WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM

The Permitting of Groundwater Withdrawals from High Capacity Wells in Wisconsin

The withdrawal of groundwater in Wisconsin is regulated by the Department of Natural Resources (DNR) under ch. 281, Stats., and the public trust doctrine. In recent years, the scope of the DNR's review of high capacity well proposals has changed as the State Legislature has amended the agency's authority and the courts and an administrative law judge have disagreed with the agency's interpretations of that authority. A recent decision arising from a contested case hearing related to a high capacity well proposal is likely to result in further change to the DNR's high capacity well application review practices.

SOURCES OF REGULATORY AUTHORITY

The DNR administers the high capacity well regulatory program under two sources of regulatory authority: statutory standards under ch. 281, Stats., that are specific to the program; and the agency's general regulatory authority as the delegated trustee for the state with respect to the public trust doctrine.

SPECIFIC STATUTORY STANDARDS FOR HIGH CAPACITY WELL APPROVALS

In Wisconsin, a landowner must obtain approval from the DNR before constructing a high capacity well.[1] [s. 281.34 (2), Stats.] "High capacity well" is a well that, together with all other wells on the same property, has a capacity[2] of more than 100,000 gallons of water per day. [s. 281.34 (1) (b), Stats.]

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[1] If a proposed well will consume or divert water from the Great Lakes basin, provisions of the Great Lakes-St. Lawrence River Basin Water Resources Compact ("Great Lakes Compact") may also apply. [s. 281.346, Stats.] Additional approval may be needed if a water withdrawal will meet certain thresholds of "water loss," defined as loss of water from the basin from which it is withdrawn as a result of interbasin diversion or consumptive use or both. [s. 281.35, Stats.] Reporting requirements also apply to withdrawals made from certain types of wells. [ss. 281.34 and 281.346, Stats.] This Information Memorandum does not discuss these requirements.

[2] The pumping "capacity" of a well refers to the rate at which a well is capable of withdrawing groundwater.

Environmental Review

For applications for certain high capacity wells, the DNR is required to conduct an environmental review of the impacts of the well using the process provided under the Wisconsin Environmental Protection Act, s. 1.11, Stats., prior to approving construction. This requirement applies to the following types of wells:

- Wells that are located in a groundwater protection area, defined as an area within 1,200 feet of a trout stream or water body designated as an outstanding or exceptional resource water.
- Wells for which more than 95% of the amount of water withdrawn by the well would be lost from the water basin in which the well is to be located as a result of interbasin diversion or consumptive use, or both.
- Wells that could have a significant environmental impact on a spring.

[s. 281.34 (4), Stats.]

For other proposed high capacity wells, the statutes are silent regarding the scope of the DNR's authority to review potential environmental impacts of the proposed well when considering an application.

Limits and Conditions on Approvals

Under current law, the DNR generally may not approve a proposed high capacity well if the well would cause the impairment of a public water supply. In addition, the DNR must impose conditions[3] on a proposed well to ensure that the well does not cause a significant environmental impact[4] if the well is one of the following:

- In a groundwater protection area.
- Proposed to result in a water loss greater than 95% of the water withdrawn.
- A well that may have a significant environmental impact on a spring.

[s. 281.34 (5), Stats.]

The statutes do not specify other factors that the DNR is required to consider when deciding whether to approve an application for a high capacity well.

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[3] Conditions may include restrictions as to the location, depth, pumping capacity, rate of flow, or ultimate use. [s. 281.34 (5), Stats.]

[4] The DNR has defined "significant adverse environmental impact" in the Wisconsin Administrative Code to mean "alteration of groundwater levels, groundwater discharge, surface water levels, surface water discharge, groundwater temperature, surface water temperature, groundwater chemistry, surface water chemistry, or other factors to the extent such alterations cause significant degradation of environmental quality including biological and ecological aspects of the affected water resource." [s. NR 820.12 (19), Wis. Adm. Code.]

GENERAL AUTHORITY

The Public Trust Doctrine

The public trust doctrine has been developed over time through numerous Wisconsin Supreme Court decisions, and provides an additional source of DNR regulatory authority in some situations involving groundwater withdrawals. The doctrine provides that navigable waters are held in trust by the state for the benefit of the public. It has been interpreted to recognize the Wisconsin Legislature as the trustee for the public's rights to navigate and enjoy recreational activities in the waters of the state.[5]

The Legislature has generally delegated its trustee obligations to the DNR, except where statutes state otherwise. Evidence of that delegation is found, in part, in ss. 281.11 and 281.12, Stats., which specify 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," and "shall have general supervision and control over the waters of the state."

The Wisconsin Supreme Court interprets the public trust doctrine broadly, to encompass a wide range of public rights, including the right of navigation and rights to recreational use of waters, including the enjoyment of scenery. The doctrine protects such rights in all navigable bodies of water.[6]

Section 30.03 (4), Stats.

The DNR has broad statutory authority, if it learns of "a possible infringement of the public rights relating to navigable waters," to initiate a process to abate that harm. [s. 30.03 (4), Stats.] That authority appears to allow the DNR to initiate an action to prevent harm to navigable waters that is being caused by a well.

REGULATORY AUTHORITY OF THE DNR AS RECENTLY APPLIED

PRIOR TO 2011

Before 2011, the DNR generally did not expand the scope of its inquiry into the potential environmental impacts of a proposed high capacity well beyond the specific requirements listed above. The DNR based that approach on its determination that it did not have the authority to expand its review beyond the scope of the specific statutory authority in s. 281.34, Stats.

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[5] Scholars debate the historical origins of the public trust doctrine. Wisconsin Constitution, Article IX, Section 1, provides that the "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." That language mirrors language in the Northwest Ordinance, a federal act that created the Northwest Territory, which included what is now Wisconsin.

[6] In general, lakes and streams are navigable if they can carry a canoe during periods of high water. [*Muench v. Public Service Commission*, 53 N.W.2d 514 (1952).]

The DNR's determination was based on a number of factors. It concluded that the specific statutory direction to review the potential impacts listed above indicated that it did not have authority beyond that charge, based on a longstanding canon of statutory construction called the "exclusio rule."[7] The DNR also determined that this interpretation was consistent with the agency's understanding of the legislative intent behind the enactment of 2003 Act 310, which created much of the specific environmental review authority under s. 281.34, Stats., described above.

2011 TO PRESENT

The Wisconsin Supreme Court disagreed with this interpretation of the DNR's authority and responsibilities in *Lake Beulah Management District v. Department of Natural Resources*, 2011 WI 54.[8] In this case, the court held that the DNR, when reviewing a proposed high capacity well, has a "general duty," grounded in its delegated obligations as trustee under the public trust doctrine and reflected in the department's general obligations under ss. 281.11 and 281.12, Stats., to investigate or consider potential harm from the proposed well on "the waters of the state."[9] In other words, the court interpreted the DNR's regulatory authority to include the authority to make general considerations not enumerated in the more specific statutory standards, described above, governing high capacity well approvals. Under the court's holding, that "general duty" is triggered when the DNR is presented with sufficient concrete, scientific evidence of potential harm to waters of the state that could result from a proposed high capacity well. [¶¶ 39 and 62-63.]

Following the *Lake Beulah* decision, the DNR reports that it began to "screen" all proposed high capacity wells for potential adverse impacts to any waters of the state. However, this screening process did not include consideration of the cumulative impacts of other existing and proposed withdrawals in the area of a proposed well, except for other wells on the same property. It has been a point of debate whether the DNR is required to consider such impacts.

In support of its decision to not include the cumulative impacts of other off-site wells in its screening process, the DNR stated that ch. 281, Stats., does not expressly require the DNR to assess such cumulative impacts of a proposed well along with other wells in the area and does not authorize the DNR to adjust the water use of other existing wells to allow an applicant's reasonable use when reviewing a request for a high capacity well approval.[10] The DNR also noted that the *Lake Beulah* ruling did not specifically require the DNR to assess these cumulative impacts. The DNR also based its decision not to consider cumulative impacts on a

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[7] The exclusio rule holds that if one subject, object, or idea is expressed in a statute, it implies that other subjects, objects, or ideas not expressed are excluded from treatment by the statute.

[8] During this case, the DNR changed its position that the agency did not have the authority to expand its environmental review of high capacity well applications beyond the specific statutory requirements, and instead argued that it had such authority under its general powers but that the authority was permissive and could be used in cases in which the DNR deemed it appropriate.

[9] As expressly provided in this case, "waters of the state" include navigable waters and all other surface waters and groundwater, natural or artificial, public or private, and wells.

[10] In contrast, for example, the department is expressly required to consider cumulative impacts when conducting certain reviews under the Great Lakes Compact. [See s. 281.343 (1e) (g), Stats.]

long-standing court decision in *State v. Michaels Pipeline Construction, Inc.*, 63 Wis. 2d 278 (1974), which established the "modified reasonable use standard" as the state standard in nuisance actions. In that case, the court recognized that landowners have a general privilege to withdraw groundwater from the ground beneath the land. The DNR had asserted that allowing agency review of the cumulative impacts of area wells to inform its decision about a proposed well would be a departure from this standard, which generally does not limit the withdrawal of water for a beneficial use.

PENDING CHANGES TO THE HIGH CAPACITY WELL APPROVAL PROCESS

The Department of Administration's Division of Hearings and Appeals (DHA) has recently issued two decisions relating to the regulation of high capacity wells. The first decision, in the Richfield Dairy case,[11] relates to the DNR's review of cumulative impacts during its high capacity well approval process. As a result of this decision, the DNR's high capacity well approval process is likely to change again in the near future.

The second decision, in the New Chester Dairy case,[12] affirmed the authority of the DNR to include groundwater monitoring and reporting as conditions in a high capacity well approval.

Richfield Dairy Case

On September 3, 2014, the DHA issued a decision in the Richfield Dairy case that stated that the DNR took an "unreasonably limited view of its authority to regulate high capacity wells" in determining not to include analysis of the cumulative impacts of other area wells when reviewing an application for a high capacity well approval. The Administrative Law Judge (ALJ) determined that the DNR, to fulfill its obligations under ch. 281, Stats., and the *Lake Beulah* decision, must consider cumulative impacts caused by existing and anticipated drawdown of groundwater and surface waters by other area wells when evaluating a proposed high capacity well application.

At issue in the Richfield Dairy case was a modified approval for two high capacity wells to be located in the Town of Richfield, Adams County, Wisconsin, that was issued by the DNR in March, 2013. The modified approval was challenged in a contested case proceeding. The proposed wells were to be constructed in an area of the state in which large quantities of water are withdrawn from numerous high capacity wells for agriculture and other uses; approximately 90 existing high capacity wells are located within four miles of the proposed location of the Richfield Dairy wells. A primary issue in this case was whether the DNR must consider cumulative impacts of other area groundwater withdrawals when reviewing an application for a new well.

The ALJ reduced the amount of water initially permitted by the DNR and directed the permit to be issued to the applicant. The ALJ noted that the revised water withdrawal amount under

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[11] *In the Matter of a Conditional High Capacity Well Approval for Two Potable Wells to be Located in the Town of Richfield, Adams County Issued to Milk Source Holdings, LLC*, Case Nos. IH-12-03, IH-12-05, DNR-13-021, and DNR-13-027 (September 3, 2014).

[12] *In the Matter of a Conditional High Capacity Well Approval for Two Potable Wells to be Located in the Town of New Chester, Adams County Issued to New Chester Dairy, Inc., and Milk Source Holdings, LLC*, Case No. DNR-13-011 (September 18, 2014).

the modified permit would further draw down area surface waters. However, the ALJ held that this additional drawdown would not harm these waters despite also finding that there have already been significant impacts to area surface waters caused by a variety of factors.

This decision will likely result in the DNR initiating a process in which it assesses the cumulative impacts of area wells on waters of the state for each proposed high capacity well application that is reviewed. It is not clear how the DNR would conduct such an analysis, the amount of time it would take to do so, or what degree of additional impacts to waters of the state are permissible in an approval even after considering these factors.

New Chester Dairy Case

The DHA issued two decisions related to the DNR's ability to include a groundwater monitoring and reporting condition in a high capacity well approval issued to New Chester Dairy ("the Dairy"). The DNR stated that the basis for the condition was to determine whether the actual reductions in groundwater levels over time would be consistent with what was predicted by the Dairy's groundwater model. The Dairy challenged the inclusion of these conditions in its approval. In the first decision, the ALJ determined that the DNR has the express authority under *Lake Beulah* and ch. 281, Stats., to include conditions in high capacity well approvals. In the subsequent decision, the ALJ found that the DNR's decision to include the specific condition that requires the Dairy to construct monitoring wells and a piezometer near the high capacity wells, collect groundwater level elevations, and report that data to DNR, was necessary to ensure that the proposed wells will not cause significant adverse impact to nearby waters of the state. The ALJ also determined that this condition is reasonable, and is supported by substantial evidence. In addition, the ALJ noted that the DNR has the authority to utilize the monitoring data to require the Dairy to conduct additional groundwater modeling and to modify or rescind the approval based on the results of additional modeling, if necessary.

The New Chester Dairy decisions affirm the DNR's ability to include conditions in high capacity wells approvals which the DNR determines are necessary to fulfill its duty to protect the waters of the state.

STATUTORY RESTRICTION ON CHALLENGES RELATED TO CUMULATIVE IMPACTS

Section 281.34 (5m), Stats., provides that "no person may challenge an approval, or an application for approval, of a high capacity well based on the lack of consideration of the cumulative environmental impacts of that high capacity well together with existing wells." This provision was included in 2013 Wisconsin Act 20, the state's 2013-15 Biennial Budget Act, and took effect on July 1, 2014.

This provision does not prohibit the DNR from considering cumulative impacts, so it does not directly contradict the Richfield Dairy decision. However, the provision does prohibit a person who challenges a DNR decision to issue a high capacity well approval from challenging the permit on the grounds that the DNR failed to do so. It is unclear to what extent this statutory provision would be construed to preclude a person from challenging a DNR approval based on the scope of a cumulative impacts review that is conducted by the DNR, or based on the sufficiency of a cumulative impacts review.

It is possible that this statutory restriction will be challenged. Such a challenge could question whether it is constitutionally permissible for the state to preclude a challenger of a high capacity well approval from arguing that the DNR is obligated to conduct a cumulative impacts review when evaluating a high capacity well application. The success of a challenge on these grounds could depend on whether the challenger is found to have a constitutional right to raise the issue of whether the DNR considered cumulative impacts in its permit decision, at least with respect to impacts to navigable surface waters, under the public trust doctrine.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

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