WISCONSIN LEGISLATIVE COUNCIL

IssueBrief

July 2021

Clean Wisconsin v. Department of Natural Resources Decisions

Prepared by: Ethan Lauer, Senior Staff Attorney

The Wisconsin Supreme Court recently issued two separate but related opinions, both captioned *Clean Wisconsin, Inc. v. Department of Natural Resources*. Although they arose in the context of permitting decisions made by the Department of Natural Resources (DNR), the decisions clarify some broader uncertainty that had existed since 2011 with regard to agency administrative authority. In that year, the Legislature enacted a statute that prohibits an agency from taking certain administrative actions unless those actions are explicitly authorized. The central question in each case was whether agency authority that is stated in broad terms nevertheless qualifies as "explicit" within the meaning of the 2011 enactment. The Court held that it does. This issue brief provides relevant background information and summarizes the Court's two decisions, one addressing water pollution permits and the other addressing high capacity well permits.

BACKGROUND

2011 Wisconsin Act 21 (Act 21) made various changes to the administrative powers of state agencies. Among the changes, Act 21 created s. 227.10 (2m), Stats., which prohibits the implementation or enforcement of a standard, requirement, or threshold not "explicitly required or explicitly permitted" by either a statute or a validly promulgated rule.

WATER POLLUTION PERMIT DECISION

The first case, *Clean Wisconsin, Inc. v. DNR*, 2021 WI 71, involved a challenge to DNR's authority to impose conditions in a Wisconsin Pollutant Discharge Elimination System (WPDES) permit. A WPDES permit controls the discharge of pollution into waters of the state. Certain large livestock facilities, called Concentrated Animal Feeding Operations, or CAFOs, must obtain a WPDES permit.[1]

The WPDES statute and accompanying DNR rules authorize DNR to impose conditions on a WPDES permit if those conditions are necessary to achieve certain water quality outcomes, like meeting pollution discharge limits or meeting groundwater protection standards. In the words of the WPDES statute, DNR must impose in a permit "at least" the conditions delineated in statute.[2]

DNR issued a WPDES permit to Kinnard Farms, Inc., a large CAFO. After various administrative and judicial proceedings, DNR was ordered to include two additional conditions in the permit: (1) a limit on the maximum number of animal units that could be maintained at the facility; and (2) a plan for off-site groundwater monitoring wells near the CAFO.

Those two conditions are not listed in either the WPDES statute or in DNR rules. The Court accepted the case to resolve the question of whether DNR's authority to impose those conditions was "explicit" as required under s. 227.10 (2m), Stats.

The Court held that statutes and rules granting DNR broad authority to impose conditions on a WPDES permit qualify as "explicit" authority to impose conditions beyond those conditions expressly listed in statute or rule, if the conditions are necessary to ensure that the permit holder complies with water pollution limitations or standards. In so holding, the Court distinguished the word "explicit" as used in s. 227.10 (2m), Stats., from the more exacting word "specific," which appears in other administrative law provisions affected by Act 21.

HIGH CAPACITY WELL PERMIT DECISION

The second case, *Clean Wisconsin, Inc. v. DNR*, 2021 WI 72, involved a challenge to eight high capacity groundwater well applications that had been approved by DNR. Under the high capacity well statute, DNR is required to conduct an environmental review for certain types of well applications and to impose conditions on their approvals to ensure that they do not cause a significant environmental impact. For other types of well applications, the high capacity well statute does not require DNR to conduct an environmental review or to impose conditions.[3] The eight well applications in question in this case were of the latter type.

DNR initially reviewed the eight applications to determine whether the proposed wells would have an adverse effect on public trust waters. Even though not required to by the high capacity well statute, DNR considered the environmental impacts using the rationale articulated in an earlier Wisconsin Supreme Court decision, *Lake Beulah Management District v. DNR* ("*Lake Beulah*"), 2011 WI 54.

In *Lake Beulah*, the Court held that DNR's authority was not limited to applying only the standards enumerated in the high capacity well statute. Instead, the Court held that DNR had a "general duty" to protect the waters of the state, based on its role as trustee of public waters under the Wisconsin Constitution[4] and on broad statutes[5] authorizing DNR's regulatory powers generally. In the Court's view, the Legislature, by requiring DNR to conduct an environmental review only for certain well applications, had not implicitly precluded DNR from considering environmental impacts in other circumstances.[6]

Notably, Act 21 was enacted after the Court had entertained oral arguments in *Lake Beulah* but before the opinion was issued. The *Lake Beulah* Court summarily concluded that Act 21 did not affect its analysis in that case, but it did not specify whether that was because the case arose prior to the enactment of Act 21.[7] However, the Attorney General issued an opinion in 2016 that Act 21 did prohibit DNR from conducting environmental reviews and from imposing high capacity well conditions, other than those specified in the high capacity well statute. Following that opinion, DNR approved all eight wells without conducting an environmental review or imposing conditions. These DNR approvals as well as a series of legislative, executive, and judicial activity in the years following *Lake Beulah* and the enactment of Act 21, continued to raise the question of whether sources of DNR's "general duty" to protect the waters of the state constitute the "explicit" authority required by s. 227.10 (2m), Stats.[8]

In *Clean Wisconsin, Inc. v. DNR*, 2021 WI 72, the Court resolved the question. The Court decided that Act 21 had not overturned the rationale in *Lake Beulah*. More specifically, the Court held that the broad authority granted to DNR over the waters of the state qualifies as "explicit" authority for DNR to consider potential harm from a high capacity well on the waters of the state and to impose conditions if necessary to protect those waters. The Court thus remanded the case back to DNR to review the eight applications in light of the Court's decision.

---

[1] For further discussion of WPDES permitting of CAFOs, see Legislative Council, *Wisconsin Pollutant Discharge Elimination System (WPDES) Permits for Large Livestock Facilities*, Information Memorandum (Nov. 28, 2016).
[2] s. 283.31 (3), (4), and (5), Stats.; ch. NR 243, Wis. Adm. Code.
[3] s. 281.34 (4) (a) 1., 2., and 3. and (5) (b), (c), and (d), Stats.
[4] For more information on the "public trust doctrine, see Legislative Council, *The Public Trust Doctrine*, Issue Brief (Oct. 2019).
[5] ss. 281.11 and 281.12, Stats.
[6] 2011 WI 54 at ¶¶ 29, 39, 46, 62, and 63.
[7] 2011 WI 54 at fn. 31.
[8] For a recitation of the activity, and for more background generally, see Legislative Council, *Regulation of High Capacity Wells*, Information Memorandum (Sept. 3, 2020).