v. Moses*, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972).

The Village of East Troy asks the Court to abandon the State's duty to protect public waters by prohibiting its primary public waters trustee from giving consideration to the impacts on navigable lakes and streams when it considers high capacity wells permit applications. The Village's argument is based on two tortured constructions of the State's water regulation laws. First, that s. 281.34(4) limits WDNR's authority to undertake

environmental review of most high capacity wells permit applications. Second, that DNR--regardless of its environmental review findings--must approve every high capacity well permit application it is not prohibited from approving under s. 281.34(5), Stats.

The Court should reject this narrow and inconsistent construction of Chapter 281 under which DNR would be simultaneously charged to serve as the State's primary trustee of public waters and to issue permits for wells it has evidence to believe would materially injure or even destroy a navigable lake or stream. The Village's argument disregards the plain language of ss. 281.11, 281.12 and 281.34, Stats., and the unambiguous purpose of those statutes to protect Wisconsin's treasured lakes and streams. Its effect would be the abrogation of the State's Constitutional public trust duties.

ARGUMENT

I. WIS. STAT. § 281.34 CIRCUMSCRIBES DNR'S PERMITTING AUTHORITY IN A DEFINED SET OF CASES, BUT OTHERWISE DOES NOT LIMIT THE AGENCY'S DISCRETION TO EVALUATE APPLICATIONS FOR HIGH-CAPACITY WELL PERMITS.

a. Section 281.34 does not restrict the scope of DNR's discretion to deny a statutorily required permit that conflicts with its duty as trustee of navigable waters.

First, s. 281.34(2) clearly establishes DNR's approval authority over ***all*** high-capacity wells:

> An owner shall apply to the department for approval before construction of a high capacity well begins. No person may construct or withdraw water from a high capacity well without the approval of the department under this section or under s. 281.17(1), 2001 Stats....

As the court of appeals recognized, this approval would be a hollow exercise unless the agency's mandate to review permit applications implicitly includes the power to deny them.

In s. 281.34(5), the Legislature identified several discrete categories of well permit applications for which it has substantially confined the Department's discretion to approve a permit. But under s. 281.34(2) *every application for a high capacity well requires DNR approval.* This review process is clearly different from the mere notification required for smaller wells under s. 281.34(3). Where DNR approval is mandated by the Legislature, some form of agency review and some standard governing approval must apply. As set forth in Part II, *infra*, the Wisconsin Association of Lakes ("WAL") agrees with DNR and the Conservancies that this standard is found in related provisions of Chapter 281 which designate DNR as the State's central water regulatory agency and grant it broad powers to regulate groundwater and protect navigable waters.

Sections 281.11, 281.12 and 281.34(3) require DNR to consider the effects of groundwater withdrawal on the navigable lakes and streams (protected under the public trust doctrine) when it considers permits for high capacity wells. That conclusion does not necessarily mean that ground water must be considered public trust water. Rather, these laws simply recognize that protection of the navigable waters under the trust doctrine requires the regulation of large-scale withdrawals of groundwater. For just the same reason, the Legislature has determined to regulate septic systems, grading of lakeshores and numerous other activities that can materially affect the navigable waters protected by the trust doctrine. Regulating high capacity wells to protect public trust resources doesn't require groundwater to be treated as public trust water any more than regulation of septic tanks requires toilet discharges to be so treated.

b. <u>Section 281.34 does not confine DNR's environmental review to a small subset of permit applications.</u>

Section 281.34(4) mandates environmental review under s. 1.11, Stats. ("WEPA"), of three particular types of high capacity wells (the "special wells"). Section 281.34 is silent with respect to WEPA review of wells not designated in sub. (4). The Village concludes from this that, because Well #7 is not in one of the "special well" categories, DNR has no environmental review authority whatsoever.

This argument is based on a misconceived application of judicial rules of statutory construction.

The present statute governing high capacity wells was created by 2003 Wisconsin Act 310, which repealed sec. 281.17(1), the former well permitting statute. When Act 310 was being considered, DNR's rules implementing WEPA provided for "Type IV" environmental review of all high capacity wells. *See* Wis. Admin. Code § NR 150.03(8)(h) (2003). The procedure for Type IV review set forth in s. NR 150.20(1)(b) (then, as now) does not require an environmental assessment ("EA") unless "the department determines that critical resources are affected by the proposed action, or there may be substantial risk to human life, health and safety."

As adopted by the Legislature, Section 7 of Act 310 would have preempted DNR's regulatory determination of the applicable level of environmental review of permit applications for "special wells" by mandating "Type III" review. *Compare* 2003 Wis. Act 310, § 7 (new s. 281.34(4)) *with* Wis. Admin. Code § NR 150.03(3). In contrast to Type IV review, Type III review calls for a mandatory EA, and authorizes DNR to require the applicant to submit a supplemental Environmental Impact Report ("EIR"). *See* Wis. Admin. Code § NR 150.20(b)2.

As adopted by the Legislature, Act 310 directly linked the elevated Type III assessment for special wells to other language mandating special permit conditions to protect the affected water resources, if the agency determined to require an EIR. *See* 2003 Wis. Act 310 § 7.

The bill sent to the Governor was carefully crafted to define the scope and consequence of WEPA review for three discrete types of high capacity well permit applications. But the Governor exercised partial veto authority to delete the sentences (in what became sub. (4) of s. 281.34) that required Type III review of the special wells. That veto broke the link set up by the Legislature between the mandated level of WEPA review for special wells in sub. (4) and the specific conditions required to approve permits for those wells in sub. (5).

As finally adopted with the Governor's partial veto, s. 281.34(4) simply provides that special wells are subject to review pursuant to the Department's rules promulgated under WEPA. There is nothing in the language or history of the statute to suggest that, by failing to enumerate them, the Legislature intended to exclude most high capacity wells from WEPA review. Rather, such an interpretation results from the Village's dubious effort to superimpose canons of statutory construction to the effect that "the specific trumps the general."

The Governor's veto obscured the Legislature's original intent. His veto message reveals his concern that the mandated level of environmental review proposed in s. 281.34(4) could have had unintended consequences on other WEPA decisions made by the agency not involving high capacity wells. *See* Governor's Veto Message dated April 22, 2004, approving AB 926 as 2003 Wis. Act 310.[1] At most, the Governor's partial veto may be read as a rejection of legislative interference in the executive branch, to preserve DNR's discretion to conduct environmental assessments in accordance with its administrative rules, even while s. 281.34 mandates environmental review of the three classes of special wells. In short, the Governor's veto reaffirmed existing law under WEPA.

The ultimate goal of statutory construction is to discern the intent of the Legislature. *State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 167, 580 N.W.2d 283 (1998). Here, the Legislature itself has decreed that DNR's powers in Chapter 281 shall be "liberally construed" to achieve the "vital purposes" of protecting, maintaining and improving the quality of Wisconsin's ground and surface water. Wis. Stat. § 281.11. The Legislature's intent is plainly expressed in

[1] Available on the website maintained by the Wisconsin Legislature: http://nxt.legis.wisconsin.gov/nxt/gateway.dll?f=templates&fn=default.htm&d=vetomsg03&jd=top (last visited January 25, 2011).

the statute. As such there is no basis to venture into judicial canons of construction.

II. THE PETITIONERS' APPROACH TO SEC. 281.34 DISREGARDS THE SCOPE OF DNR'S BROAD WATER REGULATORY AUTHORITY UNDER SECS. 281.11 AND 281.12.

The court of appeals' decision recognizes DNR's authority to deny a permit for a high capacity well if the agency finds that granting the permit would have material detrimental effects on state lakes or streams. The Village asserts that this review would require an exercise of discretion without regard to legislative standards. But this argument ignores the scope and nature of the Legislature's delegation of power of water regulatory power to DNR. The Court could accept the Village's view only by disregarding the language and context of two seminal, fifty year old statutes that: (1) established DNR as the "central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private," (2) granted the agency "general supervision and control of the waters of the state," and (3) required its approval for high capacity wells.

Chapter 614 of the Laws of 1965 established much of DNR's original water regulatory authority, now contained in Chapter 281. Before these laws were enacted, Wisconsin did not systematically

regulate many activities that can materially affect public waters, including septic tanks and most pollution discharges. Public clamor over degradation of the State's treasured lakes and streams led to the historic bipartisan legislation that created sec. 144.025, Wis. Stats., later renumbered as ss. 281.11 and 281.12.

The Act's "STATEMENT OF POLICY AND PURPOSES" announced a muscular state program to address the "[c]ontinued pollution of the waters of the state" that had "aroused widespread public concern." Ch. 614, § 1, Laws of 1965-66. The Act aimed to "grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality, management and protection of all waters of the state, ground and surface, public and private." *Id.*

Sweeping as they were, these provisions did not by themselves grant express powers to any agency. That was done in other sections of Chapter 614, including sec. 37, which provides in part:

> (2) POWERS AND DUTIES. (a) The department [of Resource Development"] shall have general supervision and control over the waters of the state . . . ."

Ch. 614, § 37, Laws of 1965-66 (creating s. 144.025(2)(a), now renumbered as s. 281.12.) This general delegation of power was

accompanied by specific grants of subject matter authority, including a provision requiring agency approval for wells whose capacity and rate of withdrawal would exceed 100,000 gallons per day. *See* Ch. 614, § 37, Laws of 1965 (creating s. 144.025(1)(e), Stats.) A 1973 Blue Book article described these powers as "militant." Selma Parker, "Protecting Wisconsin's Environment," Wisconsin Blue Book (1973), pp. 97-161.

The 1965 Act went even further, directing the courts to apply a liberal rule of construction to these regulatory powers and all rules and orders promulgated thereto in order to achieve its policy objective "to protect, maintain, and improve the quality and management of the waters of the state, ground and surface, public and private." Ch. 614, § 37, Laws of 1965 (creating s. 144.025(1) (intro)).

The powers delegated by the 1965 Act were modified two years later when a sweeping reorganization of the executive branch transferred these protean water regulatory powers to the newly created Department of Natural Resources. Chapter 75, Wisconsin Laws of 1967-1968.

In Chapters 75 and 614, the Legislature delegated broad regulatory power to an administrative agency established to undertake an historic mission close to Wisconsin's history and

identity. This expansive delegation of authority is far broader than many contemporary statutes that delegate authority to the no longer brand new DNR, in which the details of many water regulation standards are set in the statutes themselves. For example, in 2003 Act 118, the Legislature supplemented DNR's statutory authority to permit piers not deemed to be "detrimental to public rights in water" with a new statute that authorizes piers that meet dimensional, location and density standards specified in s. 30.12(1g)(f).

WAL agrees that these prescriptive laws should be construed just as they were adopted by the Legislature. But the Legislature has not repealed ss. 281.11 and 281.12. Nor was their application limited in the 2003 high capacity well legislation. The Court should properly defer to the Legislature's directive to liberally construe the sweeping laws related to ground and surface water protection and the requirements for high capacity well approval to support the declaration of policy in Chapter 614 of the Laws of 1965, unless and until the Legislature chooses to change those laws.

The position advanced by the Village would require DNR to systematically ignore evidence that a high capacity well would damage or destroy and public lake or stream and grant a permit for its construction and operation. As the Court reviews and considers the governing statutes, it should at least consider the scope and

significance of Wisconsin's globally significant inland lake resources. From the beginning of the State's history, they have supported a succession of key industries, from forestry to hydroelectric power to tourism. As this Court has observed, "The natural beauty of our northern lakes is one of the most precious heritages Wisconsin citizens enjoy." *Claflin v. DNR*, 58 Wis. 2d 182, 193, 206 N.W.2d 392 (1973). (Mr. Justice Wilke might have benefitted from spending some time on Lake Beulah and other glacial lakes of southern Wisconsin, too.)

Lakes and streams underlie a recreation and tourism economy estimated to generate more than $12 billion in traveler expenditures, creating 286,394 full-time jobs and nearly $2 billion in state and local government revenue in calendar year 2009.[2] A large share of Wisconsin visitors are drawn to the state's waterways. According to U.S. Department of Interior statistics, only Florida attracts more nonresident fisherman each year. That agency reports that in 2003, some 411,000 thousand nonresident anglers purchased a Wisconsin fishing license.[3] Seasonal homeowners and cottage renters have

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[2] *The Economic Impact of Expenditures by Travelers on Wisconsin*, available on the website of the Wisconsin Department of Tourism: http://industry.travelwisconsin.com/~/media/Files/Research/Hidden%20Research/2009%20Highlights.pdf (last visited January 21, 2011).

[3] Statistics available on the website of the U.S. Department of the Interior: http://wsfrprograms.fws.gov/Subpages/LicenseInfo/FishingLicCertHistory.pdf (last visited January 21, 2011).

"Escaped to Wisconsin" by the millions since automobile use expanded in the early twentieth century.[4]

The value of Wisconsin's lakes 15,074 inland lakes can scarcely be exaggerated. Ranging from few acres to 134,000 acre Lake Winnebago, these blue jewels have been a magnet for visitors and residents since statehood.[5] Considering the scope and significance of Wisconsin's surface water resources, the Legislature has historically pursued policies that will preserve and protect these resources for generations to come. 2003 Act 310 aimed to enhance Wisconsin water regulator laws, not to erode them.

CONCLUSION

During the Legislature's historic 1967 debate on the executive branch reorganization bill creating DNR, Senator Ruben LaFave (R-Oconto) spoke to what is at stake in Wisconsin's water regulation debate, then as now. Concerned over the composition of the proposed Natural Resources Board, LaFave warned, "Wisconsin, which is famous for muskie and trout will become a carp and sucker

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[4] An internet search for "Wisconsin Lake Home for Rent" produces about 364,000 hits in 0.31 seconds. http://www.google.com/search?hl=en&source=hp&q=wisconsin+lake+home+for+rent&aq=f&aqi=g-v1&aql=&oq= (last visited January 21, 2011).

[5] Data available on the website of WDNR: http://new.dnr.wi.gov/DocumentLibrary/Repository/Water/Watershed%20Management/lakes/LakeBook-wilakes2009bma.pdf

state."[6] The threats to Wisconsin's priceless waters have changed, but the stakes are still the same.

Section 281.12 grants the agency broad power of "general supervision and control over the waters of the state" including groundwater. The Legislature requires DNR approval for all high capacity wells in s. 234.34(2). Although it mandates review for special wells and prohibits the agency from granting some well permits, s. 281.34 does not limit DNR environmental review of high capacity wells. The Court must harmonize these laws to give effect to the Legislature's goal to establish a central agency empowered to protect the waters of the state in s. 281.11, and to require its approval for every high capacity well.

The Village's position would require the agency recognized as trustee of the State's navigable waters to grant permit approval for a high capacity well that it knows will destroy a public lake or stream. The Court should reject this startling concept, because it defies common sense, and is unsupported by statutes granting DNR regulatory powers to protect public waters.

[6] Thomas R. Huffman, *Protectors of the Land and Water: Environmentalism in Wisconsin, 1961-1968,* pp. 149-150 (Univ. of N.C. Press 1994).

Dated this 25th day of January, 2011.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of this brief is 2,915 words.

Dated: January 25th, 2011.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated: January 25, 2011.

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Re: Lake Beulah Management District, et al. v. DNR, et al.
Appeal Number: 2008-AP-3170
Walworth County Circuit Court Case Number: 06-CV-172

Dear Clerk:

The Wisconsin State Attorneys Association (WSAA) has determined that both the Department of Natural Resources and the Village of East Troy have adequately briefed the legal and policy concerns that we have regarding the above captioned matter. Both parties correctly identified the substantial harm to the integrity and efficiency of administrative agencies serving the citizens of the State of Wisconsin, if the Court of Appeals decision on the issue of what constitutes the administrative record is upheld. That portion of the decision places unreasonable burdens on State agencies and their counsel when developing agency records for review by administrative tribunals, applicants for agency approvals, future litigants, and reviewing courts, leading to inequitable, inconsistent, and untimely judicial outcomes. As a result, WSAA will not be filing an amicus brief in this case.

Should there be any questions after reading the contents of this, please feel free to call me here at this office immediately.

Thank you for your attention to this matter.

Very truly yours,

Nancy Wettersten

Nancy Wettersten
Vice-President
Wisconsin State Attorneys Association

cc: See Attached Mailing Matrix

Mailing Matrix

Lake Beulah Management District, et al. v. DNR, et al.
Appeal Number: 2008-AP-3170
Walworth County Circuit Court Case Number: 06-CV-172

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