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☞ Details: Complaint.

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2007-08

(session year)

Joint

(Assembly, Senate or Joint)

Committee for Review of Administrative Rules...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
(**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
(**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (August 2012)

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LICENSED IN WISCONSIN
AND NEW YORK

October 14, 2008

VIA HAND DELIVERY

Clerk of Courts
Dane County Courthouse, Room 1000
215 South Hamilton Street
Madison, WI 53703

RE: Matter: *Haeger, et al. v. Village of East Troy, et al.*

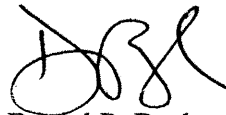
Dear Clerk:

Enclosed for filing is an Amended Complaint for the above matter. By copy of this letter the same has been served on all counsel of record, Attorney General J.B. Van Hollen, and Representative Daniel LeMahieu and Senator Robert Jauch, Co-Chairs of the Joint Committee for Review of Administrative Rules.

Please call with any questions. I may be reached at 608-282-6200.

Yours very truly,

LAWTON & CATES, S.C.



Daniel P. Bach

DPB/lm
Enclosure

c: Attorney Frank Davenport
Attorney Paul Kent
Attorney Carl Sinderbrand
Attorney General J.B. Van Hollen
Representative Daniel LeMahieu
Senator Robert Jauch

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

~~2008~~ OCT 14 AM 11:00

KENT HAEGER
700 NORTH MAYFLOWER ROAD
LAKE FOREST, ILLINOIS 60045

DANE CO. CIRCUIT COURT

RON JARECKI
N9080 OAKWOOD LANE
MUKWONAGO, WISCONSIN 53149

JOHN SONDEREGGER
44 NORTH VAIL AVENUE, UNIT 604
ARLINGTON HEIGHTS, ILLINOIS 60005

CASE NO.: 08CV1693
CASE CODE: 30703, 30704

DALE ROBLE
N9367 BEULAH PARK ROAD
EAST TROY, WISCONSIN 53120

EAGLE SPRINGS LAKE MANAGEMENT DISTRICT
P.O. BOX 196
EAGLE, WISCONSIN 53119

PHANTOM LAKES MANAGEMENT DISTRICT
P.O. BOX 212
EAGLE, WISCONSIN 53119

PLAINTIFFS,

VS.

VILLAGE OF EAST TROY
2106 CHURCH STREET
EAST TROY, WISCONSIN 53120

**THIS IS AN AUTHENTICATED COPY OF THE
ORIGINAL DOCUMENT FILED WITH THE DANE
COUNTY CLERK OF CIRCUIT COURT.**

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
101 SOUTH WEBSTER STREET
MADISON, WISCONSIN 53707

**CARLO ESQUEDA
CLERK OF CIRCUIT COURT**

DEFENDANTS.

AMENDED COMPLAINT

Now come the Plaintiffs, Kent Haeger, Ron Jarecki, John Sonderegger, Dale Roble, the Eagle Springs Lake Management District, by its president, Tom Day, and the Phantom Lakes Management District, by its president, Steve Todd, by their attorneys, Berger, Newmark & Fenchel P.C., by Attorney Frank T. Davenport, and Lawton & Cates, S.C., by Attorney Daniel P. Bach, and hereby allege the following complaint against the defendants, Wisconsin Department of Natural Resources and Village of East Troy, Wisconsin:

PARTIES

1. Plaintiff, Kent Haeger, is an adult, who owns property located at W1629 South Shore Drive, East Troy, Wisconsin 53120, and whose legal residence is 700 North Mayflower Road, Lake Forest, Illinois 60045.
2. Plaintiff, Ron Jarecki, is an adult, whose legal residence is N9080 Oakwood Lane, Mukwonago, Wisconsin 53149.
3. Plaintiff, John Sonderegger, is an adult, who owns property located at W2032 Kings Parkway, East Troy, Wisconsin 53120, and whose legal residence is 44 North Vail Avenue, Unit 604, Arlington Heights, Illinois 60005.
4. Plaintiff, Dale Roble, is an adult, whose legal residence is N9367 Beulah Park Road, East Troy, Wisconsin 53120.
5. Plaintiff, Eagle Springs Lake Management District, is a lake management district, as described and authorized under Wis. Stat. Ch. 33, which is responsible for the management, protection and preservation of Eagle Springs Lake. Its address is P.O. Box 196, Eagle, Wisconsin 53119.

6. Plaintiff, Phantom Lakes Management District, is a lake management district, as described and authorized under Wis. Stat. Ch. 33, which is responsible for the management, protection and preservation of Phantom Lake. Its address is P.O. Box 212, Eagle, WI 53119.

7. Plaintiffs Kent Haeger, Ron Jarecki, Dale Roble and John Sonderegger all own property adjacent to Lake Beulah, located in Walworth County, Wisconsin. Lake Beulah lies within the borders of the Town of East Troy, but for a parcel recently annexed by the Village of East Troy. Lake Beulah flows into the Mukwonago River, a state designated Exceptional Resource Water providing habitat for endangered species of fish and invertebrates.

8. Both Eagle Springs Lake Management District and Phantom Lakes Management District are responsible for the protection and management of navigable waters that are connected to the Mukwonago River and within the Mukwonago River watershed, which is immediately downstream of Lake Beulah. These plaintiffs have an interest in ensuring that Defendants Wisconsin Department of Natural Resources (hereinafter the "DNR") and the Village of East Troy (hereinafter the "Village") fulfill their respective obligations to protect public trust resources, and that rules promulgated by the DNR that affect public trust resources are consistent with state statutes, common law and the Wisconsin Constitution.

9. The Plaintiffs, and all members of the public, have an interest in protecting the natural resources of the State of Wisconsin, including the waters of Lake Beulah, its contiguous wetlands, and the Mukwonago River.

10. The Village is a municipal corporation under the laws of the State of Wisconsin. It is located in Walworth County. The Village Administrator for the Village of East Troy, Wisconsin is Judy Weter. Her business address is 2106 Church Street, East Troy, Wisconsin 53120.

11. The DNR is a governmental agency of the State of Wisconsin. Its business address is 101 South Webster Street, Madison, Wisconsin 53707. Matthew J. Frank is the current Secretary of the DNR. His business address is Wisconsin Department of Natural Resources, 101 South Webster Street, Madison, Wisconsin 53707.

DUTIES OF THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES

12. The DNR's duties with respect to the State's water resources are as follows: "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.) The DNR is empowered to carry out these duties by Chapter 281 of the Wisconsin Statutes, which is to be liberally construed in favor of the policy objectives stated in that Chapter.

13. The DNR's duties include, in part, reviewing and approving applications for high capacity wells, Wis. Stat. § 281.34, as well as carrying out the requirements of Wisconsin's Environmental Policy Act, Wis. Stat. § 1.11 *et seq.*

14. The DNR's duties also include establishing water quality standards for all waters of the State for the purpose of protecting the public interest. "In all cases where the potential uses of water are in conflict, water quality standards shall be interpreted to protect the general public interest." (Wis. Stat. § 281.15.)

15. In furtherance of its statutory charge and pursuant to its rulemaking authority, the DNR has promulgated rules for the protection of wetlands, set forth in Chapter NR 103, Wisconsin Administrative Code. Chapter NR 103 applies to "all department regulatory, planning, resource management, liaison and financial aid determinations that affect wetlands." NR 103.06. Any authorization or reauthorization which is subject to the requirements of statute

or rules requiring a department determination concerning the effects on water quality or wetlands must be reviewed to determine consistency with NR 103 standards.

16. “Wetlands” is defined in Wis. Stat. § 23.32 as “an area where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.”

17. Article IX, § 1 of the Wisconsin Constitution places the navigable waters of this state, including Lake Beulah and other lakes, streams and rivers, in trust for the public use and enjoyment. This provision of the Wisconsin Constitution provides the foundation for a body of law known as the “public trust doctrine,” which protects public rights in navigable waters. (Muench v. Public Service Comm., 261 Wis. 492, 507-08 (1952).)

18. The active public trust duty of the State of Wisconsin in respect to navigable waters requires the state to not only promote navigation but also to protect and preserve those waters for purely recreational boating, swimming, fishing, hunting, recreation and scenic beauty. (Just v. Marinette, 56 Wis. 2d 7, 18 (1972).)

19. Another duty of the DNR, as delegated by the Wisconsin Legislature, is to serve as the trustee responsible for safeguarding the waters of Wisconsin. In Just, the Wisconsin Supreme Court also recognized the obligations of the DNR as the trustee of the state’s navigable waters.

20. As trustee, the DNR must act in a manner consistent with that of a fiduciary entrusted with the duty and legal obligation to protect and preserve such waters. The obligations of the DNR as trustee constitute a duty to act affirmatively to protect state waters (Just), and the duty is a fiduciary one. (State v. Deetz, 66 Wis.2d 1, 12 (1974).)

21. The DNR, as trustee charged with the duty of administering the public trust, cannot delegate to third parties the powers vested in it as trustee or its attendant duties and obligations. (54 Am. Jur., Trusts, p. 244, sec. 309; Muench v. Public Service Com., 261 Wis. 492, 514 (1952).)

22. The DNR recognizes that Article IX, § 1 of the Wisconsin Constitution constitutes a directive to protect public resources: “This provision has been interpreted by the Court’s (sic) over the past 159 years to establish an affirmative duty on the State of Wisconsin to protect our navigable waters and the wetlands associated with them.” (Michael Cain, Staff Attorney, Wisconsin Department of Natural Resources, *A Template for Reasoned Environmental Planning* (Wisconsin Department of Natural Resources, Feb. 2007).)

23. In addition to its constitutional and statutory responsibilities, the DNR has the authority to require any applicant seeking a statutory approval the DNR may grant, including an approval for a high capacity well, to submit an environmental impact report if the area affected exceeds 40 acres or the estimated cost of the project exceeds \$25,000. (Wis. Stat. § 23.11(5).)

DUTIES OF THE VILLAGE OF EAST TROY

24. As an incorporated village under state law, the Village has a general grant of authority “to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public...” (Wis. Stat. § 61.34 (1).)

25. The Village is required by state law to cooperate with the DNR and other municipalities in furtherance and fulfillment of the DNR’s “role as trustee of (the state’s) navigable waters and to promote public health, safety, convenience and general welfare...” (Wis. Stat. § 281.31(1), (7).)

26. Among its other duties, the Village is required to take affirmative measures, in the form of municipal shoreland zoning regulations, which regulations govern lands under Village control and abutting or lying close to navigable waters, for the purpose of protecting navigable waters and the aquatic life dependent on such waters. (Wis. Stat. § 281.31 (1).)

27. In furtherance of the legislative directive to cooperate in the state objective to protect navigable waters and aquatic resources, the Village has a statutory obligation to aid in protecting navigable waters and their associated habitats.

FACTS

28. Lake Beulah, just north of the Village, covers an area far in excess of 40 acres and is one of several surface water bodies in the Mukwonago River basin, located in northeastern Walworth County, Wisconsin. Lake Beulah's watershed includes four lakes in addition to Lake Beulah: Booth, Swan, Pickerel and Army lakes, as well as several wetlands. At its northern end, Lake Beulah discharges into the Mukwonago River and recharges the shallow aquifers that supply groundwater to the Mukwonago River basin. (*See copy of area map attached hereto as Exhibit 1.*)

29. The Lake Beulah watershed and the Mukwonago River watershed lie within the Troy Bedrock Valley, a subsurface feature which extends from northern Illinois to southeastern Waukesha County, Wisconsin. This valley is filled with glacial melt deposits, including clays, silts, sands and gravels. In many locations and at various depths these deposits are a significant source of water for surface waters and wetlands, and also form productive aquifers.

30. Lake Beulah receives its water supply from precipitation, overland surface flow and groundwater discharging through the lake bed. Much of the overland surface flow comes from Booth, Swan and Pickerel Lakes. The surface flow into Lake Beulah is diffuse, primarily

coming into the lake through wetlands adjacent to the southern end of the lake. The groundwater discharging through the lake bed also occurs primarily in the southern portion of the lake.

31. Lake Beulah is a high-quality hard-water lake. It is a hard-water lake due to the ground water discharge into the lake. Hard-water lakes often have better water quality than would be expected for the level of phosphorus loading to them.

32. The better water quality of hard-water lakes is, in part, the result of the process of co-precipitation of phosphorus with calcium and magnesium. Co-precipitation of phosphorus precludes some of the phosphorus from being available for algae production. For Lake Beulah, the Fall 2007 turnover concentrations of calcium and magnesium were 55.2 mg/L and 33.6 mg/L respectively. Water hardness was 276 mg/L.

33. The reduction of groundwater discharge into Lake Beulah over time could result in a reduction of the lake's water hardness and quality, as well as a reduction in the amount and quality of water discharged into the Mukwonago River and its basin.

34. Recognizing the environmental significance of the Mukwonago River and its surrounding watershed (which includes Lake Beulah), and its value as a natural resource, the DNR, with the Governor's approval, recently announced plans to purchase vast tracts of land through which the Mukwonago River flows. Over ten million dollars will be spent on that purchase. A primary objective behind the purchase of that property, which includes nearly one thousand acres, is to protect the Mukwonago River watershed. The DNR considers this expenditure of public funds for the protection of that watershed to be well within the scope of its statutory mission.

35. The DNR has identified numerous sensitive area wetlands adjacent to Lake Beulah (*see copy of the DNR's Lake Beulah Sensitive Area Assessment, 1994, attached hereto as*

Exhibit 2), including one bordering the land upon which the Village intends to own and operate a high capacity well. That wetland, as well as the other identified wetlands, support varied wildlife and provide an important buffer against invasion by aquatic plant species.

36. In 2000, the Village began the process of locating an additional site for a high capacity well. The expressed purpose of the well was to increase the Village's water capacity by a minimum of 500 gallons of water per minute, which significantly exceeded its then current additional water needs.

37. The Village's plan to add an additional well producing at least 500 gallons per minute was based on its desire to encourage development of residential and commercial properties. With the approval of the new well, the Village also planned to seek DNR approval for a water booster station that would supply water to new high volume commercial users outside current service areas.

38. The Village viewed additional development as a means of solving financial problems it was experiencing.

39. The Village hired an engineering firm to explore possible sites for the well, which was identified as Village Well # 7. The estimated cost of Well # 7 is greater than \$25,000.00.

40. In 2001, the firm identified the farmland adjacent to the southeast shore of Lake Beulah ("Grafenauer site") as a favorable site for well exploration.

41. Although the Village could have pursued identified well sites that tapped into the deep aquifers that were separated from the shallow aquifers that supplied groundwater to the lake and adjacent wetlands, the Village rejected them on the basis of cost. Instead, it elected to proceed with exploration of a well site less than a thousand feet from the shores of Lake Beulah

and the adjacent wetlands. That well would tap into the shallow aquifer that supplies the groundwater for the lake and adjacent wetlands.

42. In or about 2000, a real estate developer began negotiating for the purchase of the Grafenauer site, which was then located in the Town of East Troy. In October 2002, the developer, by then holding an option to purchase this land, entered into a well exploration agreement with the Village. The Village understood that actual placement of a high capacity well on that land was, in the developer's view, contingent on approval of development plans for that property.

43. Consistent with the wishes of the developer, the sellers of the farmland petitioned the Village to annex the property. The Village subsequently did so, over the objections of the Town of East Troy, and in a manner contrary to a court-approved agreement between the Village and the Town in which the Village acknowledged the impact of annexation on the Town's residents and agreed to work in good faith with the Town to avoid future annexation disputes.

44. The Village subsequently approved plans for high density development of the annexed land that was vastly different from its existing, long-term land use plan.

45. The high capacity well's removal of water from the shallow aquifer could reduce the amount of groundwater discharging into Lake Beulah and streams tributary to the lake, which would alter the lake's water budget. If this were to happen, the lake's flushing rate would be reduced, and low water levels during drought periods may be aggravated and reduce the amount of water entering the Mukwonago River and its basin. In addition, the combined effect of increased loading of phosphorus resulting from increasing development in the watershed along with a decreased ability of the lake to assimilate phosphorus through co-precipitation could result

in significant reduction in not only water quality but in the overall limnological quality of the lake as well.

46. In August 2002, the Lake Beulah Management District (“LBMD”) related its concern to the Village about the potential impact a high capacity well located near its shores, drawing from the same shallow aquifer, might have on Lake Beulah and the adjacent wetlands. The LBMD hired its own engineering consultant to monitor the Village’s plans.

47. In Fall 2002, the Village’s consultants completed soil borings and a work plan to complete a test of the shallow aquifer that was identified as a potential water supply for proposed Village Well #7, near Lake Beulah. The work plan did not include any monitoring components that would provide information about potential environmental impacts of the well to the lake or wetlands because the Village believed the environmental impacts of the well were irrelevant and not a consideration of the DNR in the approval process. However, at the behest of the LBMD and its consultants, the Village agreed to install some minimal testing equipment – two shallow monitoring wells near the test well and a drive point in the wetlands.

48. In February 2003, the Village concluded its evaluation of the well site with a short-term test of the shallow aquifer. Water was pumped from the test well at the rate of 400 gallons per minute for just under seventy-two hours. During the test, water levels were monitored at the two shallow monitoring wells and at the drive point located at the shore of the lake and adjacent to the wetland. (*See copy of map attached hereto as Exhibit 3.*)

49. Although none of the monitoring wells actually achieved a steady state, that is, the drawdown on the water levels had not stopped and the water levels had not remained constant, the Village’s experts assumed that a steady state had been reached in the aquifer.

50. Significantly, water levels in the drive point (located the furthest from the test well) began to drop immediately after the start of the test, and continued to drop at an increasing rate as the test continued until the test was stopped, at which time they immediately began to recover. The data collected from the drive point shows a decline in water table elevation during the pump test for Well #7. (*See copy of chart reflecting the drawdown observed in the drive point during the test attached hereto as Exhibit #4.*)

51. Water levels at the drive point never reached a steady state – the drawdown on the water levels continued throughout the entire test period. Because the water levels never achieved a balanced state during pumping, the probable impact of the well could not be assessed.

52. After testing, one of the Village's consultants issued a report stating that pumping from Well # 7 at the rate of 333 gallons per minute, one-third of the anticipated maximum rate, would reduce groundwater levels, including lowering the water levels in nearby residential wells by four to five feet, and that pumping at that lesser rate also would reduce the flow of groundwater into the lake. Pumping at a higher rate, the consultant speculated, could reduce the water level in the lake as well as the flow of water into the Mukwonago River.

53. A second consultant for the Village also estimated that operation of the well could reduce the flow of water out of Lake Beulah, into the Mukwonago River, by as much as twenty percent during low water periods. This same analysis was premised on the unverified assumption that the shallow aquifer had reached a steady state condition during the seventy-two hour test.

54. Regardless of the test results and insufficiency of the data drawn from the limited testing done, on June 20, 2003, the Village applied to the DNR for approval of a high capacity well to be located approximately 1000 feet from the shoreline of Lake Beulah and the wetlands. The application further sought approval of a well that would draw up to 1000 gallons of water

per minute (almost three times the test rate), or 1.4 million gallons per day, from the same shallow aquifer that supplies groundwater to Lake Beulah, its adjoining wetlands, the Mukwonago River and the Mukwonago River basin.

55. The proposed site for Well # 7 drew considerable protest from the LBMD and members of the public concerned about the potential impact of the well. Both the Southeastern Wisconsin Regional Planning Commission and the United States Geological Survey recommended that additional testing be done.

56. Despite these concerns and recommendations, the Village did not conduct further testing, nor did the DNR request further testing although it shared the LBMD's concerns regarding the potential negative impacts to nearby water resources.

57. Although the DNR acknowledged that Well #7 could have a negative environmental impact on Lake Beulah and the surrounding wetlands, on September 4, 2003, it nevertheless approved the Village's application for Well # 7, without considering whether operation of the well would have any impact on Lake Beulah, the quality and composition of the lake water, the wetlands of Lake Beulah, including the protected wetland located less than 1000 feet from the well, or the Mukwonago River and its basin.

58. In fact, the DNR believed that those impacts should be considered when approving a request for a high capacity well but claimed that the legislature had not granted it the authority to consider them or anything else other than the potential impact such wells might have on public utility wells when approving high capacity well applications.

59. The DNR even suggested that there was clear legislative intent that the LBMD's concerns regarding the negative environmental impact on Lake Beulah, the surrounding wetlands and the Mukwonago River and its basin were not protected.

60. Later, the DNR changed its position, claiming that it can always consider the environmental impact on the state's natural resources when approving an application for a high capacity well, a view that irritated the Village's attorney. (*See Kent e-mail dated December 15, 2004, attached hereto as Exhibit 5.*) Nonetheless, at least in the case of the Village's application for a high capacity well, the DNR asserted that it was the LBMD's duty and obligation to affirmatively present evidence of the negative environmental impact and not the DNR's duty or obligation to consider such impact independently.

61. The DNR's new position improperly delegated its duty as trustee over the State's natural resources to a third party, in that the DNR now represented, that it could consider potential negative impacts only if a third party, and not the DNR, presented affirmative evidence of the negative impact.

62. Meanwhile, faced with continued opposition to Well #7, the Village publicly stated that it needed to supplement its water capacity in order to comply with certain DNR and statutory code requirements.

63. However, at or about the same time, contrary to the Village's assertions that it needed to enhance its water supply as required by the DNR, the Village President, William Loesch, told other Village employees that the Village's water supply was adequate and satisfactory so that no one would push for a moratorium or hold on current or future development within the Village boundaries, including the following developments: Lake Bluff, Glenview Estates, Brookstone, Hidden Glen, Sterling Oaks, Crystal Acres and Ashland Meadows.

64. President Loesch's assurances, however, were not shared by all Village employees or Board members. The Village's Superintendent of Public Works, Tom Rossmiller, relayed his, and former Board member Bill Stubbs', concerns to President Loesch about the

Village's inability to provide adequate water to its residents and commercial and industrial areas. Msrs. Rossmiller and Stubbs were of the opinion that further development within Village boundaries should have been halted until the Village had its water situation resolved.

65. President Loesch even went so far as to instruct Mr. Rossmiller that he wanted well pumping data that would demonstrate that the Village did not have a current water availability problem. President Loesch told Mr. Rossmiller that he wanted to cut off Board member Stubb's concerns about the Village's infrastructure and did not want to jeopardize further development in the Village pending construction of a new well. Mr. Rossmiller understood this to mean he was to "keep (his) mouth shut" about the Village's need for more water before further development was approved.

66. Meanwhile, the Village's approval for Well #7 was due to expire on September 4, 2005, as the Village had not yet started construction of the well within the specified two-year time period. The September 2003 approval specifically stated that the approval would become void "and a new application must be made" if construction of the well had not commenced within two years. (*See copy of September 2003 approval attached hereto as Exhibit 6.*)

67. Instead of seeking a new approval, in April 2005, contrary to the plain language of the original approval, the Village's attorney applied to the DNR for an extension of the original 2003 well approval.

68. In telephone conversations between the Village's attorney and the DNR, the DNR indicated to the Village's attorney that since the old law under which the original approval had been issued was no longer applicable, and a new law, Act 310, had replaced it, the DNR could no longer issue an extension of the original (outdated) approval and instead the Village would have to submit a new application for the well under the new law.

69. The Village and its attorney disputed the DNR's position because a new application for a new approval would allow members of the public opposed to the well an opportunity to request a contested case hearing and present testimony and scientific evidence of the impact the well would and could have on Lake Beulah and its surrounding wetlands.

70. As the Village did not want to allow the opponents to Well #7 the opportunity to present evidence of the impact of the well, its attorney engaged in a concerted effort to persuade the DNR to change its position and allow an extension of the previously issued and outdated approval under the new law.

71. The Village's attorney spoke with key people at the DNR and conveyed to them the Village's objections to and concerns with having to submit a new application. He told the DNR that he did not want to submit a new application because he did not want to submit Well #7's approval to a contested case hearing. (*See, e.g., Kent e-mail dated May 26, 2005, attached hereto as Exhibit 7.*)

72. By letter dated August 3, 2005, the Village's attorney reiterated the request for an extension of the existing permit and suggested arguments the DNR could rely upon to change its position and issue the extension, including that the change in state law had no impact on the standards used to approve Well # 7 and that the extension could be viewed as a modification of the prior approval.

73. Subsequently, the DNR changed its position regarding the need for a new application and informed the Village that it would extend the previous approval for an additional two-year period upon receipt of \$500 and a simple declaration from the Village's consulting engineers that "no changes in the physical circumstances upon which the application was based"

had occurred. The Village's engineers parroted that language in a one-page letter to the DNR dated August 30, 2005.

74. Yet, only months later, the Village submitted a request for a modification of Well #7 specifying circumstances requiring different construction methods than originally approved in the initial application.

75. On September 6, 2005, the DNR extended approval for Well # 7, again without considering the potential adverse consequences the well could have on Lake Beulah or its adjacent wetlands. (*See September 2005 extension, attached hereto as Exhibit 8.*) The DNR changed its position, at the specific request of the Village and knowing that its change would deprive members of the public an opportunity to request a contested case hearing and present evidence showing that operation of the well likely would have adverse environmental impacts on the quality of the waters and protected wetlands.

76. However, in subsequent legal proceedings in the appellate court involving the LBMD, the Village, and the DNR concerning the LBMD's request for a contested case hearing in the original approval process of Well # 7, the Village and the DNR changed positions yet again.

77. This time, after considerable collaboration (*See, e.g., Kent e-mail dated January 9, 2006, attached hereto as Exhibit 9.*), the Village and the DNR argued before the appellate court that the change in state law had rendered the original approval and any related matters such as a contested case hearing moot since that law was no longer in effect. Contrary to the position they had previously taken, they now argued that the September 2005 extension was really a new approval issued pursuant to a new application submitted under the new law despite the fact that the DNR never requested and the Village never submitted a new application.

78. The Village and the DNR both argued to the appellate court that any issue arising out of the Village's original application for approval, such as a request for a contested case hearing, was rendered moot because the original application had expired and was no longer of consequence. They also argued that the LBMD could have and should have requested a contested case hearing when DNR granted the "new approval" despite the fact that the Village had specifically requested that the DNR grant an extension, as opposed to a new approval, to avoid the contested case hearing issue altogether.

79. The Village has at least one alternative location available upon which to site a high capacity well which, when combined with currently operating wells, would supply more water to the municipality than presently needed.

COUNT I:
THE DNR VIOLATED ITS DUTY TO PROTECT THE PUBLIC TRUST

80. Plaintiffs reallege and incorporate each of preceding paragraphs, and further allege as follows:

81. The Wisconsin legislature has delegated authority to the DNR to act as trustee of the State's navigable waters and to protect its natural resources, including wetlands.

82. The DNR has the authority and responsibility to protect the waters of the State under Article IX, § 1 of the Wisconsin Constitution, Wisconsin's common law, Wis. Stat. Chapter 281, Wis. Stat. Chapters 30 and 31, Wis. Stat. Chapter 1, Wis. Admin. Code Chapter NR 150, and Wis. Admin. Code Chapter NR 812.

83. The areas affected by the Village's proposed Well # 7 include constitutionally protected navigable waters, including Lake Beulah and the waterways into which it flows, as well as adjacent wetlands.

84. In approving the Village's application for Well # 7, the DNR failed to undertake any independent analysis whether the withdrawal of water from that well, as proposed by the Village, would harm the environment, including navigable waters and wetlands.

85. The DNR should not permit an activity that could harm the state's wetlands, groundwater and surface water until it can determine that the activity will not do so. (*See letter from Wisconsin Attorney General James E. Doyle to DNR Secretary George S. Meyer, Sept. 19, 2000, attached hereto as Exhibit 10.*)

86. In approving the Village's application for Well # 7, the DNR failed to consider information showing that the withdrawal of water from that well, as proposed by the Village, would harm the environment, including navigable waters and wetlands.

87. In granting the Village an extension of its original approval in September 2005, as opposed to requiring a new application, the DNR knowingly and wrongfully prevented consideration, through a manipulated administrative process, of the potential adverse consequences to surface waters and wetlands from the operation of Well # 7.

88. By approving the Village's original application, and subsequent request to extend the approval, to withdraw groundwater through Well # 7 without developing sufficient evidence to make a reasonable finding of no significant impact to public trust resources, the DNR breached its statutory, common law and constitutional duties to protect public trust resources, including navigable waters and adjacent wetlands.

89. In addition, the Village's original approval expired in September 2005. However, the Village never requested nor obtained a new approval under the new law, Act 310, and the DNR never required the Village to submit the appropriate application or obtain the appropriate approval under Act 310.

90. Rather, contrary to its initial position and the plain language in the original approval, the DNR allowed the Village to request an extension of the approval under the then old and inapplicable law.

91. By allowing the Village to proceed with the construction and installation of Well #7 without proper approval, the DNR has failed to apply and enforce the current and applicable Wisconsin law, as is required of it, and it has failed to fulfill its statutory, common law and constitutional duties to protect public trust resources, including navigable waters and adjacent wetlands.

92. The Plaintiffs, and all members of the public, have an interest in ensuring that the DNR fulfills its public trust obligations and are aggrieved by the DNR's failure to fulfill its duties to protect public trust resources in this instance, as related above.

93. Pursuant to the aforementioned authorities cited and Wis. Stat. § 806.04, this conduct entitles the Plaintiffs to declaratory and injunctive relief as hereafter requested.

COUNT II:
THE DNR'S DECISION TO CLASSIFY HIGH CAPACITY WELLS AS A TYPE FOUR
ACTION VIOLATES WEPA AND THE PUBLIC TRUST DOCTRINE

94. Plaintiffs reallege and incorporate each of the preceding paragraphs, and further allege as follows:

95. The Wisconsin Environmental Policy Act ("WEPA"), Wis. Stat. § 1.11, requires an environmental statement for major actions significantly affecting the quality of the human environment, which the DNR has interpreted in Wis. Admin. Code Ch. NR 150.

96. High capacity wells have the potential to reduce significantly available ground and surface water, actions that have serious consequences for the ecosystems in which those wells are located and for connecting waterways.

97. Permitting a high capacity well is a major action significantly affecting the quality of the human environment, including waters protected by the body of law that comprises the public trust doctrine.

98. Ch. NR 150.03(8)(h)1 violates WEPA, Wis. Stat. § 1.11 *et seq.*, and the body of law that comprises the public trust doctrine by classifying high capacity well approvals as Type IV actions, which are presumed to have no significant environmental impact. (NR §§ 150.03(4)(e).)

99. The conflict between NR § 150.03(8)(h)1 and WEPA, Wis. Stat. § 1.11 *et seq.*, and the body of law that comprises the public trust doctrine warrants a Declaratory Judgment pursuant to Wis. Stat. § 227.40(1) that this section of Ch. NR 150 is invalid.

100. Pursuant to the aforementioned authorities cited and Wis. Stat. § 806.04, this conduct entitles the Plaintiffs to declaratory and injunctive relief as hereafter requested.

COUNT III:
THE DNR'S REFUSAL TO PRODUCE AN ENVIRONMENTAL STATEMENT
ADDRESSING THE ENVIRONMENTAL IMPACT OF WELL # 7 VIOLATED WEPA

101. Plaintiffs reallege and incorporate each of the following paragraphs, and further allege as follows:

102. As stated above, the operation of Well # 7, to the extent contemplated by the Village in its application, is a major action affecting the quality of the human environment.

103. Under WEPA, DNR approval of any such action must be preceded by a detailed statement substantially addressing the following issues:

- a. The environmental impact of the proposed action;
- b. Any adverse environmental effects which cannot be avoided should the proposal be implemented;
- c. Alternatives to the proposed action;

- d. The relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity;
- e. Any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; and
- f. Such statement shall also contain details of the beneficial aspects of the proposed project, both short term and long term, and the economic advantages and disadvantages of the proposal.

104. The DNR did not undertake the appropriate analysis, nor did it create the detailed statement required under WEPA.

105. The statutory obligations imposed on the DNR by WEPA do not conflict with any other statutory obligations of the DNR, as they pertain to Well # 7.

106. The DNR's alleged approval of Well # 7, should it be deemed a valid approval, is contrary to and in violation of its statutory obligations under WEPA.

107. Pursuant to the aforementioned authorities cited and Wis. Stat. § 806.04, this conduct entitles the Plaintiffs to declaratory and injunctive relief as hereafter requested.

COUNT IV:
THE DNR ERRED IN APPROVING THE APPLICATION FOR WELL # 7 WITHOUT
PERFORMING AN ENVIRONMENTAL ASSESSMENT

108. Plaintiffs reallege and incorporate each of the preceding paragraphs, and further allege as follows:

109. High capacity wells have the potential to harm public trust resources, including navigable waters and wetlands.

110. Under NR 150.20(1)(a), the DNR has the authority to conduct an environmental assessment prior to approving an application for a high capacity well if it determines that critical resources would be affected by the proposed well.

111. Public trust resources are critical resources under NR 150.20(1)(a), and Lake Beulah, its adjacent wetlands and the Mukwonago River are public trust resources.

112. The DNR chose to conduct an environmental assessment with regard to at least one other high capacity well application, made by the Perrier Group of America, for a well with a capacity to pump approximately half as much water as the Village of East Troy's Well # 7.

113. The DNR's initial decision not to conduct an environmental assessment prior to approving either the Village's initial application for Well # 7 or the subsequent request for an extension, while acknowledging the potential for negative environmental impacts, was arbitrary and capricious, and in violation of the DNR's duty and obligations as the State's trustee under the public trust doctrine.

114. The DNR's subsequent justification for its refusal to conduct an environmental assessment, premised on its assertion that it was the duty and responsibility of the LBMD, and not the DNR, to present evidence of potential negative environmental impacts, was an improper abdication of the DNR's statutory, common law and state constitutional duties and obligations.

115. Also, the DNR improperly imposed a non-existent precondition to the performance and fulfillment of its duties and obligations as trustee of the State's natural resources when it preconditioned its ability to conduct an environmental assessment upon whether some third party presents evidence of a potential negative environmental impact, thereby taking the position that it need not proactively perform and fulfill its duties and obligations but must only satisfy them when a third party presents evidence of the potential harm.

116. The DNR also failed to administer properly and impartially its duties and obligations as the State's agent and trustee when it initially took the position with respect to the

Village's request for an extension that no extension could be granted since the law had changed requiring the Village to submit a new application, which would have allowed interested parties to request a contested case hearing, and then subsequently reversed its position and granted the extension in response to the Village's attorney's lobbying efforts.

117. The DNR further failed to administer impartially and justly its duties and obligations to the State when it later collaborated with the Village's attorney and again changed its position to argue to the appellate court that although it had specifically granted the Village's request for an extension, it had really granted a new approval.

118. The DNR's inconsistent positions on its ability to conduct environmental assessments and on the 2005 extension demonstrate that, in regard to Well #7, it has not objectively and impartially fulfilled its trust duties and obligations.

119. The DNR's failure to conduct an environmental assessment is grounds to rescind the approvals given for Well # 7 and for an order that the DNR conduct an environmental assessment before such well is approved.

120. Pursuant to the aforementioned authorities cited and Wis. Stat. § 806.04, this conduct entitles the Plaintiffs to declaratory and injunctive relief as hereafter requested.

COUNT V:
THE DNR ERRED IN EXTENDING THE APPROVAL FOR WELL #7 WITHOUT
CONSIDERING WHETHER TO REQUIRE THE VILLAGE TO SUBMIT AN
ENVIRONMENTAL IMPACT REPORT

121. Plaintiffs reallege and incorporate each of the preceding paragraphs, and further allege as follows:

122. Prior to extending the approval for Well # 7 in 2005, the DNR had the authority to require the Village to submit an environmental impact report, since the area affected by the high capacity well would exceed 40 acres and the cost of the project was greater than \$25,000.

123. The DNR never required the Village to submit such a report, and never considered whether it should require the Village to submit such a report.

124. The DNR's failure even to consider whether to require the Village to submit an environmental impact report, under circumstances where it knew that Well # 7 could have an adverse impact on navigable waters and wetlands, resulted in an arbitrary and capricious decision to extend the approval for Well # 7.

125. The DNR's failure to require the Village to submit an environmental impact report was also in violation of the DNR's trust obligations.

126. Pursuant to the aforementioned authorities cited and Wis. Stat. § 806.04, this conduct entitles the Plaintiffs to declaratory and injunctive relief as hereafter requested.

COUNT VI:
THE VILLAGE OF EAST TROY VIOLATED ITS OBLIGATIONS UNDER STATE LAW TO AID IN THE PROTECTION OF THE STATE'S NAVIGABLE WATERS

127. Plaintiffs reallege and incorporate each of the preceding paragraphs, and further allege as follows:

128. The Village conducted a search for a location for a new high capacity well without considering, or directing its consultants to consider, the potential impact of the well on public trust resources, including navigable waters and wetlands.

129. Once a potential site for the new high capacity well was located near the shore of Lake Beulah, the Village pursued annexation of that property and approved of a development plan for that property, in violation of its obligations to the Town of East Troy and the Village's own long term land use plan, with the solitary goal of increasing its municipal water supply to permit even more development.

130. Based on the results and limited value of the testing done regarding the potential impact proposed Well # 7 might have on public trust resources, as well as the assessments and suggestions of the LBMD, SEWRPC and USGS, the Village knew or should have known that operation of Well # 7 might cause significant damage to Lake Beulah, its adjacent wetlands and the Mukwonago River and its basin.

131. Nonetheless, the Village applied for approval for Well # 7 in 2003, asserting that the well would not cause harm to public trust resources.

132. The Village took actions designed to mislead the public or prevent it from learning the true character and condition of its infrastructure and municipal works.

133. Thereafter, the Village, through its attorney, took actions designed to prevent the public from presenting evidence of the potential environmental harms posed by Well # 7 by convincing the DNR to consider the 2005 well approval an "extension" of the previous approval, and then later asserting in court filings that the 2005 extension was really a new approval.

134. The Village, through its attorney, sought to persuade the DNR that it ought not take the position that it had any authority to consider environmental impacts in deciding whether to approve the application for Well # 7.

135. The Village, with the aid of a public relations firm, also knowingly engaged in dissemination of false and misleading information to the public regarding the potential impact of Well # 7 on public trust resources, including the publication of a brochure that was materially false in the following respects:

- a. The Village's publication falsely stated that the new well would draw water from a different aquifer than that which supplies groundwater to Lake Beulah;

- b. The Village's publication falsely stated that it conducted testing “greatly exceed(ing) the requirements from the Wisconsin Department of Natural Resources...to gather quantitative data to allow the potential impacts on the lake to be scientifically assessed,” when in fact the DNR had no requirements for such testing and the limited testing done by the Village was at the insistence of the LBMD and was inadequate to evaluate the potential impact of the well on the lake;
- c. The Village's publication falsely stated that the water to be supplied from Well # 7 would be used to meet current demand and “is not a matter of accommodating development.”

136. Results of data derived in 2008 from monitoring wells situated adjacent to Lake Beulah prove that Well # 7 will draw water from the same aquifer that supplies groundwater to Lake Beulah. Attached as Exhibit 11 is a graph showing the impact of rain events on shallow and deep wells located in the vicinity of Well # 7. As the chart shows, there is a nearly exact correlation between the impact of rain events on the deep well, at a depth corresponding to that of Well # 7, and the shallow well, at a depth a few feet below the lake level.

137. This data flatly refutes the Village and its consultants' earlier publication wherein they falsely stated that the wells were not connected and were instead separated by a thick layer of silt and clay.

138. The Village and its consultants intentionally made the false statement or made it despite uncertainty as to its truth. To date, despite this incontrovertible evidence, the Village has done nothing to correct the false information it disseminated to the public, and has done nothing

by way of further testing to ensure that Well # 7 will not adversely impact the lake or surrounding wetlands.

139. Further, the Village considered means of limiting public expressions of opposition to Well # 7, including providing limited seating at a public forum arranged to espouse the Village's message about the impact and necessity of the well.

140. The aforementioned conduct of the Village was in violation of its obligations to aid in the protection of navigable waters and their associated habitat.

141. The Village's conduct also was contrary to its obligations to act in the public interest.

142. The Plaintiffs, and all members of the public, are aggrieved and injured as a result of the Village's conduct.

143. Pursuant to the aforementioned authorities cited and Wis. Stat. § 806.04, this conduct entitles the Plaintiffs to declaratory and injunctive relief as hereafter requested.

COUNT VII:
THE VILLAGE HAS PROCEEDED TO INSTALL WELL #7 WITHOUT A VALID APPROVAL FROM THE DNR

144. Plaintiffs reallege and incorporate each of the preceding paragraphs, and further allege as follows:

145. The 2003 approval for Well # 7 specifically provided that it was valid for two years from the date of approval, which was September 4, 2003, and that if construction or installation of the well had 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."

146. Construction or installation of Well # 7 had not commenced within two years after September 4, 2003, thus the original approval became void.

147. The Village did not file a “new application” for approval of Well # 7; instead, the Village requested an extension of the 2003 approval.

148. The documents filed by the Village in connection with its request for an extension did not meet the requirements for a new application for a high capacity well.

149. The DNR was not authorized to grant an “extension” of the 2003 approval for Well # 7 under Wisconsin law.

150. The DNR “approved” the Village’s request for an extension in 2005 without complying with state law applicable to a new application for a high capacity well, such as affording members of the public an opportunity to be heard and seek a contested case hearing.

151. The Village commenced installation of Well # 7 without a valid approval from the DNR, in violation of state law.

152. Since its original approval for Well # 7 expired in September 2003, the Village has not obtained a new approval allowing it to construct or install that well.

153. The Village, and its attorney, intentionally sought an extension of the 2003 approval, rather than a new approval, in order to prevent members of the public from contesting the application and seeking a contested case hearing.

154. The Village’s conduct, and that of the DNR, compel entry of an order directing the Village to cease construction of Well # 7 and preventing it from operating Well # 7 until further order of the Court.

155. Pursuant to the aforementioned authorities cited and Wis. Stat. § 806.04, this conduct entitles the Plaintiffs to declaratory and injunctive relief as hereafter requested.

RELIEF REQUESTED

For the foregoing reasons, the Plaintiffs respectfully request entry of an order:

- A. Directing the Village of East Troy to cease construction and operation of Village Well # 7;
- B. Declaring that the Wisconsin Department of Natural Resources, in regard to a request for approval of a high capacity well, must consider the environmental impact of any such well that will draw upon a shallow aquifer serving as a source of groundwater to navigable waters and/or protected wetlands of the State;
- C. That the Wisconsin Department of Natural Resources rescind any existing approval for the Village of East Troy's Well # 7, and deny any new application for approval of such well, until and unless it is shown that the operation of that well will not adversely affect the public's rights in navigable waters and the well-being of protected wetlands;
- D. Declaring that Ch. NR 150.03(8)(h)1 violates WEPA and the Wisconsin Constitution, and is invalid;
- E. An award of attorneys' fees and costs to the Plaintiffs; and
- F. Such other and further relief as the law allows and the Court deems appropriate.

Dated this 13th day October 2008.

**BY: BERGER, NEWMARK &
FENCHEL P.C.**

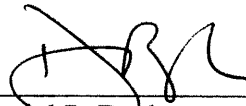


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