WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM

Wisconsin Law Relating to Groundwater Withdrawals

With the state's growth in population and water-dependent industries, the number of "high capacity wells" -- wells with the capacity to withdraw more than 100,000 gallons per day -- has increased by more than half in Wisconsin over the last five years. That increase has drawn new attention to the law of groundwater regulation. Particular attention has been paid to the Department of Natural Resources' (DNR) authority to consider harm to surface waters and to consider the cumulative impact of multiple wells when reviewing an application for a high capacity well approval. Various judicial opinions have affected the scope of that authority. Most recently, the DNR announced modifications to its approach in response to an opinion of the Wisconsin Attorney General.

The permitting process has been the primary focus of debate (and legal action) regarding high capacity wells in recent years. However, the withdrawal of groundwater in Wisconsin is also governed by various other sources of law, including the common law doctrine of modified reasonable use, the public trust doctrine, the Great Lakes Compact, and certain statutory provisions that provide remedies for harm to private wells and surface waters. This Information Memorandum provides an overview of some of those sources of law, including legal opinions that have affected their scope. It also outlines the timeline of the DNR's regulatory approach in recent years.

Historically, Wisconsin law relating to groundwater rights and regulation reflected a climate in which water was not assumed to be a scarce resource in the state. As the number of groundwater users and the amount of water they withdraw have increased in recent years, various stakeholders are exerting pressure in legal actions and public debate: some call for greater regulation to protect water resources and others argue that greater regulation would unnecessarily stifle business growth. An understanding of the legal landscape and regulatory history may be helpful to those evaluating such arguments.

MODIFIED REASONABLE USE DOCTRINE

The Wisconsin Supreme Court established the state's current approach to groundwater rights in a 1974 decision, *Michels Pipeline Construction, Inc.* Before that decision, Wisconsin courts had followed an old rule, borrowed from the English legal system, which allowed landowners to use any water that percolated below the surface of their land without facing liability for harm caused by such withdrawal. In *Michels Pipeline*, the court instead adopted a modified version

of the approach commonly known as the "reasonable use doctrine."[1] As articulated by the court, the doctrine requires that a landowner's use of groundwater must be for a useful and beneficial purpose and may not cause "unreasonable harm" to a neighbor's water supply or a substantial effect on a watercourse or lake. The court noted that the doctrine provides landowners with a broad, but not unlimited, right to use groundwater. [217 N.W.2d 339 (Wis. 1974).]

PERMITTING OF HIGH CAPACITY WELLS UNDER S. 281.34, STATS.

Specific statutory standards regarding the permitting of high capacity wells are set forth in s. 281.34, Stats. Generally, under that statute, a landowner must obtain approval from the DNR before constructing a high capacity well.[2] A "high capacity well" is a well that, together with all other wells on the same property, has a capacity[3] of more than 100,000 gallons of water per day. [s. 281.34 (1) (b) and (2), Stats.]

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.

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[1] The reasonable use doctrine is a common approach in Midwestern and Eastern states. In contrast, many Western states traditionally allocate water rights using a "first in time" approach, under which a person who diverts and uses water first gains a superior right to later users.

[2] If a proposed well will withdraw 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 also 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.

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

LIMITS AND CONDITIONS ON APPROVALS

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 certain types of conditions[4] on a proposed well to ensure that the well does not cause a significant environmental impact[5] 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 or permitted to consider when deciding whether to approve an application for a high capacity well.

THE PUBLIC TRUST DOCTRINE

The public trust doctrine has been developed over time through numerous Wisconsin Supreme Court decisions. 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.[6]

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.[7]

DELEGATION OF THE ROLE OF TRUSTEE

Wisconsin courts have noted that the Legislature has generally delegated its trustee obligations under the public trust doctrine to the DNR, except where statutes state otherwise. Evidence of

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

[5] 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.]

[6] 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.

[7] 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).]

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."

LEGAL DEVELOPMENTS REGARDING IMPACTS TO SURFACE WATERS

In *Lake Beulah Management District v. Department of Natural Resources*, 2011 WI 54, the Wisconsin Supreme 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 a proposed well on "the waters of the state."[8] 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 under s. 281.34, Stats., 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.] However, as discussed below, the *Lake Beulah* holding may be questioned following the enactment and interpretation of 2011 Wisconsin Act 21.

LEGAL DEVELOPMENTS REGARDING CUMULATIVE IMPACTS OF MULTIPLE WELLS

Richfield Dairy

A September 3, 2014 decision of the Department of Administration's Division of Hearings and Appeals (DHA), 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 environmental impacts of other area wells when reviewing an application for a high capacity well approval. The Administrative Law Judge 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.[9] As with regard to the *Lake Beulah* decision, this determination may be questioned following recent interpretations of 2011 Wisconsin Act 21.

Statutory Prohibition on Challenges

A provision enacted as part of 2013 Wisconsin Act 20, the 2013-15 Biennial Budget Act, 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." [s. 281.34 (5m), Stats.]

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[8] 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.

[9] *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).

This provision does not prohibit the DNR from considering cumulative impacts, so it does not directly contradict the *Richfield Dairy* decision. However, it prohibits a person who challenges a DNR decision to issue a high capacity well approval from challenging the approval on the grounds that the DNR failed to do so.

LIMITS TO DNR AUTHORITY FOLLOWING ENACTMENT OF 2011 WISCONSIN ACT 21

A recent circuit court case and a formal Attorney General's Opinion have interpreted 2011 Wisconsin Act 21, commonly referred to as "Act 21," to limit the DNR's authority to impose certain conditions in permits for high capacity wells.

Act 21 Restrictions

Among various other changes relating to rule promulgation, Act 21 created provisions that generally have the effect of limiting agencies' authority to act in the absence of explicit authorizing language. The following two provisions of the Act are especially relevant to the recent circuit court decision and Attorney General's opinion:

- **Prohibition of actions based on implied authority (s. 227.10 (2m), Stats.).** Act 21 generally prohibits any agency from implementing or enforcing any standard, requirement, or threshold, including as a term or a condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by **statute** or by a **validly promulgated administrative rule**.

- **Prohibition of rule-making authority based on implied authority (s. 227.11 (2) (a) 1. and 2., Stats.).** Act 21 specifies that statutory provisions that contain "a statement or declaration of legislative intent, purpose, findings, or policy" or that describe an agency's "general powers or duties" do not confer rule-making authority on an agency, beyond the rule-making authority that is explicitly conferred on the agency by the Legislature.

New Chester Dairy, LLC v. Department of Natural Resources

A 2015 circuit court decision, *New Chester Dairy, LLC v. Department of Natural Resources*, interpreted the first of the Act 21 prohibitions described above. The case related to the DNR's authority to include a groundwater monitoring and reporting condition in a high capacity well approval issued to New Chester Dairy. The DNR stated that the basis for the challenged 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 circuit court held that no statute or rule explicitly authorized the DNR to impose monitoring conditions as part of an approval for a high capacity well. Thus, the court held that Act 21 prohibited the inclusion of such conditions. [Case No. 14-CV-001055 (December 2, 2015).]

Attorney General's Opinion

On May 10, 2016, the Attorney General issued a formal opinion, OAG-01-16, in response to a question posed by Assembly Speaker Robin Vos. As articulated in the opinion, the Speaker's office asked the Attorney General to address the interpretation of the *Lake Beulah* decision,

discussed above, including, among other questions, whether the general statutory authority relied on by the court in that decision provides the authority to impose monitoring well conditions or require cumulative impact evaluations for high capacity well approvals.

Interpreting Act 21, the Attorney General determined that neither the statutes, nor the public trust doctrine, nor any other legal authority, authorizes the DNR to impose any condition in a high capacity well approval that is not explicitly allowed in state statute or administrative rule. In addition, the opinion concludes that neither the public trust doctrine, nor the general grants of authority provided in s. 281.11 and 281.12, Stats., provide explicit rulemaking authority for high capacity well approval conditions not specified in s. 281.34, Stats.

The opinion distinguishes its conclusion from *Lake Beulah* by concluding that the *Lake Beulah* decision did not consider the impact of 2011 Wisconsin Act 21 on the DNR's authority.

TIMELINE OF REGULATORY AUTHORITY AS APPLIED BY THE DNR

PRIOR TO LAKE BEULAH

Before the *Lake Beulah* decision was issued in 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 in s. 281.34 (4), Stats. The DNR based that approach on its determination that it did not have the authority to expand its review beyond the scope of that specific statutory authority. [10]

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."[11] 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 (4) and (5), Stats., described above.

FOLLOWING THE LAKE BEULAH DECISION

Following the *Lake Beulah* decision, the DNR 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.

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

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[10] While the *Lake Beulah* case was pending, 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.

[11] 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.

reasonable use when reviewing a request for a high capacity well approval.[12] 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 the *Michaels Pipeline* decision, discussed above, which established the modified reasonable use standard as the state standard in nuisance actions related to groundwater withdrawal and recognized landowners' general but limited privilege to withdraw groundwater from the ground beneath their 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 if unreasonable harm does not result.

ANNOUNCED APPROACH FOLLOWING THE ATTORNEY GENERAL'S OPINION

Following the publication of the 2016 Attorney General's opinion discussed above, the DNR announced that it will conduct environmental review only for applications for high capacity wells that are of a type enumerated in s. 281.34 (4), Stats., and will only impose the types of permit conditions that are expressly authorized by statute. In other words, if an application is for a high capacity well that does not fall within a groundwater protection area, impact a spring, result in 95% water loss, or impact a municipal well, then the DNR will approve the application without further environmental review.

Should this shift in the DNR's permit approval approach be challenged in court, the approach would arguably be upheld under current law, because Act 21 specifically requires agencies to base permit conditions on explicit statutes or administrative rules allowing the imposition of those conditions, and, arguably, no current statute or administrative rule explicitly authorizes the DNR to impose conditions other than those articulated in s. 281.34, Stats.

However, it is more difficult to predict whether a reviewing court would strike down potential future rules that may be promulgated by the DNR to authorize a broader scope of environmental review and the imposition of additional types of permit conditions for high capacity wells. The Attorney General has opined that such rules would be impermissible, but to agree, a reviewing court would have to conclude that the delegation of the trustee powers under the public trust doctrine to the DNR does not include the authority to promulgate such rules, and that no other statute provides that authority.

REMEDIES FOR HARM TO PUBLIC WATERS OR PRIVATE WELLS

Several sources of law provide potential remedies, separate from the high capacity well permitting process, for harm caused to surface waters or private wells. The Attorney General's opinion discussed above, and the DNR's announced approach following that opinion, generally do not address the sources of law summarized below.

MODIFIED REASONABLE USE DOCTRINE

In *Michels Pipeline*, discussed above, the Wisconsin Supreme Court held that, under the modified reasonable use doctrine, a landowner is not liable for interference with the use of

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[12] 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.]

groundwater if the interference is caused by the landowner's beneficial use of the groundwater and the use does not cause unreasonable harm. Generally, the court held that harm is not "unreasonable" unless one of the following situations occurs:

- The withdrawal of water causes unreasonable harm through lowering the water table or reducing artesian pressure.
- The groundwater forms an underground stream.
- The withdrawal of water has a direct and substantial effect upon the water of a watercourse or lake.

[217 N.W.2d 339 (Wis. 1974).]

The court appeared to presume that such occurrences would be rare. However, it also appears that the court did not anticipate the number and magnitude of high capacity wells operating in Wisconsin today. The potential extent of groundwater users' liability under the modified reasonable use doctrine has not yet been tested. In particular, it remains to be seen how the doctrine would be applied in the context of direct harm to surface waters.

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 high capacity wells.

PUBLIC TRUST DOCTRINE

Wisconsin statutes and case law allow a citizen to bring suit, pursuant to the public trust doctrine, directly against a private party for abatement of a public nuisance when the citizen believes that the DNR has inadequately regulated the private party. [s. 30.294, Stats.; *Gillen v. City of Neenah*, 219 Wis. 2d 806 (1998).]

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

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