

STATE OF WISCONSIN

CIRCUIT COURT
Branch _____

FILED DANE COUNTY

OCT 28 2016

CLEAN WISCONSIN, INC.
634 West Main Street, Suite 300
Madison, WI 53703

DANE COUNTY CIRCUIT COURT

16CV2821

Petitioners,

Case No. _____

v.

Case Code: 30607

Administrative Agency Review

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,
101 South Webster Street
Madison, WI 53707,

Respondent.

PETITION FOR JUDICIAL REVIEW

Petitioner, Clean Wisconsin, Inc., hereby petitions the Court, pursuant to Wis. Stat. §§ 227.52 and 227.53, for judicial review of a decision by the Wisconsin Department of Natural Resources (“DNR”), dated September 30, 2016, to approve an application for the construction and operation of a high capacity well to Roger Turzinski (“Decision”). A copy of the Decision is attached hereto as Exhibit A. Petitioner further shows to the Court as follows:

CHALLENGED DECISION

1. DNR’s Decision approved the construction and operation of a high capacity well, file number 50-01-013931, to Roger Turzinski, located in the Town of Buena Vista, Portage County. The approval, issued pursuant to Wis. Stat. § 281.34(2), permits the applicant to install and operate a 1,000 gallon per minute well on the property, in addition to two other existing wells on the property. The approved maximum yearly groundwater withdrawal for the property

is approximately 225.6 million gallons, and the maximum monthly withdrawal is 45.1 million gallons (approximately 1.5 million gallons per day).

PARTIES

2. Petitioner Clean Wisconsin, Inc. is an environmental advocacy organization that works to protect and preserve Wisconsin's air and water and to create a cleaner environment by being the leading voice for environmental protection. Clean Wisconsin was founded in 1970 as Wisconsin's Environmental Decade and is an incorporated nonprofit organization under the laws of Wisconsin and section 501(c)(3) of the Internal Revenue Code. Clean Wisconsin's principal place of business is 634 West Main Street, Suite 300, Madison, Wisconsin.

3. Clean Wisconsin is a membership organization with 46 individual members in Portage County. Clean Wisconsin also has members who reside outside of Portage County but travel to that area of the state specifically for the unique recreational opportunities that Portage County provides. Clean Wisconsin and its members have a direct interest in the physical environment that is adversely affected by the Decision. As described below, the approved high capacity well in Portage County leaves navigable waters including Buena Vista Creek and Tamarack Lake, as well as other waters of the state, unprotected from the known impacts of groundwater pumping.

4. DNR is an agency of the State of Wisconsin, as that term is defined by Wis. Stat. § 227.01(1), and as that term is used throughout Wis. Stat. Ch. 227. DNR's office is located at 202 South Webster Street, Madison, Wisconsin.

5. DNR is responsible for administering approvals for the construction of high capacity wells pursuant to relevant statutes and regulations found in Wis. Stat. Ch. 281 and Wis. Admin. Code Chs. NR 812 and 820.

JURISDICTION AND VENUE

6. Petitioner Clean Wisconsin's principal place of business is in Dane County and Clean Wisconsin is therefore a "resident" of Dane County. Dane County Circuit Court therefore is the proper venue for this action as specified in Wis. Stat. §227.53(1)(a)(3).

7. The Decision is a final agency decision subject to judicial review under Wis. Stat. § 227.52, *et seq.*

8. This petition is timely filed.

BACKGROUND

9. The legislature entrusted DNR as the central unit of state government to protect and oversee the quality of the waters of the state, pursuant to Wis. Stat. Ch. 281, and DNR is the delegated trustee of the State's constitutional duty to protect navigable waters, pursuant to Wis. Const. Art. IX, Sec. 1.

10. DNR's authority to carry out the management of the waters of that state includes the regulation of high capacity wells.

11. In July 2011 the Wisconsin Supreme Court held that, based upon statutory and constitutional authorities, "DNR must consider the environmental impact of a proposed high capacity well when presented with sufficient concrete, scientific evidence of potential harm to waters of the state." *Lake Beulah Management District v. Department of Natural Resources*, 2011 WI 54 ¶4, 335 Wis. 2d 47, 799 N.W.2d 73.

12. Pursuant to the *Lake Beulah* decision, DNR adopted a policy of analyzing impacts of high capacity well pumping to waters of the state before acting on a high capacity well application.

13. In September 2014 the Division of Hearings and Appeals (“DHA”) further found that DNR has the authority and duty to consider both individual and cumulative impacts to waters of the state from high capacity wells. DHA further found that “[i]t is scientifically unsupported, and impossible as a practical matter, to manage water resources if cumulative impacts are not considered.” *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*, Wisconsin Division of Hearings and Appeals Case Nos. IH-12-03, IH-12-05, DNR 13-021, DNR 13-027 (hereinafter “*Richfield Dairy*”).

14. Pursuant to the *Richfield Dairy* decision, DNR adopted a policy and practice of considering individual and cumulative impacts of high capacity wells to nearby waters of the state.

15. On April 16, 2015 Roger Turzinski applied for the required DNR approvals to facilitate the construction and operation of a new high capacity well.

16. Before issuing the Decision in this case, DNR analyzed the proposed well to determine its individual and cumulative adverse impacts on navigable waters and other waters of the state.

17. As a result of that analysis, DNR’s aquatic biologist stated: “This proposed well is near the headwaters to Buena Vista Creek, a known trout stream with good reproduction. This application should be evaluated to what, if any, impacts to the headwaters can be expected.”

See DNR email dated April 20, 2015, attached hereto as Exhibit B.

18. On May 10, 2016 Attorney General Brad Schimel issued an opinion renouncing DNR’s authority to evaluate or consider impacts analysis of high capacity wells on state waters, including public trust resources, except to the extent expressly set forth in Wis. Stat. § 281.34(2),

including cumulative impacts, based on the argument that such authority is not explicitly required or permitted by statute and therefore is prohibited by Wis. Stat. § 227.10(2m).

19. On June 10, 2016 DNR adopted Attorney General Schimel's opinion and subsequently began approving wells without addressing and irrespective of adverse individual or cumulative impacts to waters of the state, including public trust waters.

20. On September 30, 2016 DNR approved the Turzinski well, without conducting any analysis of the expected impacts of the well on public trust waters.

INTEREST OF THE PETITIONERS

21. Petitioner's interests are directly injured because DNR did not evaluate and address the individual and cumulative effects of pumping from the proposed well on Buena Vista Creek.

22. Clean Wisconsin and its members have a direct interest in protecting groundwater quality from impacts of excessive groundwater pumping. Clean Wisconsin and its members rely on reasonable and appropriate approval standards that consider the environmental impacts of pumping from high capacity wells to protect their public trust interest in navigable waters of the state. Clean Wisconsin and its members also have a substantial interest in DNR following the rule of law in the issuance of regulatory decisions and administration of regulatory programs. Clean Wisconsin's members statewide also have an interest in ensuring that DNR fulfills its duty to manage the water resources of the state by implementing adequate approval processes for high capacity wells.

23. Over-pumping from high capacity wells has the potential to impact seepage lakes, streams, rivers, wetlands and other surface water resources. Impacts include loss of surface area and volume, damage to fisheries and spawning areas, degradation of water quality, impacts to

aesthetic beauty, impacts to navigation, and impacts to property values. These impacts directly infringe on the public trust rights of Petitioner.

24. DNR has been delegated the authority and duty to manage the water resources of the state. Its policy of evaluating and protecting waters of the state from the individual and cumulative impact of high capacity wells through its actions on well applications were reasonable and necessary to carry out its statutory and constitutionally delegated duties under both the *Lake Beulah* decision and the public trust doctrine.

GROUNDS FOR REVIEW

25. The Decision is an “administrative decision” under Wis. Stat. § 227.52, and subject to judicial review pursuant to the provisions of Chapter 227.

26. The Decision must be reversed, set aside, vacated and/or modified for, *inter alia*, the following reasons:

- a. In issuing the Decision, DNR has incorrectly applied the applicable law and has failed to issue the decision as it was required by law to do. Wis. Stat. § 227.57(5).
- b. In issuing the Decision, DNR has improperly exercised its discretion, failed to exercise its discretion, and is outside the range of discretion delegated to the agency. Wis. Stat. § 227.57(8).

RELIEF REQUESTED

WHEREFORE, Petitioner Clean Wisconsin requests judgment in its favor as follows:

1. Declaring that DNR’s Decision is reversed, set aside, or vacated;
2. Declaring that DNR has the authority and duty to deny or condition approvals of high capacity well applications as necessary to protect waters of the state, including public trust resources;

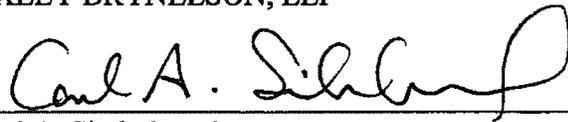
3. Declaring that DNR has the authority and duty to address the individual and cumulative effects of all high capacity wells on waters of the state;

4. Ordering such interlocutory or final relief as is necessary to preserve the interests of Petitioner and other members of the public; and

5. For such other relief as the Court may deem just and equitable.

Dated this 28th day of October, 2016.

AXLEY BRYNELSON, LLP



Carl A. Sinderbrand
State Bar No. 1018593
Attorneys for Petitioner, Clean Wisconsin, Inc.

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State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
101 S. Webster Street
Box 7921
Madison WI 53707-7921

Scott Walker, Governor
Cathy Stepp, Secretary
Telephone 608-266-2621
Toll Free 1-888-936-7463
TTY Access via relay - 711



Approval Date: September 30, 2016

High Capacity Well File Number: 50-01-013931

Application No: 82

Water Use Property Number: 13931

ROGER TURZINSKI
6994 SHERMAN RD
BANCROFT WI 54921

SUBJECT : High Capacity Well Approval - Town of Buena Vista - Portage County

Dear Mr. Turzinski:

The Department of Natural Resources, Bureau of Drinking Water and Groundwater (department), has reviewed and approved your application for the construction and operation of a non-potable high capacity well, located in the Town of Buena Vista, Portage County. The application was submitted by Roberts Irrigation Co Inc and received by the Department on 4/16/2015.

Your application has received an engineering and hydrogeological review to determine compliance with the well construction and pump installation requirements of ch. NR 812, Wis. Adm. Code and Ch.281, Wis. Stats. The department's engineering review indicates the proposed construction complies with ch. NR 812 requirements; however, you and your well driller are responsible for complying with all provisions of ch. NR 812 and the conditions contained in this approval. The department has determined to issue this conditional approval based on the information provided in your application and other available information. However, this approval may be subject to modification pursuant to s. 281.34 (7), Wis. Stats.

This approval consists of this letter and four attached sections: 1) Approval to construct a high capacity well; 2) High capacity well withdrawal approval; 3) Conditions and requirements for constructing and operating a high capacity well; and 4) Notice of appeal of rights and other legal notices.

Review this approval in its entirety. Please contact the department at 608-266-2299 with any questions or concerns.

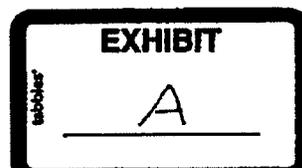
Respectfully,

Ian Anderson, Hydrogeologist
State of Wisconsin - Department of Natural Resources
For the Secretary

cc:

Roberts Irrigation Co Inc
geodata@wgnhs.uwex.edu - via email

Steve.Janowiak@wisconsin.gov - via email
Daniel.Helsel@wisconsin.gov - via email



APPROVAL TO CONSTRUCT A HIGH CAPACITY WELL

ROGER TURZINSKI
 6994 SHERMAN RD
 BANCROFT WI 54921

Approval Date: 09/30/2016

County: Portage

High Cap File Number: 50-01-013931

Property Number: 13931

Property Water Use: IR10 - Agricultural Irrigation

Well Location

| | |
|---|-----------------------------|
| High Capacity Well Number: | 91127 |
| Well Name Assigned by Well Owner: | Sherman Rd. Irrigation Well |
| PLSS Description: | SE SW Sec20 T22N R9E |
| Latitude (Decimal Degrees): | 44.3688 |
| Longitude (Decimal Degrees): | -89.4403 |
| Approved Pump Type: | Lineshaft turbine |
| Approved Pump Capacity (gpm): | 1000 |
| Approved Discharge Type (Over Top of Casing Seal, Pitless Adapter or Unit): | Over top of casing |
| Approved Discharge Location (Building Pressure Tank, Pond, etc.): | Irrigation System |

Well Construction

| | |
|--|----------------------------------|
| Drilling Method(s): | Dual Rotary |
| Total Well Depth: | 130' |
| Approved Finished Aquifer: | Sand/Gravel |
| Enlarged Drillhole Diameter / Depth Interval: | 16" / 0' to 130' |
| Lower Drillhole Diameter / Depth Interval: | |
| Casing Diameter / Wall Thickness: | 16" / 0.38" |
| Casing Material / Joint Type: | Steel / Welded |
| Depth of Grouted Casing: | 100' |
| Screen Material / Slot Size in Inches / Depth Interval or N/A if none: | Stainless / 0.03" / 100' to 130' |
| Annular Space Seal Type: | Granular Bentonite |
| Annular Space Seal Length: | 100' |

Additional Construction Approval Specifications

1. High capacity well #91127 has a location tolerance of 50 feet to the north and west to ensure that the well remains outside a designated groundwater protection area. If the well is located within the groundwater protection area it will require further environmental review per Wis. Stat. § 281.34(5).

Standard Considerations and Requirements:

- You or your well driller must contact Steve Janowiak at 715-421-7829 at least one work day prior to starting construction in accordance with s. NR 812.03 (1), Wis. Adm. Code.
- The pump installation will discharge through a Department-approved pump and the entire discharge piping arrangement system shall be installed in a manner to meet the applicable requirements of Chapter NR 812, Wis. Adm. Code.
- Unless otherwise stated in explicit conditions specified in this approval, the approved high capacity well shall be constructed within a distance of 660 feet around the approved coordinates; this allowance is subject to setbacks defined in Ch. NR 812, Wis. Adm. Code.

HIGH CAPACITY WELL WITHDRAWAL APPROVAL

ROGER TURZINSKI
6994 SHERMAN RD
BANCROFT WI 54921

Approval Date: 09/30/2016

County: Portage

High Cap File Number: 50-01-013931

Property Number: 13931

Property Water Use: IR10 - Agricultural irrigation

New Wells

| Well Name | Water Use Code(s) | High Capacity Well Number | Pump Capacity (gpm) | Latitude - Decimal Degrees (e.g. 45.12345) | Longitude - Decimal Degrees (e.g. -89.12345) |
|-----------------------------|-------------------|---------------------------|---------------------|--|--|
| Sherman Rd. Irrigation Well | IR10 | 91127 | 1000 | 44.3688 | -89.4403 |

Existing Wells

| Well Name | Water Use Code(s) | WUWN or image File # (if known) | High Capacity Well Number | Pump Capacity (gpm) | Latitude - Decimal Degrees (e.g. 45.12345) | Longitude - Decimal Degrees (e.g. -89.12345) |
|-------------|-------------------|---------------------------------|---------------------------|---------------------|--|--|
| House Point | DS11 | | 91126 | 10 | 44.3652 | -89.4369 |

Approved Withdrawals by Source

| Well Name | Water Use Code | High Cap Well # | Pump Capacity (gpm) | Approved Daily Withdrawal (gallons) | Maximum Approved Monthly Withdrawal Amount (millions of gallons) | | | | | | | | | | | |
|-----------------------------|----------------|-----------------|---------------------|-------------------------------------|--|------|------|------|------|------|------|------|------|------|------|------|
| | | | | | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec |
| House Point | DS11 | 91126 | 10 | 14400 | 0.45 | 0.40 | 0.45 | 0.43 | 0.45 | 0.43 | 0.45 | 0.45 | 0.43 | 0.45 | 0.43 | 0.45 |
| Sherman Rd. Irrigation Well | IR10 | 91127 | 1000 | 1440000 | 0 | 0 | 0 | 0 | 44.6 | 43.2 | 44.6 | 44.6 | 43.2 | 0 | 0 | 0 |

Maximum Property Monthly Withdrawal Amounts (millions of gallons)

| Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec |
|------|------|------|------|------|------|------|------|------|------|------|------|
| 0.45 | 0.40 | 0.45 | 0.43 | 45.1 | 43.8 | 45.1 | 45.1 | 43.6 | 0.45 | 0.43 | 0.45 |

Please note that your property approval is equal to the sum of the approved withdrawal amounts for each source.

CONDITIONS AND REQUIREMENTS FOR CONSTRUCTING AND OPERATING A HIGH CAPACITY WELL

- 1. WELL CONSTRUCTION.** It is your responsibility and the responsibility of the well driller and the pump installer to ensure that the well construction and pump installation for the proposed high capacity well are completed in compliance with the requirements of Chapter NR 812, Wis. Adm. Code and in compliance with the conditions in this approval. If the department discovers features or aspects of the installation or operation that are in violation of Chapter NR 812, Wis. Adm. Code or in violation of the conditions of this approval, the approval will become void. It is your responsibility to make any needed corrections to the well construction or the pump installation, or to any changes in operation or water usage.
- 2. LOCATION.** In accordance with NR 812.09(2) & (4)(a), Wis. Adm. Code; the proposed high capacity well shall be constructed at the location in the construction approval. The well driller shall determine accurate coordinates for the latitude and longitude of the well location with the use of a Global Positioning System (GPS) unit and shall include these coordinates on the Well Construction Report. It remains the responsibility of the well owner and the well driller to confirm that the wells meet all setback distances required in Chapter NR 812, Wisconsin Administrative Code
- 3. APPROVAL EXPIRATION.** If the construction of the proposed school or wastewater well has not commenced within two years from the date of this letter, this approval is void per NR 812.09(3). After two years, a new application must be made for approval of the plans and specifications before any construction work on this proposed well or pump installation may be undertaken.
- 4. DRILLING NOTIFICATION.** In accordance with NR 812.03(1), Wis. Adm. Code, notice shall be provided to the Department's District Region Drinking Water Specialist on the department work day prior to commencing the construction of the proposed high capacity well.
- 5. GROUTING NOTIFICATION.** Notice shall be provided to the Department's District Region Drinking Water Specialist on the department work day prior to commencing the grouting operation.
- 6. UNUSED WELLS.** Any constructed well is expected to be used. According to NR 812(26)(3) Wis. Adm. Code any well or drillhole removed from service shall be properly filled and sealed according to the criteria and procedures in Section NR 812.26(3).
- 7. REPORTING.** Withdrawals from each of your wells on this property must be recorded monthly and reported to the Department by March 1 of the subsequent calendar year in a format provided by the department in accordance with s. 281.34(5)(e), Wis. Stats., and NR 820.13(1), Wis. Adm. Code. Please consult current Department guidance regarding approved measurement and estimation methods.
- 8. WELL CONSTRUCTION REPORT.** In accordance with NR 812.10(11), Wis. Adm. Code; the well driller shall prepare a Well Construction Report for the proposed high capacity well and shall submit the report to the Department within 30 days following completion of the well.
- 9. WELL CONSTRUCTION LOG.** In accordance with NR 812.(18) Wis. Adm. Code; during construction of the proposed high capacity well, the well driller shall collect drill cutting samples at 5-foot intervals throughout the depth of the well and at each change in geologic formation. These samples shall be sent to the Wisconsin Geological & Natural History Survey (WGNHS) in Madison for examination and preparation of a certified geologic log of the well.
- 10. WITHDRAWAL LIMITS.** In accordance with NR 812.09(4)(a), Wis. Adm. Code; the operation of the proposed high capacity well shall be limited to the withdrawal schedule found in the withdrawal approval.
- 11. WATER WITHDRAWAL REGISTRATION.** Your approved withdrawal has been registered with the Department pursuant to s. 281.346, Wis. Stats., and Chapter NR 856, Wis. Adm. Code. Registration is required for persons who have a water supply system with the capacity to withdraw an average of 100,000 gallons per day (70 gallons per minute). You do not need to take any additional steps to register at this time. For more information on water use registration, go to <http://dnr.wi.gov/org/water/dwg/greatlakes/registration.htm> or call the Water Use Program at (608) 266-2299.
- 12. WATER USE FEES.** Any person with a high capacity well with the capacity to make a withdrawal from the waters of the state averaging 100,000 gallons per day or more in any 30-day period shall pay to the department an annual water use fee of \$125, and an additional fee for any Great Lakes basin withdrawals exceeding 50 million gallons per year. This high capacity well approval may be rescinded if these annual fees are not paid. See s. 281.346 (12), Wis. Stats., and Chapter NR 850, Wis. Adm. Code. For more information go to <http://dnr.wi.gov/org/water/dwg/greatlakes/fees.htm> or call the Water Use Program at (608) 266-2299.
- 13. WATER USE PERMIT (GREAT LAKES BASIN ONLY).** In addition to a high capacity well approval, a water use permit is required for Great Lakes Basin withdrawals averaging 100,000 gallons per day or more in any 30-day period. See s. 281.346 (4m), Wis. Stats., and Ch. NR 860, Wis. Adm. Code. For more information on water use permitting go to <http://dnr.wi.gov/topic/WaterUse/documents/PermittingFactsheet.pdf> or call the Water Use Program at (608) 266-2299.
- 14. CHANGE IN OWNERSHIP OR CONTROL.** Pursuant to NR 812.09(4)(a)2, Wis. Adm. Code, when an owner or operator relinquishes control of the operation of a high capacity well or well supply, a new approval shall be obtained by the new operator, owner or lessee before operation of the high capacity well or well supply is continued.

NOTICE OF APPEAL RIGHTS AND OTHER LEGAL NOTICES

If you believe that you have a right to challenge this decision, you should know that Wisconsin Statutes and Administrative Rules establish time periods within which requests to review Department decisions must be filed. For judicial review of a decision pursuant to Sections 227.52 and 227.53 of the State Statutes, you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review must name the Department of Natural Resources as the respondent.

To request a contested case hearing pursuant to Section 227.42 of the State Statutes, you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for hearing on the Secretary of the Department of Natural Resources. The filing of a request for a contested case hearing is not a prerequisite for judicial review and does not extend the 30 day period for filing a petition for judicial review.

All requests for contested case hearings must be made in accordance with section 227.42, Wis. Stats., and section NR 2.05(5), Wisconsin Administrative Code, and served on the Secretary in accordance with section NR 2.03, Wisconsin Administrative Code. Pursuant to Section NR 2.05(5), Wisconsin Administrative Code, and Section 227.42, Wis. Stats., you are required to include specific information demonstrating the following:

1. The substantial interest of the petitioner which is injured in fact or threatened with injury by Department action or inaction;
2. That there is no evidence of legislative intent that this interest is not to be protected;
3. That the injury to the petitioner is different in kind or degree from the injury to the general public caused by the Department action or inaction; and
4. That there is a dispute of material fact (you must specify the disputed fact).

Anderson, Ian K - DNR

From: Provost, Scott M - DNR
Sent: Monday, April 20, 2015 1:13 PM
To: DNR HiCap Applications
Subject: Roger Turzinski: Hi Cap Notice, Portage county

This proposed well is near the headwaters to the Buena Vista Creek a known trout stream with good reproduction. This application should be evaluated to what, if any, impacts to the headwater can be expected.

We are committed to service excellence.
Visit our survey at <http://dnr.wi.gov/customersurvey> to evaluate how I did.

 *Scott Provost. P.S.S.*
Water resources Specialist
Statewide Aquatic Plant Management Coordinator
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Wisconsin Rapids, WI 54494

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