Wisconsin Legislative Council
INFORMATION MEMORANDUM

IM-2020-11

REGULATION OF HIGH CAPACITY WELLS

As the number of high capacity wells[1] has increased in recent years, the Legislature, courts, attorney general, and Department of Natural Resources (DNR) have been called upon to address complicated questions relating to water use rights, the public trust doctrine, and the extent of regulatory authority. This information memorandum provides an overview of the legal backdrop for high capacity well regulation in Wisconsin, followed by a summary of relevant legal and regulatory developments over the past 10 years. Finally, it discusses a case currently pending before the Wisconsin Supreme Court that could resolve questions left unanswered by the recent developments in the law.

KEY LEGAL CONCEPTS

Modified Reasonable Use Doctrine

The Wisconsin Supreme Court established the state's current approach to groundwater rights in its 1974 *Michels Pipeline* decision.[2] In that case, the Court adopted a modified version of the approach commonly known as the "reasonable use doctrine."[3] As articulated by the Court, to qualify for protection from nuisance liability under the doctrine, 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 have 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. [*State v. Michels Pipeline Constr., Inc.*, 63 Wis.2d 278 (1974).]

The Public Trust Doctrine

The public trust doctrine provides that navigable waters are held in trust by the state for the benefit of the public. The doctrine 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.[4] Although courts have generally declined to expand the public trust doctrine to waters that are not navigable, they have recognized a role for the public trust doctrine in groundwater

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[1] Wisconsin law defines "high capacity well" as a well that, together with all other wells on the same property, has the capacity to withdraw more than 100,000 gallons of groundwater per day. [s. 281.34 (1) (b), Stats.]

[2] 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.

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

[4] The Wisconsin Supreme Court has determined that the Legislature has delegated its primary trustee obligations to DNR. For a more detailed summary of the public trust doctrine, see Legislative Council, Issue Brief, *The Public Trust Doctrine* (Oct. 2019); Legislative Reference Bureau, Reading the Constitution, *The Public Trust Doctrine* (Aug. 2020).

withdrawals based in part on the hydrologic connections between groundwater and surface waters.[5]

Section 281.34, Stats.

Statutory standards regarding the permitting of high capacity wells are set forth in s. 281.34, Stats.[6] Generally, the statute provides that a landowner must obtain approval from DNR before constructing a high capacity well.[7]

For the following types of high capacity wells, DNR must conduct an environmental review of the impacts of the well using the process provided under the Wisconsin Environmental Protection Act (WEPA), s. 1.11, Stats., prior to approving construction:

- 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 percent 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.]

DNR generally may not approve a proposed high capacity well if the well would cause the impairment of a public water supply. In addition, DNR generally must impose certain types of conditions[8] on a proposed well to ensure that the well does not cause a significant environmental impact[9] if the well is one of the three types listed above. [s. 281.34 (5), Stats.]

For other proposed high capacity wells, with the exception of a designated study area in central Wisconsin, described below, the statutes are silent regarding the scope of DNR's authority to review potential environmental impacts. The statutes also do not specify other factors that DNR is required or permitted to consider when deciding whether to approve an application for a high capacity well.

Remedies for Harm to Public Waters or Private Wells

Separate from the high capacity well permitting process, several sources of law provide potential remedies for harm caused to surface waters or private wells. First, under *Michels Pipeline*, discussed above, although a landowner is generally not subject to liability for withdrawing

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[5] See *Rock-Koshkonong Lake Dist. v. Dep't of Natural Resources*, 2013 WI 74; *Lake Beulah Mgmt. Dist. v. Dep't of Natural Resources*, 2011 WI 54.

[6] See also ch. NR 820, Wis. Adm. Code.

[7] 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.]

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

[9] DNR has defined "significant adverse environmental impact" 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.]

groundwater for a beneficial use, a landowner may be liable if 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.

[63 Wis. 2d at 302, 303.]

In *Michels Pipeline*, 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. In the years following the *Michels Pipeline* decision, the potential extent of groundwater users' liability under the modified reasonable use doctrine has not yet been tested. For example, it remains to be seen how the doctrine would be applied in the context of direct harm to surface waters.

Second, 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 DNR to initiate an action to prevent harm to navigable waters that is being caused by high capacity wells.

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

LEGAL AND REGULATORY DEVELOPMENTS OVER THE PAST DECADE

Two separate developments in 2011 – the enactment of 2011 Wisconsin Act 21 and the Wisconsin Supreme Court's decision in *Lake Beulah Mgmt. Dist. v. Dep't of Natural Resources* – have resulted in legal tension in recent years regarding the withdrawal of groundwater by high capacity wells. Act 21 changed the general bounds of agency rulemaking authority, but the Wisconsin Supreme Court only addressed it in a footnote in *Lake Beulah*, stating that the act "does not affect our analysis in this case." [2011 WI 54, ¶ 39 n. 31.] Whether Act 21 limits DNR's authority to impose conditions in permits for high capacity wells in future cases, and whether it therefore overturns the rationale in *Lake Beulah*, has been the subject of conflicting legal decisions and guidance since its enactment.

The *Lake Beulah* Decision

In its 2011 *Lake Beulah* decision, the Wisconsin Supreme Court held that DNR, when reviewing a proposed high capacity well, has a "general duty" to investigate or consider potential harm from a proposed well on "the waters of the state."[10] The Court found that this duty is grounded in DNR's 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. In other words, the Court interpreted DNR's regulatory authority as broader than merely applying the specific standards enumerated in s. 281.34, Stats. Under the Court's holding, the "general duty" to protect waters

[10] 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.

of the state is triggered when 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. [2011 WI 54 at ¶¶ 39, 46, and 62-63.]

Before the Wisconsin Supreme Court issued *Lake Beulah*, 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., summarized above. Following the *Lake Beulah* decision, 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, DNR stated that ch. 281, Stats., does not expressly require DNR to assess such cumulative impacts of a proposed well along with other wells in the area and does not authorize 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.[11] DNR also noted that the *Lake Beulah* ruling did not specifically require DNR to assess these cumulative impacts.

DNR also based its decision not to consider cumulative impacts on the *Michels 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. 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.

2011 Wisconsin Act 21

Among various other changes relating to rule promulgation, Act 21 clarified that a state agency's authority to implement or enforce standards, requirements, or thresholds must be explicitly required or permitted by either a statute or a validly promulgated rule. Act 21 retained an agency's authority to promulgate a rule "if the agency considers it necessary to effectuate the purpose of the statute," but the act specified 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. [ss. 227.10 (2m) and 227.11 (2) (a), Stats.]

Enactments and Decisions Subsequent to *Lake Beulah* and Act 21

Among questions left unanswered by the Wisconsin Supreme Court following Act 21 and *Lake Beulah* are whether DNR may consider the cumulative impacts of multiple wells on nearby surface or groundwater levels when reviewing an application for a proposed new high capacity well and the extent to which DNR may impose conditions on a high capacity well approval. Various administrative and lower court decisions, attorney general opinions, and legislative enactments have addressed those questions since 2011. The Legislature has also directed a study of certain high capacity well impacts.

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

2013 Wisconsin Act 20

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.] Although this provision does not prohibit DNR from considering cumulative impacts of multiple high capacity wells, it does prohibit a person from challenging a DNR approval of a high capacity well on the grounds that DNR failed to do so.

The Richfield Dairy Decision

A September 3, 2014 decision of the Department of Administration's Division of Hearings and Appeals, sometimes referred to as the "Richfield Dairy decision," stated that 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 two high capacity well approvals. The administrative law judge determined that DNR, to fulfill its obligations under ch. 281, Stats., and *Lake Beulah*, 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.[12]

The *New Chester Dairy* Decision

A 2015 circuit court decision, *New Chester Dairy, LLC v. Dep't of Natural Resources*, interpreted DNR's statutory authority as modified by Act 21 and took a narrower view of DNR's authority. The case related to DNR's authority to include a groundwater monitoring and reporting condition in a high capacity well approval issued to New Chester Dairy. 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 circuit court held that no statute or rule explicitly authorized 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).]

2016 Attorney General's Opinion

On May 10, 2016, Attorney General Schimel issued an opinion addressing, in part, whether the statutory authority relied on by the Wisconsin Supreme Court in *Lake Beulah* authorizes DNR 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 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 ss. 281.11 and 281.12, Stats., provide explicit rulemaking authority for high capacity well approval conditions not specified in s. 281.34, Stats. The attorney general also concluded that Act 21 precludes DNR from imposing a cumulative

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[12] *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). These two proposed wells were also the subject of separate litigation brought under WEPA. In an unpublished decision, the Wisconsin Court of Appeals decided that DNR had failed under WEPA to consider the cumulative effects of the two wells together with other past, existing, and reasonably anticipated high capacity wells in the vicinity. [*Family Farm Defenders, Inc. v. Dep't of Natural Resources*, No. 2012AP1882, unpublished slip. op., ¶ 21 (Wis. Ct. App. Dec. 19, 2013).]

impacts analysis for all high capacity wells because that regulatory requirement is not explicitly required in statute. The opinion distinguished its conclusion from *Lake Beulah* by concluding that the *Lake Beulah* decision did not directly consider the impact of Act 21 on DNR's authority.

Following the publication of the 2016 Attorney General's opinion, DNR conducted environmental review only for applications for high capacity wells that were of a type enumerated in s. 281.34 (4), Stats., and only imposed the types of permit conditions that are expressly authorized by statute.

2017 Wisconsin Act 10

Prompted in part by evidence at the time of decreasing levels in some surface waters located near high capacity wells, the Legislature enacted 2017 Wisconsin Act 10, which directed DNR to conduct a study regarding certain lakes and waterways in a watershed located in the Central Sands area of the state ("Central Sands Lakes Study"). The act directed DNR to evaluate whether existing and potential groundwater withdrawals are causing or are likely to cause a significant reduction in the rate of flow or in the water level of the lake or waterway below its average seasonal level, and, if so, to propose special measures to rectify those impacts. [s. 281.34 (7m), Stats.]

The act also authorizes the owner of a previously approved high capacity well to repair, replace, reconstruct, or transfer ownership of the well without obtaining an additional approval, if certain conditions are satisfied. [s. 281.34 (2g), Stats.]

Case Certified to the Wisconsin Supreme Court

On April 9, 2019, the Wisconsin Supreme Court accepted a certified case, summarized below, relating to the regulation of high capacity wells.

Withdrawal of the 2016 Attorney General's Opinion

On May 1, 2020, in response to a question posed by DNR Secretary-Designee Cole, Attorney General Kaul issued a letter withdrawing the 2016 Attorney General's opinion, discussed above, in its entirety.[13] Attorney General Kaul based his action on the fact that the 2016 decision had been criticized by the circuit court in *Clean Wisconsin, Inc. and Pleasant Lake Mgmt. Dist. v. Dep't of Natural Resources*, discussed below, for failing to adhere to the *Lake Beulah* holding.[14]

Following the withdrawal of the 2016 opinion, DNR announced that it will again rely on the *Lake Beulah* decision and consider environmental impacts when reviewing an application for a proposed high capacity well if presented with sufficient concrete, scientific evidence of potential harm. Specifically, DNR announced six case-by-case considerations for each proposed high capacity well. In addition to the three statutory considerations in s. 281.34 (4), Stats., summarized above, DNR will also consider the following:

- Whether the construction of a proposed well would degrade safe drinking water, degrade the groundwater resource, or impact public safety.

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[13] A copy of the letter may be viewed at https://www.doj.state.wi.us/sites/default/files/news-media/5.1.20_High_Cap_Wells_Letter.pdf.

[14] Attorney General Kaul noted that any tension between *Lake Beulah* and Act 21 likely would ultimately be resolved by the Supreme Court's disposition of *Clean Wisconsin, Inc. and Pleasant Lake Mgmt. Dist. v. Dep't of Natural Resources*.

- Whether a proposed well, when combined with existing wells, will result in a significant adverse environmental impact to a navigable water.
- Whether a proposed well, when combined with existing wells, will impair a public water system.

DNR announced that it may add specific conditions to a high capacity well approval if any of the above six considerations are at issue. Such conditions may include requirements regarding location, construction, pumping capacity, rate of flow, or amount of water that may be withdrawn.[15]

CASE PENDING BEFORE THE WISCONSIN SUPREME COURT

The Wisconsin Court of Appeals certified a case relating to high capacity well regulation to the Wisconsin Supreme Court in January, 2019, and the Wisconsin Supreme Court accepted the certification in April, 2019. [Appeal No. 2018AP59.]

The case, *Clean Wisconsin, Inc. and Pleasant Lake Mgmt. Dist. v. Dep't of Natural Resources*, involves a challenge to eight high capacity well applications that had been approved by DNR. During review of the applications, DNR determined that public trust waters would be adversely impacted by each well. Nevertheless, DNR, solely on the basis of the 2016 Attorney General's opinion, discussed above, approved the wells without any conditions necessary to protect the affected public trust waters. The circuit court decided that, regardless of the 2016 Attorney General's opinion, the holding of *Lake Beulah* had not been overturned and thus was still binding on lower courts. [Case No. 16-CV-2817 (October 11, 2017).]

The certification requests the Wisconsin Supreme Court to address legal questions left unresolved in the wake of 2011 Wisconsin Act 21, the *Lake Beulah* decision, and subsequent legal developments. Namely, the Court accepted the case to address: (1) the impact of Act 21 on the regulatory permit approval process; (2) who is trustee of the state's waters; and (3) whether the *Lake Beulah* decision remains controlling law in Wisconsin.[16]

This information memorandum was prepared by Anna Henning, Senior Staff Attorney, Ethan Lauer, Staff Attorney, and Rachel Letzing, Deputy Director, on September 3, 2020.

[15] DNR's announced guidance is available here: https://dnr.wi.gov/news/input/documents/guidance/draft/20200615/DG-20-0002-D.pdf.

[16] On the same day that it accepted certification of *Clean Wisconsin, Inc. and Pleasant Lake Mgmt. Dist. v. Dep't of Natural Resources*, the Wisconsin Supreme Court also accepted certification of consolidated companion cases. [Appeal Nos. 2016AP1688 and 2016AP2502.] Those cases, captioned *Clean Wisconsin, Inc. v. Dep't of Natural Resources and Kinnard Farms, Inc.*, address whether DNR has authority to impose certain conditions on a Wisconsin Pollutant Discharge Elimination System permit given the enactment of Act 21. Although not involving a high capacity well application, the consolidated companion cases should resolve at least some of the same underlying legal questions as those present in *Clean Wisconsin, Inc. and Pleasant Lake Mgmt. Dist. v. Dep't of Natural Resources*.