STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 OUTAGAMIE COUNTY

NEW CHESTER DAIRY, LLC
and MS REAL ESTATE HOLDINGS, LLC,

Petitioners,

v. Case No. 2014CV1055

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent,

CLEAN WISCONSIN,

Intervenor.

INTERVENORS WISCONSIN MANUFACTURERS & COMMERCE, DAIRY BUSINESS ASSOCIATION, MIDWEST FOOD PROCESSORS ASSOCIATION, WISCONSIN POTATO & VEGETABLE GROWERS ASSOCIATION OPENING BRIEF ON THE MERITS

INTRODUCTION

The Intervenors' interest in this case is two-fold. First, the application of Wis. Stat. § 227.10 (2m), created by 2011 Wisconsin Act 21 (Act 21), prohibits the Department of Natural Resources (DNR) from issuing permit conditions that are not explicitly allowed by statute or rule. Second, Wis. Stat. §§ 227.11 (2)(a)1. and 2., also created by Act 21, provide that statutory preambles – declarations of legislative intent, purpose, findings, or policy, as well as descriptions of an agency's general powers or duties – are not to be used as a wildcard by agencies that cannot otherwise find explicit regulatory authority.

There is nothing in Chapter 281 or elsewhere that explicitly permits DNR to require monitoring wells and collection of associated data as a condition for the high capacity well permit sought by New Chester Dairy, LLC and MS Real Estate Holdings, LLC ("New Chester Dairy"). The imposition of such conditions is therefore legally invalid. Moreover, New Chester Dairy's high capacity well is not unique and DNR will likely make similar findings that monitoring wells and related data collection and reporting are needed as conditions for other high capacity well permits.

Intervenors Wisconsin Manufacturers & Commerce, Dairy Business Association, Midwest Food Processors Association, and Wisconsin Potato and Vegetable Growers Association are trade associations whose members include dairy producers (small and large), potato and vegetable growers, food processors, and manufacturers. Their members own and operate high capacity wells that are necessary to conduct their businesses. Mandating those conditions on their members that are being imposed on New Chester Dairy will result in substantial and unnecessary costs.

This Court should make clear that statutory preambles do not provide agencies authority to impose permit conditions that are not explicitly provided for in relevant enabling legislation, in this case, those provisions in Chapter 281 enacted by the Legislature to regulate high capacity wells.

BACKGROUND

During the high capacity well permit process, DNR staff informed New Chester Dairy that the original proposed location of the wells may impact nearby Patrick Lake. As a result, a new location, 2.5 miles from the New Chester Dairy production area, was proposed. New Chester Dairy undertook a groundwater modeling study to assess the impacts of the well at the new location. DNR deemed the modeling insufficient and stated that it would condition approval

of the new well location upon New Chester Dairy installing three groundwater monitoring wells and collecting and reporting related data to DNR over an extended period of time ("Monitoring and Reporting Condition"). For one well, DNR required collection of water level elevations every four hours for the first year, and then, at DNR's discretion, every two days. Two other wells were required to be installed and monitored daily for the first year, and then weekly. The data was to be submitted to DNR on a quarterly basis for a minimum of three years. *New Chester Dairy, Inc.*, DNR-13-011, 3-4 (Dec. 13, 2013), Ruling on Motions for Summary Judgment ("Summary Judgement Decision").

On January 17, 2013, DNR included the Monitoring and Reporting Condition in the New Chester Dairy High Capacity Well Approval. New Chester Dairy requested a contested hearing under Wis. Stat. § 227.42, which was granted by DNR. New Chester Dairy argued DNR had no explicit statutory or administrative authority to impose the Monitoring and Reporting Condition. Specifically, New Chester Dairy cited a provision created by Act 21, Wis. Stat. § 227.10(2m), which prohibits an agency from including as a term or condition of any permit issued by the agency unless it is explicitly permitted by statute or by a rule. *Id.*

On December 13, 2013, the Administrative Law Judge ("the ALJ") granted partial summary judgment ruling that DNR had "legal authority to include conditions in high capacity well approvals." *Id*. 6. On September 18, 2014, the ALJ issued the Findings of Fact, Conclusions of Law and Order ("ALJ Decision") regarding the remaining issue of whether the specific conditions in the approval were reasonable and necessary. The ALJ again ruled in favor of DNR, but did not revisit the legal issues previously addressed in the summary judgement ruling. *Id*.

On October 17, 2014, New Chester Dairy filed a petition for review in this Court. On February 17, 2015, Intervenors were granted their motion to intervene.

ARGUMENT

I. LEGAL STANDARD.

At issue is the application of Wis. Stat. § 227.10(2m), created by 2011 Wis. Act 21, which prohibits conditions in permits not explicitly allowed by law. *De novo* review is appropriate because the issue is one of first impression, concerns the scope of DNR's power, and relates to an area of law in which DNR has no special knowledge.

A court's review of legal issues of first impression is *de novo*. *RURAL v. PSC*, 2000 WI 129, ¶ 22, 239 Wis.2d 660, 619 N.W.2d 888. The ALJ expressly declined to interpret Wis. Stat. § 227.10(2m) when he opined that any "determination [relating to § 227.10(2m)] must come from the circuit or appellate court." Summary Judgement Decision, p. 5. The ALJ also made no reference to Wis. Stat. § 227.10(2m) in the subsequent ALJ Decision setting forth his findings of fact and conclusions of law. Thus, Wis. Stat. § 227.10(2m) was never interpreted by DNR and the review is *de novo*.[1]

Courts "are not bound by an agency's decision that concerns the scope of its own power." *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 11, 270 Wis. 2d 318, 677 N.W.2d 612. *See also Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res*., 2011 WI 54, ¶ 23, 335 Wis. 2d 47, 799 N.W.2d 73 (holding that "[t]he question of the scope of an agency's authority requires the interpretation of relevant statutes, which presents a question of law, which we review de novo.")

Finally, d*e novo* review is also appropriate because Wis. Stat. § 227.10(2m) relates to all administrative agencies and DNR has no special knowledge in nor is charged with interpreting this area of law. *See Haase-Hardie v. DNR*, 2014 WI App 103, ¶ 12 n.7, 357 Wis. 2d 442, 855 N.W.2d

[1] DNR did not petition for judicial review of the ALJ's decision, resulting in that decision being DNR's final decision in this matter. Wis. Stat.§ 227.46(3)(a); Wis. Admin. Code § NR 2.155(1).

443 (holding that *de nova* review is appropriate because "DNR is not charged with administering Wis. Stat. ch. 227.")

II. THE *LAKE BEULAH* COURT DID NOT TAKE UP THE INVITATION TO INTERPRET WIS. STAT. § 227.10(2m).

The ALJ's reliance on *Lake Beulah* is misplaced as the Court in that case declined to interpret the provisions of newly enacted Act 21. Their findings relating to DNR's authority over high capacity wells are not controlling, therefore, because the Court did not consider the need for explicit authority that is now required under Wis. Stat. § 227.10(2m).

Section 227.10(2m) was created by Act 21, effective June 8, 2011. The provision that controls here did not exist until after the briefing and oral argument in *Lake Beulah*. A group of *amica*, including Intervenors Wisconsin Manufacturers & Commerce, Dairy Business Association, and Midwest Food Processors Association, did attempt, however, to have the Supreme Court consider Wis. Stat. § 227.10(2m) as a supplemental authority pursuant to Wis. Stat. § 809.19(10).

In response, all the parties in the case, including DNR, asserted for multiple reasons that Wis. Stat. § 227.10(2m) was not relevant to the *Lake Beulah* case. Merely referencing the attempt by the *amica* group in a footnote, the Supreme Court stated that they "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 (emphasis ours). Nowhere else in the 48-page decision did the Supreme Court reference Wis. Stat. § 227.10(2m). A fair interpretation of this footnote is that the Supreme Court merely chose to find the newly enacted law inapplicable to the case before them. Nothing more can be read from this *Lake Beulah* footnote.

In this case, however, § 227.10(2m) is properly before the court and is controlling on the issue of DNR's authority to require monitoring wells as a condition in a high capacity well permit.

III. DNR DOES NOT HAVE AUTHORITY TO REQUIRE MONITORING WELL CONDITIONS IN HIGH CAPACITY WELL PERMITS.

A. There is No Explicit Authority in Wisconsin's High Capacity Well Enabling Legislation for the Inclusion of Monitoring Well Conditions.

Wis. Stat. § 227.10(2m) provides:

> No agency may implement or enforce any standard, requirement, or threshold, including 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. . . . (Emphasis ours.)

Because the court "'assume[s] that the legislature's intent is expressed in the statutory language,' statutory interpretation begins with the language of the statute." And "[i]f the meaning of the statute is plain, and therefore unambiguous, our inquiry goes no further and we apply the statute according to our ascertainment of its *plain meaning*." *Sheboygan County Dep't of Health & Human Servs. v. Tanya M.B.*, 2010 WI 55, ¶ 27, 325 Wis. 2d 524 (citing *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶ 44-45, 271 Wis. 2d 633, 681 N.W.2d 110). (Emphasis ours.)

The dispositive language in Wis. Stat. § 227.10(2m) is the term "explicitly." It is neither ambiguous nor vague, and its plain meaning is:

> **Explicit**. 1 clearly stated and leaving nothing implied; distinctly expressed; definite; *distinguished from implicit*. *Webster's New World College Dictionary* (4th Edition). (Emphasis ours.)

Given the meaning of "explicit," DNR's authority to impose monitoring wells in high capacity well permits must be clearly stated in the statutes or rules, and notably, *not* implied.

The Legislature conferred DNR limited but explicit authority when it enacted language regulating high capacity wells under Wis. Stat. § 281.34. This section created a comprehensive permitting framework based on specific criteria. Section Wis. Stat. 281.34(2) requires all high capacity wells to be approved by DNR, but does not specify those conditions that may be imposed.

In addition, Wis. Stat. § 281.34(7) allows DNR to modify or rescind the approval, but only if "the high capacity well or the use of the high capacity well is not in conformance with standards or conditions applicable to the approval of the high capacity well."

The Legislature was indeed explicit on conditions DNR may impose in high capacity well permits for wells triggering Wis. Stat. § 281.34(5) conditions, including wells that may impair public water supply, are located in certain groundwater protection areas, will result in high water loss, or may impact springs. These are limited and specific circumstances, which in turn, provide DNR with explicit authority to "include conditions as to location, depth, pumping capacity, rate of flow, and ultimate use." See Wis. Stat. § 281.34(5)(a)-(dm).

Although DNR has explicit authority to impose these conditions on wells specified in Wis. Stat. § 281.34(5)(a)-(dm), those conditions are inapplicable to the New Chester Dairy wells as they do not fall within the specified categories. (Ex. 5, pp. 3-4 (R. 0951-0952).) Even if those authorities applied, the Legislature was clear that the conditions could only relate to the location, depth, pumping capacity, rate of flow, and ultimate use of the high capacity well that is the subject of the permit application. That is, Wis. Stat. § 281.34(5)(a)-(dm) provides no authority for installation of monitoring wells.

For high capacity wells not meeting the criteria in Wis. Stat. § 281.34(5)(a)-(dm), the statute specifies that DNR "shall include in the approval for each high capacity well requirements that the owner identify the location of the high capacity well and submit an annual pumping report." Wis. Stat. § 281.34(5)(e). A requirement to identify the location of the high capacity well and submit an annual pumping report is the limit of DNR's explicit statutory authority for conditions on New Chester Dairy high capacity well permit.

With regard to explicit requirements in rules, Wis. Admin. Code ch. NR 812 regulates well construction and pump installation and Wis. Admin. Code ch NR 820 regulates groundwater quantity protection. Neither chapter explicitly authorizes DNR to impose the monitoring and reporting condition. The ALJ cites Wis. Admin. Code § 812.09(4) as providing "DNR with explicit authority to condition both existing and proposed high capacity well approvals when necessary and appropriate to protect public safety, safe drinking water and the groundwater resource." (Summary Judgement Decision, p. 4.) The ALJ statutory reference stops too soon, though, as that portion of the rule in total states:

> When deemed necessary and appropriate for the protection of public safety, safe drinking water and the groundwater resource, the department may specify more stringent well and heat exchange drillhole locations, well and heat exchange drillhole construction or pump installation specifications for existing and proposed high capacity, school or wastewater treatment plant water systems requiring approval by this subsection or water systems approved by variance.

Wis. Admin. Code § 812.09(4).

There is nothing in this code section that provides explicit authority to require monitoring well installation and data collection for high capacity wells.

In chapter NR 820, only § NR 820.13 applies to all high capacity wells, and it requires owners to record monthly pumping volume and report to DNR on an annual basis. Again, nothing in this chapter provides explicit authority to require monitoring well installation and data collection for high capacity wells.

B. Statutory Preambles – Declarations Of Legislative Intent, Purpose, Findings, or Policy, and Descriptions of An Agency's General Powers or Duties – Do Not Provide Explicit Regulatory Authority.

Without any statutes or rules that *explicitly require or explicitly permit* DNR to impose installation of monitoring wells, the ALJ ignores the ordinary meaning of the word explicit and looks for implicit authorities, even though something that is implicit is by definition not explicit.

As is often the case, the source of implied authority is the prefatory section of a given chapter. In this case, the ALJ finds DNR has plenary authority by noting:

> Section 281.11 provides in part that 'The department shall serve as the central unit of state government to protect, maintain and improve the quality and *management of the waters of the state*, ground and surface, public and private.' (Emphasis in original.)
>
> Wisconsin Stat. § 281.12 provides in part that '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.' (Emphasis in original.)

Summary Judgement Decision, p. 4.

The ALJ goes on to state that "the Legislature explicitly granted the DNR the broad authority and a duty to regulate high capacity wells through Wis. Stat. §§281.11 and 281.12 and the authority was not revoked by the language in Wis. Stat. §§ 281.34 and 281.35." Summary Judgement Decision, p. 4. This is backward reasoning.

There was never authority under Wis. Stat. §§281.11 and 281.12 to establish a high capacity well regulatory program. That authority for the regulation of high capacity wells was established by enactment of Wis. Stat. §§ 281.34 and 281.35. Wis. Stat. § 227.10(2m) put a fine point on that by confirming agencies need explicit authority. Moreover, Act 21 had provisions that validate what should be a clear reading of Wis. Stat. § 227.10(2m).

Although the plain meaning of "explicit" should exclude the use of implicit authorities found in Wis. Stat. §§ 281.11 and .12 for permit conditions, the Governor and the Legislature sent a clear message through other provisions in Act 21 that these prefatory provisions do not provide sufficiently explicit regulatory authority. Sections Wis. Stat. 227.11 (2)(a)1. and 2, both created by Act 21, provide:

> A statutory or nonstatutory provision containing a statement or declaration of legislative intent, <u>purpose</u>, findings, or <u>policy</u> 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.
>
> 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.

Relating to these provisions in Act 21, Governor Walker wrote that there was a need for, "legislation that states . . . that the departments' broad statements of policies or general duties or powers provisions do not empower the department to create rules not explicitly authorized in the state statutes" to individuals who are not accountable to Wisconsin citizens. (Walker, Regulatory Reform Informational Paper, Dec. 21, 2010.) Similarly, Secretary for Administration Mike Huebsch stated that, "the most critical aspects of this legislation are to . . . limit [the ability to create] rules to the express authority granted by the Legislature . . ." (Huebsch Testimony, SB 8, (Feb. 1, 2011)). And finally, Tom Tiffany, the lead author of AB 8 (companion bill to SB 8) said, "[The] agency's general powers do not confer rule-making authority. In other words they can't use their mission statement in order to write a rule." (Transcript of Jan. 2011 Special Session Assembly Floor Debate on AB 8, (Feb. 2, 2011)). (AB 8 was enacted as Act 21.)

Sections Wis. Stat. 227.11 (2)(a)1. and 2 clearly took aim at agency "mission statements," including those that the ALJ rely upon here. Wis. Stat. § 281.11 is titled "Statement of policy and purpose," while Wis. Stat. § 281.12 is titled "General department powers and duties." The Legislature made it clear that statements of policy and purpose referring to DNR's role in *managing the waters of the state* and its general powers and duties to *supervise and control the waters of the state,* under Wis. Stat. §§ 281.11 and 281.12, respectively, are not to be a basis for rulemaking authority. And it necessarily follows that these prefatory provision are not explicit authority for permit conditions because they are simply not explicit in any plain meaning of that word; something "clearly stated and leaving nothing implied."

The policies set forth in Act 21 are consistent with many courts and commentators' views that the statutory prologue cannot be invoked when the text is clear. *See Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) finding that "It is a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists. Courts should look to materials like preambles and titles only if the text of the instrument is ambiguous." The court in *Jogi* also cites Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 47.04, at 146 (5th ed.1992) ("The preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.").

And as a practical matter, to allow these general, all-encompassing prefatory statements in Wis. Stat. §§ 281.11 and 281.12 to override the explicit requirements in Wis. Stat. § 283.34 renders both Wis. Stat. § 227.10(2m) and § 281.34 meaningless. That is, the Legislature need not have bothered enacting Wis. Stat. §281.34 with explicit language for permit conditions in high capacity wells because Wis. Stat. §§ 281.11 and 281.12 would, according to the ALJ's reasoning, provide requisite authority for DNR to impose those conditions set forth in § 281.34(5)(a)-(dm) even if § 281.34(5)(a)-(dm) never existed. The entire purpose of defining the scope of an agency's regulatory program through enabling legislation, like that for high capacity wells under Wis. Stat. § 281.34, would be defeated because DNR would have unlimited plenary powers that swallows the more specific statutory framework. The Legislature's work would be done by merely enacting the preamble provisions.

Clearly the Legislature was targeting the expansive use by agencies of general prefatory provisions to find sweeping authorities that were never intended to be the basis for regulatory mandates. Intent aside, the use of the word "explicitly" in Wis. Stat. § 227.10(2m) rules out the option of using these general statements of policy and duties as authority for permit conditions.

C. Mandating Those Legally Invalid Conditions On Intervenor Members That Are Being Imposed On New Chester Dairy Will Result In Substantial And Unnecessary Costs.

There is nothing notably unique in New Chester Dairy's high capacity wells that led to DNR's conclusion groundwater monitoring was necessary to verify the model's groundwater drawdown predictions. All models have similar uncertainties. Intervenors anticipate DNR will make similar findings that monitoring is needed to validate other groundwater models or otherwise assess speculative impacts of high capacity wells. Intervenor associations and their members know well that a condition in one permit leads to similar conditions in subsequent permits. Permit by permit, an agency will regulate an entire industrial sector without undertaking required rulemaking, or as here, without necessary statutory authority.

The Findings of Fact in the ALJ Decision is an indicator of how this iterative regulatory process works. The draft Environmental Assessment, dated July 27, 2012, indicted:

> [T]he department intends to require monitoring of pumping and groundwater elevations as part of the high capacity well approval in order to track actual field conditions. ALJ Decision, p. 8, finding 46.

In addition, the ALJ notes that:

> In addition to the first Richfield Dairy high capacity well approval, which stated the monitoring may be required, the record includes two additional high capacity well approvals that were issued before the Dairy's Approval was issued on January 17, 2013. . . ALJ Decision, p. 8, finding 49.

These conditions impose not only substantial costs associated with the monitoring wells installation and related data collection and reporting, they require related contingency planning and further mandates that would impact the operations of the high capacity wells. On May 18, 2012, for example, DNR made the following request of New Chester Dairy:

> Please provide a discussion of the contingencies available to the Diary if the wells are approved and future monitoring related to operation of the Dairy's high capacity wells indicates impacts to surface waters are greater than currently projected and it becomes necessary to reduce water withdrawal from the wells. ALJ Decision, p. 8, finding 47.

Intervenors members own and operate high capacity wells that are necessary to conduct their businesses. Mandating those same invalid conditions on their members that are being imposed on New Chester Dairy will result in substantial and unnecessary costs.

CONCLUSION

The plain language of Wis. Stat. § 227.10(2m) prevents state agencies from imposing conditions in permits without explicit authority. Lacking such authority, DNR has no legal basis to impose monitoring conditions upon New Chester Dairy. Moreover, Act 21 is clear that statutory preambles, such as Wis. Stat. §§ 281.11 and 281.12, that declare legislative intent, purpose, findings, or policy, as well as describe an agency's general powers or duties, do not provide rulemaking authority or are they otherwise explicit regulatory authority for permit conditions. The refusal of DNR to follow Act 21 creates regulatory uncertainty, unnecessary costs, and otherwise harms the state's business community. This Court should rule that Wis. Stat. § 227.10(2m) applies to DNR and that DNR's authority to impose any permits condition for high capacity wells is limited to that explicitly provided by statute, namely Wis. Stat. § 281.34(5).

Dated this 6th day of April, 2015.

Respectfully submitted,

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/s/

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