STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 6

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

and

PLEASANT LAKE MANAGEMENT DISTRICT
P.O. Box 230
Coloma, WI 54930,

Petitioners,

v.

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

Respondent.

Case Nos. 16-CV-2817
16-CV-2818
16-CV-2819
16-CV-2820
16-CV-2821
16-CV-2822
16-CV-2823
16-CV-2824

Case Code: 30607
Administrative Agency Review

PETITIONERS' PRINCIPAL BRIEF

INTRODUCTION

Wisconsin's lakes and streams belong to the public. They are held in trust by the State to be protected for the benefit of the public. This "Public Trust Doctrine" ("PTD") has existed since the territorial Northwest Ordinance of 1787 and was incorporated into our Constitution at statehood. Wis. Const., Art. IX, § 1. For over 100 years, our Supreme Court has repeatedly, unanimously held that the Public Trust Doctrine broadly protects public rights in, *inter alia*, boating, fishing, swimming and scenic beauty. The Court also has characterized the trust as an "active" trust, requiring the state to affirmatively protect and enhance the public's right to enjoy our waters. Recently, in *Lake Beulah Mgmt. Dist. v. DNR* ("*Lake Beulah*"), the Court reinforced

these principles, unanimously holding that Department of Natural Resources ("DNR"), as the designated trustee, has the constitutional and statutory authority and duty to consider impacts to waters of the state when evaluating applications for proposed high capacity wells. 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73.

Since June 2016, the PTD has been under siege from the very institution that is constitutionally mandated to administer it. DNR, enabled by the Attorney General, has turned a blind eye to adverse impacts to public waters when it acts on high capacity well applications. In the cases before this Court, it has ignored anticipated, often calculated impacts to already-impaired waters, ensuring the ongoing degradation and loss of Public Trust waters will continue and expand.

Petitioners ask this Court to end this misguided episode in DNR's history and to require that DNR restore and follow its constitutional, statutory and judicial mandate to protect Public Trust waters when acting on well applications.

BACKGROUND LEGAL AND FACTUAL FRAMEWORK

A. High Capacity Well Regulatory Program

Petitioners provided a detailed discussion of the high capacity well program in our Brief in Opposition to Motion to Dismiss, and we will not repeat it here. Instead, we highlight key components of that discussion.

Withdrawals of groundwater, whether for drinking water, agriculture, or other commercial purposes, are governed by Wis. Stat ch. 281. The statutes create three categories of wells, based on the volume of withdrawal: 1) small wells with a withdrawal capacity of less than 100,000 gallons per day (gpd) (70 gallons per minute); 2) "high capacity" wells, with a withdrawal capacity of more than 100,000 gpd; and 3) high capacity wells with a withdrawal

water loss of more than 2 million gpd. *See* Wis. Stat. §§ 281.34 and 281.35.[1] These cases focuses on the second category of wells, which are regulated primarily under Wis. Stat. § 281.34.

A proposed well (or collection of wells on the same property) with a capacity to withdraw more than 100,000 gpd requires DNR approval. The criteria for approval include consideration of whether the well interferes with an existing public water supply well. Wis. Stat. § 281.34(5)(a). Additional environmental review is required for three categories of wells: 1) wells located in a "groundwater protection area," *i.e.*, within 1,200 feet of a designated outstanding resource water ("ORW"), exceptional resource water (ERW"), or classified trout stream; 2) wells with a water loss of more than 95% of the water withdrawn (*e.g.*, bottling plants); and 3) wells that may have a significant impact on a large spring (a surface water discharge of at least one cubic foot per second 80% of the time). Wis. Stat. § 281.34(4). DNR also has limited statutory authority to impose certain conditions in well approvals to ensure that those identified resources are protected. Wis. Stat. § 281.34(5)(b)-(d).

B. Judicial Decisions Affecting the High Capacity Well Program

1. *Lake Beulah*

The seminal case regarding DNR's authority and duties when acting on a high capacity well application is *Lake Beulah*. The Lake Beulah Management District had petitioned for judicial review challenging the approval of a high capacity well for the Village of East Troy. Since the proposed well would not adversely impact a public water supply well and did not meet any of the criteria for additional environmental review in § 281.34(4), DNR approved the well. The petitioner argued that DNR should have considered potential impacts to nearby Lake Beulah, even though the well was not within 1,200 feet and the lake was not a groundwater

[1] There also are separate statutory requirements associated with high capacity wells in the Great Lakes basin, not applicable to these cases. *See, e.g.*, Wis. Stat. §§ 281.343 and 281.346.

protection area resource. DNR agreed that it had a statutorily delegated, constitutional duty to protect navigable waters from adverse impacts from proposed high capacity wells, but the duty to consider such impacts was triggered only if there were concrete scientific evidence of potential impacts before the agency at the time of its review. The Village argued that DNR's authority was constrained by § 281.34, which did not address impacts to navigable waters unless the well was in a special category in § 281.34(4).

The principal issue before the Supreme Court focused on DNR's authority to protect navigable waters under the Public Trust Doctrine. Article IX, § 1 of the Wisconsin Constitution states, in pertinent part:

> [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, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

In evaluating the scope of DNR's authority, the Court drew from nearly 100 years of unanimous public trust decisions, which have recognized that the PTD requires the state to actively "protect and preserve its waters for fishing, hunting, recreation, and scenic beauty." *Lake Beulah*, ¶ 32 (quoted source omitted). The Court also reiterated that the legislature has delegated this public trust duty to DNR: "The duties of the DNR are comprehensive, and its role in protecting state waters is clearly dominant." *Id.*, ¶ 33 (quoted source omitted). As a result of its lengthy analysis of both the history of PTD case law and the statutes pertinent to high capacity wells, the Court unanimously held as follows:

> We conclude that, pursuant to Wis. Stat. § 281.11, § 281.12, § 281.34, and § 281.35 (2005-06), along with the legislature's delegation of the State's public trust duties, the **DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state**….
>
> We further hold that to comply with this general duty, **the 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.** The DNR should use both its expertise in water resources management and its discretion to

> determine whether its duty as trustee of public trust resources is implicated by a proposed high capacity well permit application, such that **it must consider the environmental impact of the well or in some cases deny a permit application or include conditions in a well permit**.

Id., ¶¶ 3-4 and 62-63 (footnotes omitted; emphasis added).

2. *Richfield Dairy*

DNR's duties to protect surface waters from high capacity well groundwater withdrawals were clarified and reaffirmed in an administrative decision in a contested case hearing: *In the Matter of a Conditional High Capacity Well Approval for Two Potable Wells to be Located in the Town of Richfield, Adams County Issued to Milk Source Holdings, LLC*, Case Nos. IH-12-03, *et al*. (September 3, 2014) ("*Richfield Dairy*"). Pleasant Lake Management District (one of the petitioners here) and others challenged DNR's approval of high capacity wells for Richfield Dairy, a proposed mega-dairy known as a "concentrated animal feeding operation," or "CAFO." The petitioners asserted that the wells should not have been authorized at the approved pumping capacity because of the projected impact, alone and in conjunction with other existing wells, on Pleasant Lake and several nearby trout streams and wetlands. DNR argued that it had no duty or authority to consider the cumulative impacts of a proposed well with existing wells, even though its own staff testified that DNR could not protect Public Trust resources unless it both considered and addressed cumulative impacts.

After a two-week evidentiary hearing at which multiple scientists and regulators testified, the administrative law judge agreed with petitioners, holding:

> To fulfill its obligations under Wis. Stat. §§ 281.11, 281.12, 281.34 and 281.35, its public trust duties, the *Lake Beulah* … decision and to protect public waters both surface and groundwater the Department must consider cumulative impacts to prevent "potential harm to waters of the state." Numerous water resources experts testified that one could not properly evaluate the "concrete scientific evidence" (as required by *Lake Beulah*) without considering existing and reasonably anticipated cumulative impacts…."

Richfield Dairy at 3. The ALJ's decision further stated, in pertinent part:

> The Department of Natural Resources took an unreasonably limited view of its authority to regulate high capacity well permit applications to reach the conclusion that it lacks the authority to consider cumulative impacts in connection with its review of high capacity wells…. [I]t was incumbent upon the Department to consider "the concrete, scientific evidence of potential harm to waters of the state" caused by this high capacity well application and existing and reasonably anticipated cumulative impacts. *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73. As numerous experts on all sides testified in the instant case, **to properly consider the concrete scientific evidence one has to consider the cumulative impacts of groundwater withdrawals upon surface waters and springs consistent with the DNR's clear legal duty** to "protect, maintain and improve the quality and management of the waters of the State, ground and surface, public and private." *Id*.

Richfield Dairy at 14 (emphasis added). After reviewing the evidence, the judge imposed more restrictive limits on the authorized pumping capacity of the approved well. No party appealed.

C. DNR Response to *Lake Beulah* and *Richfield Dairy*

In 2011, as a result of the decision in *Lake Beulah*, DNR began evaluating environmental impacts of proposed wells as part of its review of high capacity well applications. In 2014, it added review of cumulative impacts based on *Richfield Dairy*, as part of its reasonable and necessary activities to satisfy its Public Trust and statutory duties. It also would take action based on those reviews, such as including conditions to monitor impacts or setting pumping limits lower than sought in the application. For those applications for which DNR scientists identified adverse impacts that rendered the applications unapprovable, however, DNR typically did not deny approval. Rather, it withheld any decision, creating the appearance of a backlog of well applications. In the cases at bar, several of the applications date back to 2014.

These Public Trust reviews continued until June 2016. In May 2016, the Attorney General issued an opinion stating that DNR did not have the authority to consider cumulative impacts of proposed and existing high capacity wells on Public Trust resources, or to include in its decisions conditions necessary to protect those resources. OAG-01-16. DNR immediately adopted the Attorney General's opinion, and thereafter ceased evaluating environmental impacts

of proposed high-capacity wells except for the narrow categories described in § 281.34(5)(b)-(d) (*i.e.*, wells in groundwater protection areas, with 95% water loss, or affecting large springs). http://dnr.wi.gov/topic/wells/HighCapacity.html. For those applications previously deemed un-approvable due to anticipated adverse impacts to Public Trust waters, DNR began issuing unconditional approvals in September 2016.

D. Facts Specific to the Cases at Bar

The eight well approvals at issue here were applied for after the *Richfield Dairy* decision but before the Attorney General's contrary opinion. For each of those applications, DNR staff undertook some consideration of environmental impacts. As discussed below, and as shown in Exhibit B to each of the Petitions, those evaluations varied from raising questions about potential impacts to nearby lakes and streams to detailed modeling and calculations of both individual and cumulative impacts on Public Trust resources. The adverse impacts led to DNR management withholding action on the applications, even where DNR's scientists opposed approval.

After the Attorney General's opinion and DNR's adoption of it, DNR contacted the well applicants to ask whether they wanted DNR to act on their applications. In several of those instances, DNR acknowledged that the well would compromise its protection of Public Trust resources, but indicated that based on the new policy it would approve the well as requested, without conditions.

On September 30, 2016, DNR issued approximately twenty new well approvals, most of which were in Wisconsin's Central Sands region.[2] The locations of these wells in the Central Sands is significant, as that area already is home to the highest concentration of high capacity

[2] The "Central Sands" is comprised of most or parts of six counties in central Wisconsin, east of the Wisconsin River, extending approximately from Portage to Stevens Point. Its geology is dominated by sandy soils and a single groundwater aquifer with a shallow water table. Its "seepage" lakes and streams are predominantly fed by groundwater, which contributes to high water quality and water temperatures conducive to trout and other game fish.

wells in the state; and its lakes and streams already have been severely damaged by associated reductions in lake levels and stream flows.

Several salient facts are repeated in the records of the eight cases at bar, including the following:

1. In each case, there was concrete, scientific evidence that triggered DNR's duty to consider and potentially act on adverse impacts to Public Trust waters, as dictated by *Lake Beulah*.

2. In each case, DNR scientists identified potential adverse impacts that would compromise public rights in navigable waters.

3. In each case, DNR management withheld any action on the application until after the Attorney General's May 2016 opinion.

4. In each case, DNR contacted the well applicant after its adoption of the AG opinion, advising the applicant that it could now approve the proposed well.

5. In each case, DNR approved the well without conditions, irrespective of the evidence of potential or anticipated adverse effects on Public Trust waters.

DNR may again argue that the adverse impacts are all associated with cumulative impacts in conjunction with existing wells, and therefore are exempted from any judicial scrutiny under Wis. Stat. § 281.34(5m). The legal inadequacy of this argument was addressed in Petitioners' briefs in opposition to DNR's motion to dismiss. It is also factually inaccurate based on undisputed evidence in the record, including the following:

1. <u>Case Nos. 16-CV-2817, 2818 and 2819 (Lutz, Gordon, Peplinski)</u>

DNR evaluated adverse impacts associated with applications for four proposed wells in Portage County. Each of the proposed wells (none of which existed at the time) would impact multiple Public Trust waters, including Stoltenberg Creek – a designated ERW and Class I trout stream – and several nearby lakes. The record reflects a substantial investigation and evaluation

of potential impacts to Stoltenberg Creek, the Tomorrow River, and Lake Emily, including hydrologic modeling and fisheries evaluation.

DNR determined that Stoltenberg Creek in particular had already suffered a "substantial" depletion of over 30% of stream flow from existing wells, and that each of the proposed wells would add a nearly 3% additional depletion of the creek. A DNR email dated May 11, 2015 (the last substantive email prior to approval) stated that it was "not yet clear whether [3% per well depletion] is a significant amount of depletion or not." Exhibit 1.[3] That same email also stated that DNR was going to place the application "on-hold" because of potential legislation that would affect cumulative impact review. On September 30, 2016 (the date of well approval), the same DNR scientist stated: "As part of the review process I did some groundwater flow modeling that showed that the cumulative impacts from pumping on Stoltenberg Creek were substantial." Exhibit 2.

2. Case No. 16-CV-2820 (Frozene)

The well in this case is in close proximity to Pleasant Lake, and affects several of the same resources impacted by the proposed well in *Richfield Dairy*. The affected streams are all Class I trout streams and designated as either ERWs or ORWs.[4] Although the application requested authority to pump 38.9 million gallons **per month**, DNR modeled the impact based on a "conditioned rate" of one inch per week, equating to 36.3 million gallons **per year**. Exhibit 3. Even at this substantially reduced rate, DNR staff calculated a 1.3 inch drawdown in the Chafee

[3] Quoted or cited language in these exhibits from the record has been highlighted by counsel for the Court's ease of reading.

[4] Wis. Stat. § 281.34(5)(b) requires additional evaluation and potential conditions for wells within 1,200 feet of an ERW, ORW, or classified trout stream. Several of the well applicants identified their wells as being 1,250 or 1,300 feet from such protected waters. There is no indication that DNR ever verified these estimated distances, or considered whether the difference between 1,200 feet and the identified distance was hydrologically meaningful to protection of the affected Public Trust resources.

Creek calcareous fen[5] from the proposed well alone, further noting that a 1-1.5 inch drawdown could cause a loss of about 10% of the fen area and adversely alter the type of wetland. *Id.* at 2. DNR further noted that the 1.7-inch modeled drawdown at Pleasant Lake, coupled with the calculated drawdown for the not-yet-constructed Richfield Dairy well, "would reach the level the ALJ considered a significant impact for the lake (more than 2.5-3 inches)." *Id.* at 3. Notwithstanding these impacts, DNR unconditionally approved the well for more than 7.5 times the pumping rate considered in its modeling and evaluation.

3. Case No. 16-CV-2821 (Turzinski)

The application for this well states that it is 1,300 feet from Buena Vista Creek, an ERW and trout stream. On April 20, 2015, a DNR scientist observed that the proposed well is near the headwaters of the creek, and that the application "should be evaluated to what, if any, impacts to the headwaters can be expected." Exhibit 4. The record includes no evidence of any evaluation of the impact of this well on Buena Vista Creek.

4. Case No. 16-CV-2822 (Laskowski)

The applied-for well is in close proximity to two Class I trout streams. The DNR scientist stated that it "is too close to the headwaters of Ditch 4, especially near reproduction area for trout." Exhibit 5.[6] He noted that the ditch is already heavily used by cranberry operations,[7] and stated: that "The stream is too impacted already for another well." *Id.* DNR ignored this opinion, conducted no further evaluation, and approved the well without conditions.

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[5] Calcareous fens are rare and sensitive wetland resources, whose flora are dependent on water rich in calcium. Wetland law accords special consideration and protection to calcareous fens. *See, e.g.*, Wis. Stat. § 281.36(3g)(d)7.

[6] Many trout streams are identified as "ditches" due to historic channelization.

[7] Cranberries typically are grown in marshes and bogs. Some irrigation may be necessary during the growing season. The heavy use, however, is during harvesting, when the bogs are flooded by stream diversion to float the fruit to the surface. *See, e.g.*, www.wiscran.org/media/1347/cranproduction08.pdf.

5. Case No. 16-CV-2823 (Lauritzen)

The proposed well is a fourth well on the same property. (All wells on the same property are treated as one well under Wis. Stat. § 281.34(1)(b), *i.e.*, not as a cumulative impact.) In October 2014, the DNR scientist stated that he was "concerned that the combined impact from the 4 wells will add to a significant adverse impact to the temperature and fish community of Radley Creek" (a Class 1 trout stream and ORW). Exhibit 6. He then requested information on how much impact is projected from this set of wells and existing wells. Although there is no such response in the record, a subsequent DNR email indicates that DNR had placed the application "on hold" "due to predicted impacts to Radley Creek…." *Id.* The same email stated that the well may be approvable despite its adverse impacts under the 2016 AG opinion. *Id*. It was approved without conditions a week later.

6. Case No. 16-CV-2824 (Derousseau)

This is the only challenged well not in the Central Sands: it is located near Rice Lake in Barron County. DNR's hydrogeologist initially expressed concern due to the proposed well's proximity to the wetlands and headwaters of Roux Creek, a Class II trout stream, as initial modeling showed "unacceptable impact to Roux Creek." Exhibit 7. DNR staff undertook substantial evaluation, including site visits and additional monitoring. As a result of that evaluation, DNR's hydrogeologist wrote:

> My assessment of the surface water / groundwater resources surrounding the property just east of Rice Lake concluded that the combination of existing irrigation wells with the proposed irrigation well in the sand/gravel aquifer would have a direct impact on the surrounding wetlands and the headwaters of Roux Creek, a class II trout stream.… I have informed the applicant's consultant that they can either voluntarily withdraw their application or the WDNR can issue a formal denial.

Exhibit 8.

After the 2016 AG opinion, DNR offered to revisit the application, which had been placed on hold. It was approved without conditions.

ARGUMENT

I. STANDARD OF REVIEW.

A. The Court Must Apply a *De Novo* Standard of Review to Interpretation of DNR's Authority and Duties.

This is an action for judicial review of administrative decisions. The issues relate to DNR's application of a generally applicable state statute and its effect on DNR obligations to protect ground and surface waters. Specifically, this case focuses on Wis. Stat. § 227.10(2m), enacted in 2011 as part of revisions to the Administrative Procedures Act applicable to all state agencies.

Statutory interpretation "is ordinarily a question of law determined independently by a court …." *Racine Harley-Davidson, Inc. v. State*, 2006 WI 86, ¶ 11, 292 Wis. 2d 549, 717 N.W.2d 184; *see also, Lake Beulah*, ¶ 23 (questions of law reviewed *de novo*). However, the Court may accord one of three levels of deference to an agency's interpretation of a statute or regulation: great weight, due weight, or *de novo* review. *See, e.g., id.*; *DaimlerChrysler c/o ESIS v. LIRC*, 2007 WI 1, ¶ 15, 299 Wis. 2d 1, 727 N.W.2d 311; *RURAL v. PSC*, 2000 WI 129 ¶ 21, 239 Wis. 2d 660, 619 N.W.2d 888.

A court gives great weight deference when the agency satisfies each of four conditions: 1) it is legislatively charged with administering the statute; 2) its interpretation is long-standing; 3) it employed specialized knowledge or expertise in forming the interpretation; and 4) its interpretation will provide uniformity and consistency in the statute's application. *DaimlerChrysler*, ¶ 16. Under that standard, a court will not substitute its views for that of the

agency, and will sustain the agency's interpretation if it is reasonable, irrespective of whether there is a more reasonable interpretation. *Id.*

The middle, due weight deference standard, applies where "an agency has some experience in the area, but has not yet developed the expertise that would place it in a better position than a court to make judgments regarding the interpretation of the statute." *Id.*, ¶ 17. *De novo* review applies when the issue is one of first impression, the agency has no particular expertise, or the agency's position is "so inconsistent that it provides no guidance." *Id.*, ¶ 18.

The *de novo*, no-deference standard must be followed here for the following reasons:

1. This case involves interpretation of DNR's statutory authority. Courts accord no deference to an agency's interpretation of its own statutory authority. *Grafft v. DNR*, 2000 WI App 187, ¶ 4, 238 Wis. 2d 750, 618 N.W.2d 897.

2. DNR is not uniquely charged with administering Wis. Stat. § 227.10(2m): it applies generally to all administrative agencies of the state.

3. DNR's interpretation of its authority is neither long-standing nor consistent. The history of this case demonstrates that DNR's interpretation and application of its statutory authority under the high-capacity well program have flip-flopped over time: no consideration of adverse impacts before *Lake Beulah*; consideration of adverse impacts but not cumulative impacts after *Lake Beulah*; consideration of cumulative impacts after *Richfield Dairy*; and now no consideration of adverse impacts after the 2016 AG opinion.

4. DNR's legal arguments are novel, unprecedented, contrary to existing judicial, statutory and constitutional law, and, as discussed in the context of the motion to dismiss, defy basic canons of statutory construction.

II. DNR HAS VIOLATED ITS PARAMOUNT DUTY TO PROTECT WATERS OF THE STATE.

The core issues in this case revolve around whether DNR has fulfilled its statutory and constitutional obligations to protect waters of the State. Prior to the 2016 AG opinion, the case law was clear that DNR had the constitutional and statutory mandate to protect waters of the state when acting on well applications. Accordingly, this analysis requires review of the AG opinion in the context of existing constitutional, statutory and jurisprudential law.

A. DNR Is the Trustee of Public Trust Waters, with the Duty to Protect Waters of the State when Considering and Acting on High-Capacity Well Applications.

The Wisconsin Supreme Court and Court of Appeals repeatedly have held that DNR is the trustee of state waters under the Public Trust Doctrine, and charged with protecting those public water resources. *See, e.g., ABKA Ltd. P'ship v. Wis. Dep't of Natural Res.*, 2002 WI 106, ¶ 12, 255 Wis. 2d 486, 648 N.W.2d 854; *State v. Town of Linn*, 205 Wis. 2d 426, 444-45, 556 N.W.2d 394 (Ct. App. 1996), *rev. den.* 207 Wis. 2d 287 (1996); *Borsellino v. DNR*, 2000 WI App 27, ¶ 18, 232 Wis. 2d 430, 443-44, 605 N.W.2d 255. In *Borsellino*, the court referred to DNR as "trustee under the public trust doctrine …." *Id.*, ¶ 19.

DNR's public trust obligations are broad and comprehensive. Nearly forty years ago, the Supreme Court stated:

> In furtherance of the state's affirmative obligation as trustee of navigable waters, the legislature has delegated substantial authority over water management matters to the DNR. The duties of the DNR are comprehensive, and its role in protecting state waters is clearly dominant….

Wis. Environmental Decade, Inc. v. DNR, 85 Wis. 2d 518, 527, 271 N.W.2d 69 (1978) (footnote omitted).

The courts frequently have reiterated the importance of protecting the Public Trust, and that DNR's authority must be construed liberally to protect those waters. *See, e.g., Muench v. Public Service Comm.*, 261 Wis. at 512; *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983); *Hilton v. Dept. of Natural Resources*, 2006 WI 84, ¶¶ 18-20, 293 Wis. 2d 1, 717 N.W.2d 166; *Town of Linn*, 205 Wis. 2d at 442-43.

DNR's duties include protection from cumulative impacts. As the Court stated in *Hixon v. PSC*, 32 Wis. 2d 608, 632-33, 146 N.W.2d 577 (1966):

> A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and

> before long a great body of water may be eaten away until it may no longer exist. Our navigable waters are a precious natural heritage; once gone, they disappear forever.

In *Lake Beulah*, the Supreme Court did not alter or expand DNR's Public Trust responsibilities. Rather, it addressed how DNR's existing statutory and constitutionally-based trust responsibilities apply to the high capacity well program. Relying on a long history and plethora of Public Trust case law, the Court held unequivocally that: a) DNR has the statutory and constitutional authority and duty to consider impacts to Public Trust resources; and b) whether DNR's duty has been triggered is determined on a case by case basis.

> We conclude that, pursuant to Wis. Stat. § 281.11, § 281.12, § 281.34, and § 281.35 (2005-06), along with the legislature's delegation of the State's public trust duties, the DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state. Upon what evidence, and under what circumstances, the DNR's general duty is implicated by a proposed high capacity well is a highly fact specific matter that depends on what information is presented to the DNR decision makers ….

2011 WI 54, ¶ 3 (footnotes omitted).

In *Lake Beulah*, the Village/well applicant argued that DNR may not consider impacts to Public Trust resources because that authority is not found in §§ 281.34 and 281.35. *Id.*, ¶ 29. DNR argued that it had broad authority to consider impacts to those water resources and that its authority derives from both the Public Trust Doctrine and ch. 281. *Id.*, ¶¶ 27-28.

The Supreme Court adopted the broad authority and duty as articulated by DNR. It characterized the statutory scheme for high capacity wells as combining DNR's "overarching authority and duty to manage and preserve waters of the state" with certain specific requirements. *Id.*, ¶ 35. The Court specifically relied upon Wis. Stat. §§ 281.11 and 281.12. Wisconsin Stat. § 281.11 provides in pertinent part:

> 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…. The purpose of this subchapter is **to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the**

> **state**, ground and surface, public and private. To the end that these vital purposes may be accomplished, this subchapter and all rules and orders promulgated under this subchapter **shall be liberally construed in favor of the policy objectives** set forth in this subchapter….

(Emphasis added.) Similarly, Wis. Stat. § 281.12(1) provides in pertinent part:

> 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 foundation of DNR's Public Trust authority and duties is not limited to these statutes. Relying upon the wealth of precedential cases, the Court held that DNR's duty is also grounded in the Constitution. *Id.*, ¶ 3 fn. 6 and ¶ 33 (quoting *WED v. DNR*, 85 Wis. 2d at 527).

Ultimately, the Court concluded, consistent with prior case law, that DNR has a "broad authority and a general duty" to "manage, protect, and maintain waters of the state." *Id.*, ¶ 39 (footnotes omitted). It also expressly rejected the Village's argument that § 281.34 somehow limits DNR's authority: "To the contrary, there is nothing in either Wis. Stat. § 281.34 or § 281.35 that limits the DNR's authority to consider the environmental impacts of a proposed high capacity well." *Id.*, ¶ 41.

B. DNR Has Violated Its Duty to Protect Public Trust Waters.

There can be no dispute that in these cases, DNR did not perform its Public Trust responsibilities to protect our lakes and streams. In each case, DNR had scientific evidence, typically generated by its own scientists, that triggered DNR's duty to consider impacts to surface waters under *Lake Beulah*. Additionally, these cases involved impacts to ERWs, ORWs, and trout streams. In some cases, DNR staff specifically recommended further investigation because of the risk to Public Trust waters, but there is no evidence that DNR undertook the evaluation required to protect those waters. *See, e.g.*, Exhibits 4 and 6 (Turzinski and Lauritzen). In other cases, DNR conducted a detailed investigation and concluded that the affected streams

were already too compromised for another well. Exhibits 1 and 5 (Lutz, Gordon, Peplinski, Laskowski). In the Derousseau case, the hydrogeologist specifically recommended denial of the application due to unacceptable impacts. Exhibit 8. In Frozene, DNR's scientists acknowledged that even at a fraction of the approved capacity, the proposed well would exceed a prior determination of adverse impacts on Pleasant Lake and would substantially impact a calcareous fen. Exhibit 3.

Despite these acknowledged adverse impacts to sensitive, highly valued Public Trust waters, DNR approved each of these wells without any pertinent conditions.

III. THE 2016 AG OPINION IS GROSSLY FLAWED AND CONTRAVENES ONE HUNDRED YEARS OF PUBLIC TRUST JURISPRUDENCE.

In each of the permits at issue, DNR decided to ignore its scientists' analyses and its statutory and Public Trust responsibilities solely based on the 2016 AG opinion. OAG-01-16. This appears to be the only articulated defense to DNR's conduct.

The 2016 AG opinion reviews two sets of issues: a) whether *Lake Beulah* addressed the effect of Wis. Stat. § 227.10(2m); and b) whether § 227.10(2m) prohibits DNR from considering cumulative impacts or imposing conditions in well approvals that are necessary to protect against adverse impacts to Public Trust waters. *Id.*, ¶ 1.

In considering this opinion, it is noteworthy that attorney general opinions do not have the force of law. *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 37, 312 Wis. 2d. 84, 752 N.W.2d 295. Rather, they are only useful for whatever persuasive value they add to the analysis, i.e., "if well reasoned and founded upon appropriate legal principles." *State v. Wachsmuth*, 73 Wis. 2d 318, 323, 243 N.W.2d 410 (1976). In *Wood County v. Bd. of Vocational, T. & A. Ed.*, the Court rejected the attorney general's opinion as leading to absurd results contrary to the

applicable law. 60 Wis. 2d 606, 613, 211 N.W.2d 617 (1973). Here, the AG opinion is so fundamentally flawed and patently outcome-driven that it has no persuasive value. [8]

A. *Lake Beulah* Addressed Wis. Stat. § 227.10(2m), Consistent with the Requirement that DNR Must Consider Impacts to Waters of the State.

The AG opinion first focused on *Lake Beulah*, holding that it did not address the effect of § 227.10(2m) and therefore is not relevant to the application of that section to DNR's authority under the high capacity well program. The AG opinion reaches that conclusion by selectively quoting one line in *Lake Beulah*, and speculating that the Court did not address the statute because it "presumed" that § 227.10(2m) would only apply prospectively. *Id.*, ¶¶ 8, 10, 12. It also relies for support on a circuit court decision, which did not mention *Lake Beulah*. AG Opinion, ¶ 15.

Section 227.10(2m) was created by 2011 Act 21, which made substantial changes to the rulemaking provisions in Subchapter II of Wis. Stat. ch. 227, the Administrative Procedures Act. That subsection states in pertinent 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 rule that has been promulgated in accordance with this subchapter ….

The AG opinion acknowledges that the effect and application of § 227.10(2m) was raised in *Lake Beulah*: it was raised by the intervenors in the cases at bar, who argued that it was no more than a codification of existing law. The AG opinion also acknowledges that the Supreme Court discussed the effect of that statute in footnote 31. However, it dismissed the Court's

[8] At the time that the legislature requested the AG opinion, counsel for PLMD sent a letter to the attorney general noting that he had a conflict of interest because he already was representing DNR in court on the subject of the request and could not ethically issue an objective opinion contrary to his client's interest. For the same underlying reasons, a formal opinion would conflict with Department of Justice policy not to issue opinions on matters in litigation. *See* Sinderbrand Affidavit, Exhibit A. The attorney general never addressed or responded to these ethical issues.

consideration as "short shrift" based on one sentence in that lengthy footnote observing that none of the parties argued that § 227.10(2m) affects DNR's authority "in this case." *Id.*, ¶ 8.

The AG opinion errs, in part, by ignoring the rest of that paragraph in footnote 31, which states as follows:

> None 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. **The DNR responds that Wis. Stat. ch. 281 does explicitly confer authority upon the DNR to consider potential environmental harm presented by a proposed high capacity well**. **The conservancies agree.** The Village maintains that the DNR lacks such authority under Wis. Stat ch. 281 but states that "Wis. Stat. § 227.10(2m) does not change the law as it relates to the authority of the [DNR] to issue high capacity well approvals under Wis. Stat. § 281.34." **We agree with the parties** that 2011 Wis. Act 21 does not affect our analysis in this case. Therefore we do not address this statutory change any further.

2011 WI 54, fn. 31 (emphasis added).

Contrary to the AG opinion, the Supreme Court did not give this statute short shrift; nor did it consider the statute only in the context of the facts of the case before it. Moreover, there is no indication that the Court "presumed" a wholly prospective application or relied upon that theory. Rather, the Court addressed § 227.10(2m) on its merits.

The DNR and petitioners argued that § 227.10(2m) does not affect the outcome because ch. 281 "does confer explicit authority upon DNR to consider proposed environmental harm …."; *i.e.*, the authority granted to DNR by ch. 281 satisfies the "explicit" requirement or permission language in § 227.10(2m). While the Village of East Troy disputed that DNR had any authority to consider environmental impacts – an argument rejected by the Court – it also argued that § 227.10(2m) did not affect the statutory analysis. The Court determined not to engage in more elaborate analysis because it expressly agreed with DNR and the other parties.

The AG opinion's reliance on a circuit court decision also is misguided. State law specifically prohibits citing or relying on circuit court and other unpublished decisions. Wis. Stat. § 809.23(3)(a). Moreover, an unpublished opinion may be cited for its persuasive value

only in limited types of appellate court decisions. Wis. Stat. § 809.23(3)(b). This is particularly true in this case, where the cited circuit court's decision regarding DNR's duties under the high-capacity well program did not even mention the seminal case on point.

B. DNR Has the Explicit Authority and Duty to Consider Impacts to Public Trust Waters and to Condition or Deny Approval of High-Capacity Wells Based on Such Impacts.

Having dismissed any significance to *Lake Beulah*, the AG opinion focuses on the effect of § 227.10(2m). Its argument is similarly selective, biased and fundamentally wrong, ignoring both statutory language and Supreme Court precedent.

1. The AG Opinion Is Based on His Disagreement with Supreme Court Decisions Regarding the Public Trust Doctrine.

It is important to observe at the outset that the AG opinion expressly rejects the long-standing, consistent and unanimous applications of the constitutional Public Trust Doctrine. He asserts that "DNR's public trust authority has been expanded by the courts beyond the plain language of the Wisconsin Constitution" (¶ 19) and criticizes the "ever-expanding doctrine" (¶ 25). That is, the attorney general used his opinion to undermine the Wisconsin Constitution that he swore to protect and preserve, and to reject over 100 years of Supreme Court jurisprudence.

This outcome-driven, politically motivated taint also infects the attorney general's argument. For example, he argues that the purpose of Act 21 was to restrict judicial decisions regarding DNR's Public Trust authority. *Id.*, ¶ 19. However, Act 21 is not limited to DNR or to those programs that affect Public Trust resources. It applies across the board to all state agencies. Moreover, § 227.10(2m) is one of many sections of ch. 227 that were modified as part of the broad revision to the administrative rule-making statutes in Act 21. The attorney general also fails to cite any legislative history or authority for this proposition.

2. The Court Must Liberally Construe DNR's Authority in Favor of Protecting Waters of the State.

The AG opinion next asserts that grants of administrative agency powers must be narrowly construed against the exercise of such powers. *Id.*, ¶ 20. While this is true as a general proposition, the AG opinion ignores the explicit language to the contrary in one of the statutes that are the foundation of DNR's authority. Wisconsin Stat. § 281.11 states in pertinent part:

> The department [of natural resources] shall serve as the central unit of state government to protect, maintain and improve the quality and management of waters of the state, ground and surface, public and private…. **The purpose of this subchapter is to grant necessary powers** and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposed may be accomplished, **this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed** in favor of the policy objectives set forth in this subchapter….

(Emphasis added.) Under basic canons of statutory construction, this specific statute governs over a general statute or principle of law. *See, e.g.*, *Belding v. Demoulin*, 2014 WI 8, ¶ 17, 352 Wis. 2d 359, 843 N.W.2d 373; *Emjay Ins. Co. v. Vill. Of Germantown*, 2011 WI 31, ¶ 38, 333 Wi.s2d 252, 797 N.W.2d 844. The Court therefore must "liberally construe" DNR's statutory authority to "protect, maintain and improve" water quality and management, including groundwater. The attorney general's failure to even note, let alone address, this statutory language, is inexplicable.

3. Chapter 281 of the Wisconsin Statutes Provides DNR Explicit Authority to Consider and Regulte Impacts to Public Trust Waters, Consistent with Wis. Stat. § 227.10(2m).

The AG opinion next turns to the language of chapter 281. It dismisses § 281.11 as only a policy and purpose statement, quotes but does not specifically discuss § 281.12, and then characterizes *Lake Beulah* as holding that these statutes "impliedly" granted DNR public trust

authority. *Id.*, ¶¶ 24, 25. It offers no citation or support for this characterization of *Lake Beulah*, and it is facially wrong.

As discussed in Section III.A, above, DNR and the petitioners both argued in *Lake Beulah* that DNR had "explicit" authority under ch. 281 to consider harmful effects of wells on the environment; and the Court expressly agreed. 2011 WI 54, fn. 31. However, that is not the only reference to DNR's explicit authority in the decision. The Court also held:

> We conclude that, through Wis. Stat. ch. 281, the **legislature has explicitly provided the DNR** with the broad authority and a general duty, in part through its delegation of the State's public trust obligations, to manage, protect, and maintain waters of the state…. Specifically, for all proposed high capacity wells, the **legislature has expressly granted the DNR** the authority and a general duty to review all permit applications and to decide whether to issue the permit, to issue the permit with conditions, or to deny the application

Id., ¶ 39 (footnotes and citations omitted; emphasis added).

In addition to ignoring dispositive language in Lake Beulah, the AG opinion does not address what it means to be "explicit." It cites a definition of "fully and clearly expressed; leaving nothing implied." AG opinion, ¶ 26. It then leaps to the conclusion that ch. 281 does not provide DNR with explicit authority, without further explanation. *Id.*, ¶ 28. That is, it does not discuss how specific or comprehensive "explicit" must be.

Common definitions of "explicit" focus on clarity and not whether it leaves any residual matters to be decided. For example, the American Heritage Dictionary (2nd Coll. Ed.) at 478 defines "explicit" as:

> **1.a.** Expressed with clarity and precision. **b.** Clearly defined or formulated. **2.** Forthright and unreserved in expression …."

The notion that "explicit" means that statutory authority must be so clear as to leave nothing to the discretion of the agency, as argued by the AG, is inimical to the structure of administrative law and the Administrative Procedures Act. By definition, a "rule" means:

> a regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency **to implement, interpret, or make specific legislation** enforced or administered by the agency ….

Wis. Stat. § 227.01(13) (emphasis added). That is, legislation necessarily is limited to the grant of authority in general terms, and agencies are accorded authority through rulemaking to add specificity. If the statutes "fully" addressed their subject matter, as the AG argues, there would be no need for rules.

The same can be said for decision-making, which is authorized under Ch. 227, Subch. III. Statutes provide the grant of authority, and rules provide the specificity and detail that apply to all actions within their scope. Decisions apply those statutes and/or rules to specific factual circumstances, tailoring conditions as necessary to fulfill legal requirements. The Supreme Court recognized and reinforced this principle in *Lake Beulah*, 335 Wis. 2d 47, ¶ 43:

> As with many other environmental statutes, within the general statutory framework, the DNR utilizes its expertise and exercises its discretion to make what, by necessity, are fact-specific determinations. General standards are common in environmental statutes and are included elsewhere in the high capacity well statutes. *See, e.g.,* Wis. Stat. § 281.35(5)(d)1. (requiring the DNR to make a finding "[t]hat no public water rights in navigable waters will be adversely affected" before issuing a permit).

(Footnote omitted.) Any other interpretation "ignores the reality of how the DNR exercises its authority and complies with its duty within the statutory standards." *Id*.

The AG opinion further obfuscates by quoting at length from Wis. Stat. § 227.11(2)(a). AG opinion, ¶ 27. That statute relates exclusively to rulemaking, and provides that a statute containing a general statement of purpose or policy or conveying general powers or duties does not confer rulemaking authority absent some other explicit authority. This statute does not preclude an agency from issuing decisions under a grant of general powers or duties. If it did so,

the general delegation of duties would be rendered meaningless.[9] Moreover, § 227.10(2m), which does deal with agency decision-making, does not include the same limitations as § 227.11(2)(a). One can only draw from this distinction that the Legislature chose not to include this limitation on decision-making by state agencies.

The Supreme Court has held that chapter 281 provides explicit authority to DNR to consider and act upon adverse impacts to waters of the state under the high capacity well program. Sections 281.11 and 281.12 express "with clarity and precision" that DNR is granted the authority "to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private"; that DNR "shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose"; and that DNR's authority is to be "liberally construed" to achieve those purposes. Decades of unanimous Supreme Court decisions have reinforced the delegation of these Public Trust duties. There is nothing in § 227.10(2m), a general statute applicable to all state agencies, that abrogates those duties.

III. DNR'S INTERPRETATION OF STATE LAW IN THESE CASES IS UNCONSTITUTIONAL.

The AG opinion and DNR also failed to address a troubling consequence of the AG's interpretation of § 227.10(2m): it renders the statute unconstitutional as applied.

The core holding of *Lake Beulah* is that DNR's responsibility to protect Public Trust waters from the impacts of high-capacity wells is grounded in Art. IX, § 1 of the Wisconsin Constitution. That is, the State has an affirmative duty to protect Public Trust waters; and DNR is the delegated trustee of that duty. In *Richfield Dairy*, the administrative law judge applied that duty in the context of a well in an area where high capacity wells are cumulatively ravaging

[9] A court may not interpret a statute in a way that renders it (or any part of it) meaningless. *See, e.g., Belding v. Demoulin*, 2014 WI 8, ¶ 17; *Lornson v. Siddiqui*, 2007 WI 92, ¶ 34, 302 Wis. 2d 519, 735 N.W.2d 55.

Public Trust resources, concluding that where the close proximity of wells creates a cumulative impact – a "death by a thousand straws" – DNR must consider those cumulative impacts. Neither DNR nor the well applicant appealed that decision; and DNR began to consider cumulative impacts as part of its Public Trust responsibilities in high-capacity well permitting.

The AG opinion concluded that DNR does not have the authority to condition approvals except in the narrow areas identified in § 281.34(5)(b)-(d), and does not have the authority to consider or act upon cumulative impacts. It therefore raised but did not address this constitutional question: if DNR no longer has the authority to protect Public Trust waters from high capacity wells, who does? The State's duty is an affirmative duty, and it cannot be abrogated by the legislature or an attorney general's opinion. Nearly 120 years ago, the Supreme Court stated:

> The legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose. It is supposed that this doctrine has been so firmly rooted in our jurisprudence as to be safe from any assault that can be made upon it.

Priewe v. Wis. State Land & Improv. Co., 103 Wis. 537, 549-50, 79 N.W. 780, 781 (1899). The attorney general ignored this fundamental principle.

Petitioners do not claim that § 227.10(2m) is inherently unconstitutional. Rather, it has been rendered unconstitutional as applied because the AG opinion and DNR have interpreted it to bar DNR from fulfilling a constitutional duty, and no other agency has been given that duty.

This distinction is significant. In a facial challenge, the petitioner is challenging the statute itself. The courts accord statutes a strong presumption of validity, based on respect for and deference to the legislature as a co-equal branch of government. *See, e.g., In re Gwenevere T.*, 2011 WI 30, ¶ 46, 333 Wis. 2d 273, 797 N.W.2d 854. The petitioner therefore faces a "heavy

burden" to overcome this presumption, and it also must prove the statute's unconstitutionality beyond a reasonable doubt.[10] *Id.*; *see also, League of Women Voters Educ. Network v. Walker*, 2014 WI 97, ¶¶ 16-17, 357 WI 360, 851 N.W.2d 302.

In an as-applied challenge, the petitioner does not dispute the validity of the statute: the dispute focuses on its administration or enforcement. The courts "'do not presume that the State applies statutes in a constitutional manner.'… Therefore, in an as-applied challenge, neither party faces a presumption that the statute was constitutionally applied." *In Re Gwenevere*, ¶ 48 (quoted source and footnote omitted); *see also, Society Ins. v. LIRC*, 2010 WI 68, ¶ 27, 326 Wis. 2d 444, 786 N.W.2d 385. The petitioner still has the burden of convincing the court that the statute as applied is unconstitutional.

The cases at bar satisfy the burden of demonstrating unconstitutionality as applied. The facts are comparable to, and in some cases worse than in *Richfield Dairy*, in which the administrative law judge found that the well as approved violated DNR's Public Trust duties.

As discussed in the Statement of Facts, DNR scientists already determined in these cases – prior to approval—that the challenged wells, either alone, in conjunction with other proposed wells, or cumulatively with existing wells or other factors, would cause significant adverse impacts to Public Trust lakes and streams. In the three applications considered together, DNR determined that the affected Stoltenberg Creek and other resources already were substantially impacted. In the Frozene case, DNR determined that the proposed well, in conjunction with the approved Richfield Dairy well, will cause impacts to Pleasant Lake and the Chaffee Creek calcareous fen that the administrative law judge in *Richfield Dairy* found to be unacceptable. In

[10] The "beyond a reasonable doubt" standard, though generally associated with criminal law, is different in the context of challenge to a statute's constitutionality. The courts have described this standard as expressing the "force of conviction" with which the court must conclude that the statute is unconstitutional either facially or as applied. *League of Women Voters*, ¶ 17 (quoted source omitted).

Laskowski, DNR concluded that the affected stream already was too heavily impacted by cranberry-related stream diversions. And in Derousseau, DNR concluded that the well would have unacceptable impacts on the trout stream and should be denied.

The constitutional duty to take action to protect these lakes and streams has been invoked by DNR's own scientists. However, the AG opinion and DNR's new policy based thereon would preclude DNR from protecting those resources. Moreover, no other state agency has been delegated the authority to protect those resources. There can be no doubt that the AG/DNR interpretation of § 227.10(2m) is an unconstitutional abrogation of DNR's Public Trust authority and duties.

The Court cannot sanction this interpretation. *See, e.g., Redevelopment Auth. of City of Milwaukee v. Uptown Arts & Educ., Inc.*, 229 Wis. 2d 458, 463, 599 N.W.2d 65 (Ct. App. 1999) ("The cardinal rule of statutory construction is to preserve a statute and find it constitutional if it is at all possible to do so.")

CONCLUSION

For each of the reasons stated herein, Petitioners request that the Court reverse and vacate the well approvals in each of the cases at bar, and direct that DNR fulfill its statutory and constitutional duty to protect Public Trust resources when acting on high capacity well applications.

Dated this 16th day of June, 2017.

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