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OAG–01–16

The Honorable Robin Vos
Chairperson
Assembly Committee on Organization
211 West, State Capitol
Madison, WI 53702

Dear Representative Vos:

¶ 1. The Wisconsin State Assembly, through your request as Chair of the Assembly Committee on Organization, asks for my opinion on the application of Wis. Stat. § 227.10(2m), as enacted by 2011 Wisconsin Act 21, to the issuance of high capacity groundwater well withdrawal permits. You specifically inquire about: (1) the interpretation of the Supreme Court's opinion in *Lake Beulah Management District v. Department of Natural Resources*, 2011 WI 54, 355 Wis. 2d 47, 799 N.W.2d 73, regarding high capacity well permitting; (2) whether Wis. Stat. §§ 281.11–.12 gives the Department of Natural Resources (DNR) authority to impose monitoring well conditions or require cumulative impact evaluations for high capacity well permits; (3) whether the Legislature has delegated public trust authority to the DNR for conditioning high capacity well permits; and (4) whether there exists other explicit statutory authority permitting DNR to impose monitoring wells or cumulative impact conditions on high capacity well permits.

¶ 2. I have determined that the Supreme Court did not address the newly enacted Act 21 in *Lake Beulah Management District v. Department of Natural Resources*. *Lake Beulah,* 335 Wis. 2d 47. I further conclude that neither Wis. Stat. ch. 281, nor the public trust doctrine give DNR authority to impose any condition not explicitly allowed in state statute or rule. In addition, no other authority exists which permits DNR to impose the conditions enumerated by the Assembly.

QUESTION ONE

¶ 3. The Assembly asks whether the Wisconsin Supreme Court in *Lake Beulah Management District v. Department of Natural Resources,* 2011 WI 54, 355 Wis. 2d 47, 799 N.W.2d 73, interpreted and applied the requirement in Wis. Stat. § 227.10(2m) that DNR must have explicit authority to impose requirements and conditions on a high capacity well permit. I conclude that the Court did not interpret and apply the newly-enacted Wis. Stat. § 227.10(2m) to the facts of *Lake Beulah* because the statute did not apply retroactively to a permit issued seven years earlier.

¶ 4. Wisconsin Stat. § 227.10(2m) was created by 2011 Wisconsin Act 21 (Act 21), and states, in relevant part:

> No agency may implement or enforce any standard, requirement, or threshold, including as a term or 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 rule that has been promulgated in accordance with this subchapter, except as provided in s. 186.118(2d)(c) and (3)(b)3.

¶ 5. Act 21 was passed on May 23, 2011 and took effect June 8, 2011. 2011 Wis. Act 21. At that same time, *Lake Beulah* was pending in the Supreme Court

of Wisconsin. *Lake Beulah,* 335 Wis. 2d 47. In *Lake Beulah*, DNR issued a permit for a high capacity well to be used as a municipal water source for the Village of East Troy. *Id.* ¶ 1. At issue was the scope of DNR's authority and duty to consider the environmental impacts of the well on Lake Beulah "if presented with sufficient scientific evidence suggesting potential harm to waters of the state." *Id.* ¶¶ 2-3. Petitioners challenged issuance of the permit based on DNR's decision not to perform a more in-depth environmental review, including how the well might impact nearby Lake Beulah. *Id.* The petitioners and the DNR agreed that the Legislature had granted a broad public trust duty to the agency, and that nothing limited that broad grant of authority. *Id.* ¶ 28. Petitioners argued that the record contained sufficient evidence of the potential impacts on the lake to warrant an environmental review in accordance with DNR's public trust duties. *Id.* ¶ 16. DNR asserted that it may have authority to consider impacts of a high capacity well, but it was not required to do so in this case. *Id.* ¶ 27.

¶ 6. The Village maintained that DNR did not have authority to consider the impacts of the well on Lake Beulah because DNR's authority was specifically laid out in Wis. Stat. §§ 281.34–.35. *Id.* ¶ 29. The Village argued that those statutes represented "a deliberate legislative choice to limit DNR's authority" notwithstanding the public trust doctrine, or Wis. Stat. §§ 281.11–.12, which describe the general powers and duties of DNR. *Id.*

¶ 7. The Court heard oral arguments in April 2011, and the parties were awaiting a decision when Act 21 was enacted and took effect. On May 31, 2011, *amici*, Dairy Business Association, Midwest Food Processors Association, and Wisconsin Manufacturers & Commerce, filed a letter pursuant to Wis. Stat. § 809.19(10) asking the Court to consider Wis. Stat. § 227.10(2m) as relevant supplemental authority. Letter from Robert I. Fassbender, Attorney, Great Lakes Legal Foundation, Inc., to Clerk of Court, Wisconsin Supreme Court (May 31, 2011), filed in *Lake Beulah Management District v. DNR*, 335 Wis. 2d 47 (2011) (No. 2008AP3170). *Amici* argued the Court should apply the new statute to the DNR decision under review because it was simply a codification of existing law, and because it would be impractical for the Court to ignore the new statute. *Id.* at 5. On June 9, 2011, DNR responded arguing that Act 21 was not applicable to the permit conditions, and that Act 21 should not be applied to the facts of the pending case because it applied prospectively only. Response of the Respondent-Respondent Wisconsin Department of Natural Resources to Letter of Supplemental Authorities at 2 (June 9, 2011), filed in *Lake Beulah Management District v. DNR*, 335 Wis. 2d 47 (2011) (No. 2008AP3170).

¶ 8. The Court gave the letters, and Act 21, short shrift. It addressed Act 21 only in one footnote, explaining "[n]one of the parties argues that the amendments to Wis. Stat. ch. 227 in 2011 Wisconsin Act 21 affect the DNR's authority *in this case*." *Lake Beulah*, 335 Wis. 2d 47, ¶ 39 n.31 (emphasis added). The Court concluded that Act 21 did not affect its analysis and decided not to address Act 21 any further. *Id.*

The Court ultimately held that DNR had the authority and duty to consider the impacts of the well on Lake Beulah. *Id.* ¶ 3. The Court concluded that Wis. Stat. §§ 281.11–.12 constituted a broad legislative grant of public trust duty to DNR, and nothing in Wis. Stat. §§ 281.34–.35, or any other applicable statute, limited that duty. *Id.* ¶¶ 3, 41.

¶ 9. The timing of Act 21's passage, as well as the plain language of the decision, supports my conclusion that the *Lake Beulah* Court did not interpret and apply Wis. Stat. § 227.10(2m).

¶ 10. First, the Court in *Lake Beulah* correctly presumed that Wis. Stat. § 227.10(2m) should not be retroactively applied. The first step to determine retroactivity is to examine the text of the statute. *Trinity Petroleum, Inc. v. Scott Oil Co.*, 2007 WI 88, ¶ 36, 302 Wis. 2d 299, 735 N.W.2d 1. Legislation is presumed to be prospective "unless the statutory language reveals by express language or necessary implication an intent that it apply retroactively." *Matthies v. Positive Safety Mfg. Co.,* 2001 WI 82, ¶ 15, 244 Wis. 2d 720, 628 N.W.2d 842 (citation omitted). Statutes are generally prospectively applied because "retroactivity disturbs the stability of past transactions." *Snopek v. Lakeland Med. Ctr.*, 223 Wis. 2d 288, 293-94, 588 N.W.2d 19 (1999) (citation omitted).

¶ 11. If the text is silent as to retroactivity, the next step is to determine if the statute is procedural or remedial, or if it is substantive. *Trinity Petroleum,* 302 Wis. 2d 299, ¶ 40. "[A] procedural law is that which concerns the manner and

order of conducting suits or the mode of proceeding to enforce legal rights and the substantive law is one that establishes the rights and duties of a party." *Id.* ¶ 41 (citation omitted). Substantive changes are presumed prospective unless there is clear language or a necessary implication of the intent to apply it retroactively. *Id.* ¶ 40; *Matthies*, 244 Wis. 2d 720, ¶ 15.

¶ 12. The language of Wis. Stat. § 227.10(2m) is silent regarding retroactive application. The statute unambiguously changed the authority of agencies to implement and enforce standards rendering it a substantive change. Since Wis. Stat. § 227.10(2m) does not expressly require nor necessarily implicate retroactive application, but directly impacts the duty and authority of state agencies, including DNR, it was a substantive statutory change that could not be applied retroactively.

¶ 13. Footnote 31 of the *Lake Beulah* decision states in relevant part, "[w]e agree with the parties that 2011 Wisconsin Act 21 does not affect our analysis in this case. Therefore, we do not address this statutory change any further." *Lake Beulah*, 335 Wis. 2d 47, ¶ 39 n.31. The Court presumably recognized that applying the new statute to this case, seven years after the permit was issued, and after extensive litigation under statutes in effect prior to the enactment of Act 21, would unquestionably disturb the stability of a past transaction. The Court thus concluded that Act 21 did not affect DNR's authority to issue that particular permit. *Id.* However, the Court carefully limited its determination to this specific case. *Id.* (twice clarifying that Wis. Stat. § 227.10(2m) does not affect "this case").

¶ 14. The Court's intentional silence on the future impact of Act 21 is telling. The Court overtly declined to fully address the scope of Act 21. *Id*. On the other hand, the Court engaged in a full analysis of several statutes in its decision. *Id.* ¶¶ 34-44. If the Court intended to render Wis. Stat. § 227.10(2m) inapplicable in all future high capacity well cases, presumably it would have included the same detailed interpretation of the new statute. The Court likely recognized that the untimely passage of Act 21 (which was not retroactive) while the case was pending left it no choice but to base its decision on prior law. Rather than delving into a detailed evaluation of Wis. Stat. § 227.10(2m), the Court chose not to address the new law at all. In short, the Court avoided further evaluation of Wis. Stat. § 227.10(2m) in *Lake Beulah* because it would have contradicted the pre-Act 21 reasoning on which the decision in that very case was based.

¶ 15. In addition, a recent circuit court ruling treated the application of Wis. Stat. § 227.10(2m) as an issue of first impression, further clarifying the scope of the *Lake Beulah* decision. *New Chester Dairy LLC v. DNR*, No. 14-CV-1055 (Wis. Cir. Ct. Outagamie Cty. Dec. 2, 2015). In *New Chester*, the court held that imposing monitoring conditions on a high capacity well permit was beyond the authority of DNR because no statute or rule explicitly authorized such a condition. *Id.* at 6. *New Chester* did not rely on, or even mention, *Lake Beulah*'s footnote 31. *Id.* The *New Chester* Court interpreted and applied Wis. Stat. § 227.10(2m), and reached a different conclusion than the *Lake Beulah* Court as to the authority and the duties of

the DNR with respect to high capacity well permits. Thus, the *New Chester* decision supports my conclusion that the *Lake Beulah* Court did not interpret and apply Wis. Stat. § 227.10(2m).

¶ 16. Given that the *Lake Beulah* Court did not retroactively apply Act 21 to a permit issued seven years earlier, I conclude the Court did not interpret and apply Wis. Stat. § 227.10(2m) when evaluating DNR's authority. Therefore, much of the Court's reasoning in *Lake Beulah*, including the breadth of DNR's public trust authority discussed below, is no longer controlling.

QUESTIONS TWO AND THREE

¶ 17. The Assembly asks whether Wis. Stat. §§ 281.11–.12 are exceptions to the proscriptions of Wis. Stat. § 227.10(2m) such that DNR may impose a monitoring well condition or require consideration of cumulative impacts for high capacity well permits in the absence of explicit authority under any statute or administrative rule.

¶ 18. In addition, the Assembly asks whether the Legislature delegated its public trust authority to DNR with sufficient clarity and specificity in the context of the issuances of high capacity groundwater well withdrawals, particularly with respect to: (i) conditions for monitoring wells, (ii) cumulative impact analysis, and (iii) impact analysis on groundwater, other private wells, and wetlands.

¶ 19. These two questions are closely related. In *Lake Beulah*, the Supreme Court concluded that the Legislature, through Wis. Stat. §§ 281.11–.12, had delegated broad public trust authority to DNR in the context of high capacity well regulation.

Lake Beulah, 335 Wis. 2d 47, ¶¶ 62-63. However, I conclude that, although DNR's public trust authority has been expanded by the courts beyond the plain language of the Wisconsin Constitution, Act 21 restricts that authority by withdrawing DNR's ability to implement or enforce any standard, requirement, or threshold, including as a term or condition of a permit issued by the agency, unless explicitly permitted in statute or rule. Neither Wis. Stat. § 281.11 nor § 281.12 explicitly allow DNR to require any term or condition on high capacity well permits. Therefore, the aforementioned statutes do not give DNR the authority to require or impose any term or condition absent explicit statutory or rule-based language sanctioning that specific term or condition.

¶ 20. Administrative agencies are creatures of the Legislature, with "only those powers as are expressly conferred or necessarily implied from the statutory provisions under which [they] operate." *Lake Beulah*, 335 Wis. 2d 47, ¶ 23 (quoting *Brown Cty. v. DHSS*, 103 Wis. 2d 37, 43, 307 N.W.2d 247 (1981)). Those statutes will be strictly construed to preclude the exercise of power not expressly granted. *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 14, 270 Wis. 2d 318, 677 N.W.2d 612. Any reasonable doubt regarding an agency's implied power should be resolved against the agency. *Id.* Since the Legislature has discretion to grant power to an agency, it follows that the Legislature can also retract that power. *Lake Beulah*, 335 Wis. 2d 47, ¶ 23.

¶ 21. The public trust doctrine, which has its roots in article IX, section 1, of the Wisconsin Constitution, is the foundation of the State's duty to protect navigable waters. *Id.* ¶ 31. The Legislature is the primary administrator of the trust and "has the power of regulation to effectuate the purposes of the trust." *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983); *see Town of Ashwaubenon v. PSC*, 22 Wis. 2d 38, 49, 125 N.W.2d 647 (1963). The Legislature may delegate to the DNR the authority to exercise such legislative power as is necessary to "make public regulations interpreting [its] statute[s] and directing the details of [their] execution." *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 59, 158 N.W.2d 306 (1968) (citation omitted).

¶ 22. Wisconsin Stat. § 281.11 is a policy and purpose statement, explaining in general terms the function of DNR with respect to management of water resources, including broad statements of the importance of water quality in our state. Wisconsin Stat. § 281.12 explains the general powers and duties of the DNR with respect to management of those same resources. Wisconsin Stat. § 281.12 states:

> (1) The department shall have general supervision and control over the waters of the state. It shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter. The department also shall formulate plans and programs for the prevention and abatement of water pollution and for the maintenance and improvement of water quality.
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> (3) The department, upon request, shall consult with and advise owners who have installed or are about to install systems or plants, as to the most appropriate water source and the best method of providing for its purity, or as to the best method of disposing of wastewater, including operations and maintenance, taking into consideration the future needs of the

> community for protection of its water supply. The department is not required to prepare plans.
>
> (5) The department may enter into agreements with the responsible authorities of other states, subject to approval by the governor, relative to methods, means and measures to be employed to control pollution of any interstate streams and other waters and to carry out such agreement by appropriate general and special orders. This power shall not be deemed to extend to the modification of any agreement with any other state concluded by direct legislative act, but, unless otherwise expressly provided, the department shall be the agency for the enforcement of any such legislative agreement.

¶ 23. These two sections are followed by more detailed sections describing DNR's authority over specific programs and areas of regulation. For example, Wis. Stat. § 281.34 (addressed below) provides a detailed explanation of DNR's authority to approve high capacity wells. Though neither Wis. Stat. § 281.11 nor § 281.12 mention the public trust doctrine, a long line of cases culminating with *Lake Beulah* has held that those provisions constitute a broad grant of the public trust duties to the DNR from the Legislature. *Rock-Koshkonong Lake Dist. v. DNR*, 2013 WI 74, 350 Wis. 2d 45, 833 N.W.2d 800; *Nekoosa Edwards Paper Co. v. R.R. Comm'n,* 201 Wis. 40, 228 N.W. 144 (1929); *Reuter v. DNR,* 43 Wis. 2d 272, 168 N.W.2d 860 (1969); *Just v. Marinette Cty.,* 56 Wis. 2d 7, 201 N.W.2d 761 (1972); *Vill. of Menomonee Falls v. DNR,* 140 Wis. 2d 579, 412 N.W.2d 505 (Ct. App. 1987). The public trust doctrine's foundation is in the Wisconsin Constitution: "[T]he 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 . . . ." Wis. Const. art. IX, § 1.

¶ 24. *Lake Beulah* held that the Legislature impliedly delegated to DNR, through Wis. Stat. §§ 281.11–.12, public trust authority and duty to impose on high capacity wells any condition DNR deemed necessary to manage the state's water resources. *Lake Beulah*, 335 Wis. 2d 47, ¶ 34. The *Lake Beulah* Court relied on a judicially developed and expanded public trust doctrine to prescribe DNR's broad authority, giving DNR constitutional control of nearly all water in the state. *Id.* ¶ 31 (citing *Diana Shooting Club. v. Husting*, 156 Wis. 261, 271, 145 N.W. 816 (1914); *Muench v. PSC*, 261 Wis. 492, 499-508, 53 N.W.2d 514 (1952); *Menzer v. Vill. of Elkhart Lake*, 51 Wis. 2d 70, 82, 186 N.W.2d 290 (1971)). While you do not inquire about the legality of the public trust doctrine's vast expansion since ratification of the Wisconsin Constitution in 1848, which the Wisconsin Supreme Court has only recently sought to limit,[1] the appellate court in *Lake Beulah* appropriately pointed out that "[t]he public trust doctrine found in our state constitution does not have any self-executing language authorizing the DNR to do anything–the statutes do that." *Lake Beulah Mgmt. Dist. v. DNR*, 2010 WI App 85, ¶ 30, 327 Wis. 2d 222, 787 N.W.2d 926, *aff'd in part, rev'd in part,* 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73.

¶ 25. Nonetheless, prior to *Rock-Koshkonong*, the ever-expanding doctrine resulted in the parallel expansion of DNR's implied authority to regulate and control

[1] In *Rock-Koshkonong Lake District*, the Wisconsin Supreme Court held that the State had no public trust authority to control land or water above the ordinary high water mark. 350 Wis. 2d 45, ¶11.

all waters in the state. The *Lake Beulah* Court held that the broad language of Wis. Stat. §§ 281.11–.12 *impliedly* granted equally broad public trust authority to the DNR. 335 Wis. 2d 47, ¶ 33 ("the legislature has delegated substantial authority over water management matters to the DNR") (citation omitted). The Court relied on the absence of statutory language restricting DNR's broad authority. *Id.* ¶¶ 41-42. "Finding no language expressly revoking or limiting the DNR's authority and general duty to protect and manage waters of the state," the Court concluded that "the DNR retains such authority and general duty to consider whether a proposed high capacity well may impact waters of the state." *Id.* ¶ 42. The Court added that the duty was not absolute, but that DNR had a duty to consider harms to the water of the state when the duty was triggered. *Id.* ¶ 5.

¶ 26. As discussed above, Act 21 explicitly limited agency authority, which would necessarily limit any public trust authority deemed to have been previously granted to DNR in the 'statement of policy and purpose' and 'general departmental powers and duties' sections of Wis. Stat. ch. 281. In drafting Wis. Stat. § 227.10(2m), the Legislature specifically chose to use the word "explicitly." "Explicit" means "[f]ully and clearly expressed; leaving nothing implied."[2] Thus, permit conditions are lawful only if they are permitted or required in a manner that is fully expressed by statute or rule. An implied grant of authority to impose them is insufficient, under Act 21.

[2] *Explicit*, The American Heritage Dictionary of the English Language, https://www.ahdictionary.com/word/search.html?q=explicit&submit.y=18 (last visited Apr. 26, 2016).

¶ 27. In addition to Wis. Stat. § 227.10(2m), Act 21 also created Wis. Stat. §§ 227.11(2)(a)1.–2., which state:

> 1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule–making authority on the agency or augment the agency's rule–making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
>
> 2. A statutory provision describing the agency's general powers or duties does not confer rule–making authority on the agency or augment the agency's rule–making authority beyond the rule–making authority that is explicitly conferred on the agency by the legislature.

Taken together, these sections represent the Legislature's unambiguous limitation of agency authority.

¶ 28. Therefore, based on these provisions, Act 21 implied public trust authority or duty for DNR based on the policy and powers sections of Wis. Stat. §§ 281.11–.12. Wisconsin Stat. §§ 281.11–.12 does not provide DNR *explicit* authority to condition high capacity well permits. At the time of the *Lake Beulah* decision, explicit authority was not required. The Court could thus rely on implied agency authority, if necessary. *Lake Beulah*, 335 Wis. 2d 47, ¶ 23 (citing *Brown Cty.,* 103 Wis. 2d at 43).

¶ 29. Through the plain language of Act 21, the Legislature sought to regain and maintain control of the breadth of agency authority in two ways. First, an agency must have explicit authority to impose license and permit conditions and second, by requiring explicit authority for rulemaking. Wis. Stat. §§ 227.10(2m), 227.11(2)(a).

Act 21 makes clear that permit conditions and rulemaking may no longer be premised on implied agency authority.

¶ 30. Interpreting Wis. Stat. §§ 281.11–.12 as explicit authority to impose a specific condition would bypass the strict limitation of agency authority set forth by the Legislature. Wisconsin Stat. § 227.11(2)(a) clearly disallows rulemaking based on broad statements of policy or duty, such as those found in Wis. Stat. §§ 281.11–.12. Although Wis. Stat. § 227.11(2)(a) only speaks to rulemaking, it follows that DNR is also prohibited from conditioning a permit based on broad statements of policy or duty. Any other interpretation would allow DNR to bypass the rulemaking process, rendering Wis. Stat. § 227.11(2)(a) meaningless.

¶ 31. For example, DNR could propose a rule explicitly allowing monitoring wells as a condition of high capacity well permits. If that rulemaking failed based on a determination that DNR does not have explicit legislative consent to promulgate such a rule, DNR should not be allowed to impose that same condition in a permit by relying on the broad policy statements in Wis. Stat. §§ 281.11–.12.

¶ 32. The same remains true if no rule is proposed. After Act 21, an agency must obtain authorization to impose any specific condition through the rule-making process or through legislation explicitly allowing such a condition. These two avenues for DNR authority are exclusive–there is no other avenue through which DNR can gain additional authority. Act 21 is clear. In no instance is DNR allowed to impose conditions or requirements absent explicit authority, in rule or statute.

See Wis. Stat. § 227.10(2m) ("[n]o agency may implement or enforce any standard, requirement, or threshold, including as a term or *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 rule that has been promulgated in accordance with this subchapter . . . .").

¶ 33. Although the *Lake Beulah* Court found that DNR had broad implied authority to impose permit conditions, 335 Wis. 2d 47, ¶ 3, that holding now directly conflicts with Act 21. I conclude that through Wis. Stat. §§ 227.10(2m), .11(2)(a), the Legislature has limited DNR's authority to regulate high capacity wells only as explicitly enumerated through statute or rule.[3] DNR cannot premise such authority on broad statements of policy or general duty, such as those found in Wis. Stat. §§ 281.11–.12.

¶ 34. Specifically regarding any requirement for cumulative impact analysis, you inquire whether either Wis. Stat. §§ 281.11–.12 or the delegated public trust duty require DNR to undertake a cumulative impact analysis for high capacity well applications.

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[3] During the 1985-86 legislative session the Legislature enacted 1985 Wisconsin Act 60, which required the DNR to evaluate the impact of the wells on public rights in navigable waters for wells with a water loss of over two million gallons per day. Wis. Stat. § 281.35. Subsequently, during the 2003-04 legislative session, the Legislature enacted comprehensive legislation (2003 Wisconsin Act 310) that explicitly set forth DNR's authority when it comes to regulating high capacity wells. Wis. Stat. § 281.34. If the Legislature believes that current law does not provide sufficient groundwater protections, it clearly has the authority to enact more stringent laws. However, as explained in great detail in this opinion, the DNR may not impose conditions unless it has such explicit statutory authority.

¶ 35. I conclude that DNR's imposition of cumulative impact analyses for all high capacity wells is precluded by Act 21. I further conclude that Wis. Stat. § 281.34(5m) clearly illustrates the Legislature's intent to cede very limited public trust authority to DNR regarding cumulative impacts of high capacity wells.

¶ 36. The requirement to perform an environmental review, including a cumulative impacts analysis, for all high capacity wells is not explicitly required in any Wisconsin statute. Current DNR practice is to analyze the cumulative impacts of all wells and other sources of water drawdown in the vicinity of, and in combination with, the high capacity well proposed in the permit application. *High Capacity Well,* http://dnr.wi.gov/topic/wells/highcapacity.html (last revised Feb. 4, 2016). DNR relies on a 2014 Administrative Law Judge (ALJ) opinion as authority, and a directive, to undertake this analysis in all high capacity well cases. *In re Conditional High Capacity Well Approval for Two Potable Wells to be Located in the Town of Richland, Adams County Issued to Milk Source Holdings, Inc. (Richfield Dairy)*, Nos. IH-12-03, IH-12-05, DNR-13-021, DNR-13-027 (Wis. Div. Hearings & Appeals Sept. 3, 2014).

¶ 37. The issue in *Richfield Dairy* was whether DNR, when granting, conditioning, or denying a high capacity well permit, has an obligation to evaluate the cumulative impacts of existing sources of water drawdown in combination with the proposed well. *Id.* at 2. DNR argued that no such obligation exists, and the agency is only authorized to consider the well(s) for which a permit was being evaluated. *Id.* at 12. DNR relied on the statutory framework for evaluating high capacity wells,

which specifically lists the types of wells for which an environmental review may be undertaken. Wis. Stat. § 281.34(4)–(5). DNR concluded that language limits its authority to perform an environmental review, including cumulative impact analysis, on high capacity wells based on factors not listed in Wis. Stat. § 281.34(4).

¶ 38. The ALJ, however, relying on *Lake Beulah*, held that DNR has a broad public trust duty and therefore is obligated to perform an environmental review on all high capacity wells. *Richfield Dairy*, No. DNR-13-021, at 2. The ALJ in *Richfield Dairy* further held that the environmental review must include a cumulative impact study. *Id.* at 11.

¶ 39. After issuance of the order in *Richfield Dairy,* the Legislature passed Wis. Stat. § 281.34(5m), which states:

> 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.

¶ 40. For a number of reasons, the DNR may not rely on the *Richfield Dairy* order as a mandate to review cumulative environmental impacts on all high capacity well applications. First, it directly contradicts Act 21. Second, it renders Wis. Stat. § 281.34(4)–(5) meaningless. Third, the Legislature has subsequently clarified DNR's limited delegation of public trust duty in Wis. Stat. § 281.34(5m).

¶ 41. I will not re-iterate the requirement in Wis. Stat. § 227.10(2m) that DNR's authority be based on explicit language in a rule or statute. As noted, no court order, including an ALJ order, can take the place of an explicit rule or statute in

defining agency duties. It is the Legislature, not the judiciary, which is the trustee of navigable waters. *Bleck*, 114 Wis. 2d at 465. Therefore, only the Legislature can delegate such duties. There is no explicit requirement from the Legislature that DNR perform cumulative impact analyses on all proposed high capacity wells. Doing so directly contradicts Act 21 and Wis. Stat. § 227.10(2m).

¶ 42. Moreover, a requirement to perform cumulative impact analyses, or undergo any type of environmental review, for all high capacity well permit applications would render Wis. Stat. §§ 281.34(4)–(5) meaningless. The Legislature took great care to explain in detail the instances when DNR can perform such an analysis. Wis. Stat. § 281.34(4). This includes limiting the types of wells for which this analysis must be performed, as well as explicitly listing the conditions that may be imposed if the DNR determines there is cause for concern. Wis. Stat. §§ 281.34(4)–(5). Presumably, the Legislature, as trustee of the waters of the state, carefully considered the instances in which high capacity wells might impact those waters, and gave DNR the explicit tools for managing that impact. A mandate to perform an environmental review, including cumulative impacts, on all high capacity wells would effectively erase the Legislature's detailed evaluative framework from the statutes.

¶ 43. Finally, after confusion about the apparent ALJ mandate to consider cumulative environmental impacts on all high capacity wells, the Legislature clearly removed the requirement by prohibiting a permit challenge based on absence of a

cumulative impact evaluation. Wis. Stat. § 281.34(5m). The Legislature could not have been clearer about its intent. If a permit cannot be challenged based on a cumulative impact analysis, it makes little sense that the Legislature would delegate a public trust duty to the DNR that would force them to perform such an analysis.

¶ 44. The *Richfield Dairy* ALJ relied heavily on *Lake Beulah*'s rationale which, as explained, is without support after Act 21. The Legislature's passage of Wis. Stat. § 281.34(5m) made clear that DNR may not rely on the *Richfield* opinion as a mandate to analyze cumulate impacts.

QUESTION FOUR

¶ 45. Finally, the Assembly asks whether Wisconsin's high capacity well regulatory structure set forth at Wis. Stat. § 281.34, or in related sections, explicitly require or explicitly permit monitoring wells or cumulative impact analysis as conditions for high capacity well permits.

¶ 46. I conclude that there is no explicit authority in Wis. Stat. § 281.34, or related sections, for DNR to impose these specific conditions on high capacity wells.[4]

¶ 47. Wisconsin Stat. § 281.34 was the result of an effort by the Legislature to create a detailed structure for regulating the impact of high capacity wells on groundwater. 2003 Wis. Act 310. Wisconsin Stat. § 281.34(2), and the related Wis. Stat. § 281.17, explain in detail the application and approval process for high

[4] You specifically inquire about Wis. Stat. § 281.34. This opinion does not address the authority that may or may not be derived from Wis. Stat. § 281.35.

capacity wells. High capacity wells must be approved by the DNR. Wis. Stat. § 281.34(2). The DNR must undertake an environmental review of certain high capacity well applications. Wis. Stat. § 281.34(4). In those cases, there are specific conditions that the DNR may place on an approved application. Wis. Stat. § 281.34(5). Those conditions "may include . . . location, depth, pumping capacity, rate of flow, and ultimate use." Wis. Stat. § 281.23(5)(a)–(d).

¶ 48. The DNR has authority, through Wis. Stat. §§ 281.34, .17, to regulate high capacity wells, but that authority is not without limits. As explained in detail above, explicit authority is required for any condition placed on a permit. Wis. Stat. § 227.10(2m). Wisconsin Stat. § 281.34 gives DNR authority to impose only the conditions listed: location, depth, pumping capacity, rate of flow, and ultimate use. In addition, those conditions may only be imposed on a certain subset of high capacity wells. Wis. Stat. § 281.34(4). Any condition not explicitly identified, or any condition on a well that is not listed in Wis. Stat. § 281.34(4), is prohibited and unlawful, unless and until it is sanctioned by the Legislature either by rule or statute. Wis. Stat. § 227.10(2m).

¶ 49. Further, DNR is not required to impose any condition on a high capacity well permit. The use of the word "may" indicates that DNR has discretion to impose the enumerated conditions on the enumerated categories of wells. Wis. Stat. § 281.34(5)(a)–(d).

¶ 50. Monitoring is not an explicitly permitted condition. Wis. Stat. § 281.34(5)(a)–(d). Nevertheless, it is clear that the issue of monitoring was not lost on the Legislature when it passed Wis. Stat. § 281.34. The Legislature specifically granted DNR the authority to research and monitor interactions of groundwater and surface water, characterization of groundwater resources, and strategies for managing water. Wis. Stat. § 281.34(10). However, the Legislature did not grant DNR authority to impose that monitoring requirement on high capacity well permits. Therefore, a monitoring well condition on a high capacity well permit is prohibited and unenforceable. Wis. Stat. § 227.10(2m).

CONCLUSION

¶ 51. The constitution vested in the state a duty to keep navigable waters in trust for the citizens of the state. Nowhere in the constitution is there language delegating that duty to the DNR. Rather, the Legislature maintains the duty of trustee and can choose to delegate that duty in whole or in part to an administrative agency, or to maintain control and carry out the duty itself.

¶ 52. Since the *Lake Beulah* decision, the Legislature has clearly limited the public trust duty for which DNR is responsible. Act 21 was not intended to remove power from agencies; instead it defines the authority with which they are allowed to act. The Legislature has defined the parameters in which DNR can act to protect the state's navigable waters, and additionally clarified the ways in which DNR can regulate non-navigable waters, specifically in the context of high capacity wells.

¶ 53. Through these changes to the law, the public trust duty does not cease to exist. Rather, it reverts back to the Legislature, which is responsible for making rules and statutes necessary to protect the waters of the state. The Legislature is free to grant the authority to DNR to impose any conditions the Legislature finds necessary. However, the DNR has only the level of public trust duty assigned to it by the Legislature, and no more.

Very truly yours,

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BDS:DMB:pss:ts