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' REPLY BRIEF

INTRODUCTION

Petitioners have challenged eight high capacity well approvals by the Department of Natural Resources ("DNR") principally because, in each of those cases, DNR approved the wells despite the documentation from the agency's own scientists showing that groundwater withdrawals from those wells were likely to – and sometimes certain to – adversely affect navigable waters protected by the Public Trust Doctrine under Wis. Const., Art. IX, § 1. Additionally, DNR's decision to forsake its duty to protect those Public Trust resources was predicated on a flawed opinion by the Attorney General that is inconsistent with over a century of Public Trust Doctrine jurisprudence.

It is notable that DNR's response brief largely ignores Petitioners' analyses. It does not dispute any of the documentation compiled by DNR staff identifying anticipated adverse impacts to Public Trust waters from the approved wells, either individually or in conjunction with other impacts. Instead, the brief erroneously suggests that DNR made findings of fact supporting the decision that are entitled to deference.

DNR also does not address any of the flaws in the opinion of the attorney general ("AG") regarding the effect of Wis. Stat. § 227.10(2m). Instead, it appears to argue that the State's constitutional duty to protect Public Trust navigable waters does not apply if protection of a Public Trust water (*e.g.*, a lake) requires management of other, interconnected resources (*e.g.*, groundwater). It reaches this result by misinterpreting the *Rock-Koshkonong* case[1] as overruling, *sub silentio*, *Lake Beulah*[2], and arguing that *Lake Beulah* is not relevant to the analysis because of a statute enacted prior to that ruling. DNR's argument ignores the plain holdings of these cases and invents a new *post hoc* argument in a failed attempt to justify DNR's abandonment of Public Trust duties.

The intervening industrial associations, Wisconsin Manufacturers and Commerce, *et al*. (collectively "WMC"), continue to invoke the AG opinion as authority, arguing that Act 21 (which includes but is not limited to § 227.10(2m)) was enacted specifically to reverse *Lake Beulah*. WMC Br. at 8-11. However, Act 21 predates the Supreme Court's decision in *Lake Beulah*. Moreover, WMC cites no authority for this proposition and ignores the fact that this statute was created as part of a comprehensive modification to chapter 227, which applies to all agencies.

[1] *Rock-Koshkonong Lake Dist. v. State* 2013 WI 74, 350 Wis. 2d 45, 833 N.W.2d 800.

[2] *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73.

Both DNR and WMC support a narrow reading of DNR's statutory duties, directly contrary to *Lake Beulah* and the statutory directive that DNR's duties to protect all waters of the state, including but not limited to Public Trust waters, are to be "liberally construed." Wis. Stat. § 281.11. Beyond rejecting this recent, unanimous Supreme Court decision, DNR and WMC also fail to answer the fundamental question that literally was ignored by the AG opinion: if DNR cannot protect Public Trust waters from the effects of high capacity wells, to whom has the Legislature delegated this affirmative Constitutional mandate?[3] DNR and WMC simply ignore this critical question – and ask the court to rely on an AG opinion that also completely ignores this issue.

The natural resources at stake in this proceeding are undisputedly Public Trust waters: lakes, streams, wetlands, and navigable drainage ditches. The State, through the AG's opinion and DNR's approval of these eight wells, has attempted to abrogate the State's duty to actively protect and preserve those water resources by relying on a flawed interpretation of a generic, broadly applicable modification to the Administrative Procedures Act (ch. 227), for which there is no meaningful legislative history regarding any connection with DNR's well regulatory program or protection of waters of the state. In the process, they disregard over 100 years of Supreme Court precedent, as well as a recent Supreme Court decision and an unchallenged administrative decision that are directly on point.

Petitioners reiterate their plea to end this misguided episode in DNR's history and to require that DNR restore and follow its Constitutional, statutory and judicial mandates to protect Public Trust waters when acting on high capacity well applications.

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[3] This affirmative duty was articulated nearly 120 years ago in *Priewe v. Wis. State. Land & Improvement Co*, 103 Wis. 537, 549-50, 79 N.W. 780 (1899):

> The Legislature has no more authority to emancipate itself from the obligation resting upon it . . . 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 state capitol to a private purpose.

ARGUMENT

I. STANDARD OF REVIEW.

A. DNR's Interpretations of Its Own Authority and Duties Are Subject to *De Novo* Review, *i.e.* No Deference.

Petitioners have argued that DNR's interpretation of the pertinent statutes is not entitled to any deference, and that the Court must apply a *de novo* standard of review. DNR asserts that its statutory interpretations are entitled to "due weight deference" because it is charged with authority to administer the high capacity well statutes. DNR Br. at 18-19. However, to the extent that DNR's brief interprets the high capacity well statute, Wis. Stat. § 281.34, its arguments focus on the limits of its authority, an issue that is subject to *de novo* review without deference. *See, e.g., Grafft v. DNR*, 2000 WI App 187, ¶ 4, 238 Wis. 2d 750, 618 N.W.2d 897.[4] DNR also concedes that the Court must review the application of Wis. Stat. § 227.10(2m) under the *de novo* standard. DNR Br. at 19.

WMC ambiguously suggests that the Court should apply a special but unarticulated standard of deference to the AG opinion regarding § 227.10(2m) because it is important that the Court correctly interpret that statute. WMC Br. at 5-8. The Court should reject this suggestion. Correct statutory interpretation is important in every case, and WMC offers no reason why the Court should depart from long-standing canons of statutory interpretation for this particular statute. However, the cases cited by WMC actually acknowledge that an AG opinion, like any legal opinion, has value only if it is well reasoned and persuasive. Moreover, WMC acknowledges that the value of an AG opinion is augmented if it has been uniformly adopted by

[4] DNR's interpretation of Wis. Stat. § 281.34 also is entitled to no deference because, as discussed in Petitioners' principal brief, DNR's interpretation of the scope of its duties under that statute has changed numerous times over the past several years. In fact, during the *Lake Beulah* case, DNR twice changed its interpretation of its Public Trust duties under § 281.34. *See Lake Beulah Mgmt. Dist. v. DNR*, 2010 WI App 85, ¶¶ 6 and 8, 327 Wis. 2d 222, 787 N.W.2d 926.

agencies over a long period of time. Here, the AG opinion was immediately adopted by DNR, as it was consistent with the position that the AG already was taking in court on behalf of DNR; and there is no evidence it has been adopted by any other agency.[5]

Accordingly, all legal issues before this Court are subject to *de novo* review.

B. This Action Is Not Subject to the "Substantial Evidence" Test.

DNR also argues that its factual findings are subject to the "substantial evidence" test, under which the Court searches the record for any credible evidence to support the agency's decision. DNR Br. at 16-17. This is a gross misstatement of the law. The "substantial evidence" test is an **evidentiary** standard that applies only to contested cases, in which there has been an adjudicatory hearing, a weighing of the evidence by a hearing examiner, and a decision with findings of fact. Wis. Stat. § 227.57(6); *see also*, *City of Oak Creek v. Public Service Comm'n*, 2006 WI App 83, ¶¶ 11-13, 292 Wis. 2d 119, 716 N.W.2d 152, *rev. den.* 2006 WI 108; *Sea View Estate Beach Club, Inc. v. DNR*, 223 Wis. 2d 138, 148, 588 N.W.2d 667 (Ct. App. 1998), *rev. den.* 225 Wis. 2d 489, 594 N.W.2d 383 (1998). Every case cited in DNR's brief at 16-17 regarding the substantial evidence test was a judicial review after a contested case hearing.

Where, as here, the decision was made without a hearing, the Court has broad authority to set aside the decision or order action if the facts in the record compel a particular result, remand the matter for further proceedings, or provide any other appropriate relief. Wis. Stat. § 227.57(7) and (9).

[5] WMC also suggests in its brief at 6-7 that the AG opinion is entitled to deference because it was requested by the speaker of the Assembly to address DNR regulation of high capacity wells. Again, WMC offers no authority for this novel approach; and it is undermined by at least two facts of record: a) the AG already was taking this position in a lawsuit on behalf of DNR; and b) the legislature previously had attempted and failed to restrict DNR authority over high capacity wells. *See* 2015 AB 477; SB 291. This reinforces the conclusion that the request for the AG opinion was no more than an end run to justify DNR reducing its protection of Public Trust and other water resources.

II. THE FACTS IN THE RECORD DEMONSTRATE THAT DNR HAS VIOLATED ITS PARAMOUNT DUTY TO PROTECT PUBLIC TRUST WATERS.

The caption of DNR's argument in its brief at 20 erroneously asserts that DNR made factual findings. It also suggests that the record contains facts supporting DNR's decision, but it does not identify any of those facts. Instead, DNR asserts that its duties were limited to determining whether the application was subject to heightened review under the Wisconsin Environmental Policy Act (WEPA) or Wis. Stat. § 281.34(4). DNR Br. at 22. Of course, that limited view of DNR's authority directly conflicts with *Lake Beulah*.

The record in each of these cases has a consistent pattern:

a. DNR received an application;

b. DNR staff determined that affected Public Trust waters would be adversely impacted by the loss of groundwater (and in some cases expressly that the application must be denied);

c. DNR management decided to hold the application in abeyance pending potential legislative changes to allow approval, thereby creating its own backlog;

d. After the AG opinion, DNR advised the applicant that the well is now approvable because of limitations in its authority as opined by the AG; and

e. DNR approved the application without conditions necessary to protect affected Public Trust waters.

Oddly, DNR's brief at 21-22 states that its record does not include all the staff analyses of impacts to Public Trust waters, four of which were attached as exhibits to the Petitions for Judicial Review and Petitioners' brief. If that is the case, DNR has violated Wis. Stat. § 227.55, which requires that it submit "the **entire** record of the proceedings in which the decision under review was made …." (Emphasis added.) Alternatively, any suggestion in its brief that DNR ignored its own staff analyses of Public Trust resource impacts would be a significant abdication of its Public Trust responsibilities as described in decades of Supreme Court cases. As an

exercise of caution, Petitioners have filed a motion to supplement the record to ensure that the full DNR record is before the Court.

DNR then asserts that Petitioners' claims are barred by Wis. Stat. § 281.34(5m), even if the claims are not based on cumulative impacts with other existing wells, relying on prior arguments regarding the effect of that statute. DNR Br. at 22-23. DNR fails to explain how a statute that is expressly limited to cumulative impacts "together with existing wells" could apply more broadly to evaluation of other sources of cumulative impacts (*e.g.*, stream diversion). In any event, Petitioners rely upon their prior analysis of that statute as rebutting any application to this case.

The facts of record in each of these cases compel the conclusion that DNR approved the wells despite their anticipated adverse impacts to Public Trust waters, based solely on an AG opinion that is inconsistent with settled law on DNR's duty to protect those waters.

III. THE PUBLIC TRUST DOCTRINE PROTECTS PUBLIC TRUST WATERS FROM THE ADVERSE IMPACTS OF DNR'S DECISIONS ON HIGH CAPACITY WELL APPLICATIONS.

DNR and WMC recognize that if *Lake Beulah* is good law, Petitioners must prevail. That is, they do not dispute that the Supreme Court held that DNR has a constitutionally and statutorily based authority and duty to consider the effects of high capacity wells on Public Trust waters when acting on well applications. Instead, their briefs erroneously argue that *Lake Beulah* has been superseded by legislation or overruled by subsequent case law. There are obvious reasons why both arguments fail.

A. The *Lake Beulah* Decision Was Not Reversed by § 227.10(2m).

The central argument advanced in the AG opinion is that Wis. Stat. § 227.10(2m) was not considered by the Court in *Lake Beulah* and that the Court's consideration of that statute would have changed the outcome. WMC repeats that argument. WMC Br. at 12-13.

As discussed in Petitioners' Principal Brief at 18-24, that argument must fail because, *inter alia*: a) the Supreme Court considered § 227.10(2m) and agreed with DNR that it had no effect on the decision; and b) the Court expressly held that DNR has the "explicit" authority and duty to consider impacts to Public Trust waters, deriving from both statutes and the Constitution.

DNR's brief at 38-40 acknowledges the Court's discussion of § 227.10(2m) but argues that it is insufficient because it is discussed in a footnote rather than text. However, it cites no authority (and none exists) for its proposition that the Supreme Court cannot or does not address legal issues in footnotes.

WMC states that "a fair interpretation" of footnote 31 is that the Court "merely chose to find" that § 227.10(2m) was inapplicable to the case, without further explanation. WMC Br. at 13. It illogically argues that the Court acknowledged and discussed but failed to sufficiently address a statute that – according to WMC – negates its entire ruling. Its assertion also ignores the fact that DNR and petitioners argued (and the Court agreed) "that Wis. Stat. ch. 281 does explicitly confer authority upon the DNR to consider potential environmental harm presented by a proposed high capacity well." 2011 WI 47, fn. 31.

DNR wholly ignores the Court's description of DNR's authority as "explicit." WMC argues that §§ 281.11 and 281.12 do not contain sufficiently explicit authority to protect Public Trust waters, which ignores and is contrary to the specific holding of *Lake Beulah*. WMC Br. at 14-17. WMC quotes a definition of "explicit" that focuses on its distinction from "implied." *Id.* at 14. It then inappropriately conflates the terms "implied" and "general."

In *Lake Beulah*, the Court held that DNR has both the authority and a general duty to protect Public Trust waters, grounded in both the Wisconsin Constitution and specific state statutes. 2011 WI 54, ¶¶ 3 and 62. However, that does not mean that those obligations are

implied, or that §§ 281.11 and 281.12 do not provide explicit authority. To the contrary, the Supreme Court in *Lake Beulah* recognized that these statutes convey specific authority to DNR to plan and manage regulatory programs to "protect, maintain and improve the quality and management of the waters of the state," (§ 281.11) and that this statutory authority reflects the Legislature's delegation of the State's constitutional duties to DNR as trustee of public waters.

DNR/WMC would have this Court rule that DNR does not have the authority or duty to protect Public Trust waters from the effects of high capacity wells because that authority is not found in § 281.34. DNR Br. at 20, 24-25; WMC Br. at 20-21. WMC also argues that § 281.34 is the exclusive basis for regulating wells. WMC Br. at 19-20. These are the same arguments that were expressly rejected in *Lake Beulah*. 2011 WI 54, ¶ 41 (*see generally*, ¶¶ 39-43). In essence, DNR/WMC asks this Court to overrule the Supreme Court.

WMC also relies on partial quotes from statements by the governor, his Department of Administration secretary, and one legislator as legislative history of the statute's intent. *Id*. at 15. These citations cannot be considered for two reasons. First, statements by individuals, including legislators, may not be considered as evidence of legislative intent. *See, e.g.*, *RURAL v. PSC*, 2000 WI 129, fn. 20 and 29, 239 Wis. 2d 660, 610 N.W.2d 888; *Labor & Farm Party v. Elections Board*, 117 Wis. 2d 351, 356, 344 N.W.2d 177 (1984). Additionally, all of WMC's citations and quotes relate to § 227.11, a separate statutory section regarding agency rulemaking authority: Section 227.10(2m) relates to agency decision-making authority. Moreover, as discussed in Petitioners' Principal Brief at 23-24, § 227.11 contains language specifically relating to limitations in rulemaking authority that is not found in § 227.10(2m). It is a basic rule of statutory construction that if words are used in one section but not in another section of a statute, the Legislature intended a different meaning. *See, e.g.*, *RURAL*, 2000 WI 129, ¶ 39.

WMC would have this Court overrule the Supreme Court based on a general modification to state administrative statutes in Act 21, even though both the session law and legislative history make no mention of *Lake Beulah*, high capacity wells, or chapter 281. The bottom line is that there is nothing in § 227.10(2m) or its legislative history that suggests, let alone dictates, that it was intended to overrule or reverse *Lake Beulah*.

B. *Lake Beulah* Was Not Overruled by *Rock-Koshkonong*.

DNR and WMC propose a new rationale for rejecting the *Lake Beulah* decision: that *Lake Beulah* is no longer viable because it predates *Rock-Koshkonong*. DNR Br. at 36-38; WMC Br. at 17-18. However, the *Rock-Koshkonong* decision, consisting of over 150 paragraphs, barely mentions *Lake Beulah*, and then only approvingly. *See, e.g.*, 2013 WI 74, ¶¶ 53, 70 and 72. The assertion that a 4-3 Supreme Court discussing a different statutory program and issue implicitly reversed a unanimous decision issued only two years earlier is unpersuasive on its face.

DNR/WMC's argument also is predicated on fundamental misunderstanding of the relationship between constitutional duties and police powers regarding state waters, creating an artificial conflict where none exists. DNR/WMC posit a simplistic, false dichotomy between Public Trust duties and police power authorities that fails to recognize that surface waters protected by the Public Trust Doctrine are hydrologically connected to groundwater resources.[6]

DNR/WMC argue that the Supreme Court in *Lake Beulah* ruled that groundwater is entitled to protection under the Public Trust Doctrine, but that *Rock-Koshkonong* nullified that holding by determining that the Public Trust Doctrine only protects surface waters below the

[6] The Supreme Court has long recognized the interrelationship between Public Trust navigable waters and other waters of the state. *See, e.g., Rock-Koshkonong*, 2013 WI 74, ¶ 99, quoting *Just v. Marinette County*, 56 Wis. 2d 7, 16-18, 201 Wis. 2d 761 (1972).

ordinary high water mark. DNR Br. at 25-26; WMC Br. at 17-19. They then argue that DNR's management of groundwater withdrawals therefore cannot implicate the Public Trust Doctrine, but derives solely from police powers that can be granted or withdrawn by the Legislature without constitutional consequence. DNR Br. at 28-29, 34-35. They are wrong on all points.

The Court in *Lake Beulah* never determined that DNR's constitutionally based authority and duty derived from a duty to protect groundwater. While groundwater falls within the definition of "waters of the state" under § 227.11, it plainly is not a navigable water.[7] Rather, the Court's decision was premised on the duty to protect Lake Beulah, a Public Trust water, and the impact of groundwater withdrawal on that Public Trust resource:

> It is undisputed that Lake Beulah is a navigable water. Thus, we begin our analysis with the applicability of the public trust doctrine to the DNR's regulation of high capacity wells because "[w]hen considering actions that affect navigable waters of the state, one must start with the public trust doctrine, rooted in Article IX, Section 1 of the Wisconsin Constitution."

2011 WI 54, ¶ 30, quoting *Hilton v. Dept. of Natural Resources*, 2006 WI 84, ¶ 18, 293 Wis. 2d 1, 717 N.W.2d 166. The Court then held that DNR, as the legislatively delegated trustee of Public Trust waters, had the duty to protect those Public Trust waters through, *inter alia*, its regulation of high capacity wells:

> [W]e conclude that, through Wis. Stat. § 281.11 and § 281.12, the legislature has delegated the State's public trust duties to the DNR in the context of its regulation of high capacity wells and their potential effect on navigable waters such as Lake Beulah.

Id., ¶ 34. The Court recognized that groundwater and navigable waters are hydrologically interconnected, *i.e.*, groundwater withdrawals can adversely impact the navigable waters.

[7] DNR proffers an erroneous straw-man argument that Petitioners have confused "waters of the state" with "Public Trust" waters. DNR Br. at 29-30. As discussed in Petitioners' Principal Brief at 3-5, 7-11, and 14-17 and herein, the constitutional duty identified in *Lake Beulah* is predicated on the impact of groundwater withdrawals on lakes and streams, which are Public Trust waters, and the waters at risk from the wells challenged herein are Public Trust lakes and streams.

In *Rock-Koshkonong*, the principal issues related to the scope of DNR's authority and duties to manage water levels in impoundment lakes through the regulation of dams, pursuant to Wis. Stat. § 31.02(1). 2013 WI 74, ¶¶ 4-8. All of the issues presented were statutory, and none raised a constitutional question. *Id*. Additionally, the Court's conclusion focused on the application of § 31.02(1), particularly the kind of economic impact evidence that DNR must consider in evaluating a proposed water level order. *Id.*, ¶¶ 150-153.

Although not required to reach its decision, the majority opinion discussed the limits of applying the Public Trust Doctrine in the context of an upland wetland. Specifically, the petitioners disputed DNR's authority to consider the impacts of the water level on private, non-navigable wetlands adjacent to and upland from Lake Koshkonong. *Id.*, ¶ 65.

After a lengthy discussion of the roots of the Public Trust Doctrine and its effect on ownership of land,[8] the Court held:

> There is no constitutional foundation for *public trust* over land, including non-navigable wetlands, that is not below the OHWM of a navigable lake or stream. Applying the state's police power to land above or beyond the OHWM of navigable waters – to protect the public interest *in navigable waters* – is different from asserting public trust jurisdiction over non-navigable land and water.

Id., ¶ 86 (italics in original).

This holding, however, did not end the Court's discussion. It went on to distinguish between a statute grounded in the constitutional Public Trust Doctrine and a statute grounded in the state's general police powers. Using § 31.02(1) as an illustration, the Court made a distinction between a statute whose purpose is to fulfill the state's Public Trust responsibilities a statute more generally intended to protect public health, safety and welfare, irrespective of impacts on Public Trust resources:

[8] The Court observed that the land beneath a lake is owned by the public, and that land beneath a stream is subject to only a limited, qualified ownership in the adjacent riparian. *Id.*, ¶ 78.

> If the statute read only that the department "in the interest of public rights in navigable waters," may regulate and control the level and flow of waters in all navigable waters, the statute would be seen as a direct enforcement mechanism for the public trust in navigable waters. But the statute does more. It contains a disjunctive element giving the department authority to regulate and control the flow of water in all navigable waters "to promote safety and protect life, health and property. Wis. Stat. § 31.02(1). Because the quoted language follows the key word "or," the department is given distinct and different authority to consider interests affected by the level of the "navigable waters."

Id., ¶ 103.

This discussion in *Rock-Koshkonong* relied on the Court's prior ruling in *Just v. Marinette County*. 2013 WI 74, ¶¶ 95-101. In *Just*, the Court stated: "Lands adjacent to or near navigable waters exist in a special relationship to the state…, and are subject to the state's public trust powers…." 56 Wis. 2d at 18-19. That is, jurisdiction is grounded in the Public Trust Doctrine when the resource that is the object of protection is a Public Trust water, irrespective of whether the State is managing a non-Trust resource to fulfill that duty.

There is nothing inconsistent in the *Lake Beulah* and *Rock-Koshkonong* decisions. The Court in *Rock-Koshkonong* addressed a case in which DNR was relying on the Public Trust Doctrine and regulation of Public Trust waters to protect upland resources that were not Public Trust resources. In *Lake Beulah*, the Court confirmed DNR's delegated constitutional authority to regulate groundwater to protect lakes and streams. Furthermore, the Court in *Rock-Koshkonong* (and *Just*) held that a statute intended to protect Public Trust waters is constitutionally grounded, regardless of whether it authorizes management of non-Trust resources to fulfill that goal. That is exactly how the same Court ruled in *Lake Beulah* a mere two years earlier.

C. The Legislature Has Not Fulfilled the State's Public Trust Duties Through Other Statutes.

DNR and WMC do not dispute that DNR's administration of the high capacity well program, as now constrained by its adoption of the AG opinion's interpretation of § 227.10(2m), fails to protect Public Trust resources. They do not dispute that Public Trust waters will be severely damaged or destroyed by the newly approved wells challenged herein. Rather, DNR argues that there are other statutes that afford citizens the opportunity to challenge high capacity wells, including an action under § 30.294 to enjoin violations of state law; a petition under § 31.02(1) to set a water level; a challenge to DNR's WEPA rule; and a common law remedy for unreasonable harm to groundwater. DNR Br. at 33.

The statutes cited by DNR do not fulfill the State's duty to protect Public Trust waters for the simple reason that the duty to protect those resources is an "affirmative obligation" of the State, not the burden of private citizens. *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 527, 271 N.W.2d 69 (1978); *see also, Lake Beulah*, 2011 WI 54, ¶ 32-33; *ABKA Ltd. Partnership v. DNR*, 2002 WI 106, ¶ 12, 255 Wis. 2d 486, 648 N.W.2d 854; *Priewe*, 103 Wis. at 549-50. Additionally, none of these statutes is applicable to this situation, for the following reasons:

- § 30.294 only applies to violations of chapter 30, which is not relevant here.
- § 31.02(1) is part of the bridges and dams statutes: it applies to controlling water levels on lakes through impoundments (dams), not protecting a lake from groundwater withdrawals.
- Challenging DNR's WEPA rules (Wis. Adm. Code ch. NR 150) is irrelevant, since this case does not relate to the scope of a WEPA environmental assessment. The Court in *Lake Beulah* expressly rejected the notion that DNR's authority is limited by WEPA. 2011 WI 47, ¶¶ 40-41.[9]

[9] Additionally, WEPA analysis does not direct an outcome. *Clean Wisconsin v. Public Service Comm'n*, 2005 WI 93, ¶ 188, 282 Wis. 2d 250, 700 N.W.2d 768. It exists to ensure that DNR considers

- A nuisance or other common law claim for unreasonable use cannot be maintained until there is in fact an unreasonable use, *i.e.*, the damage has already occurred. DNR has long asserted that "after-the-fact remedies would not be sufficient to protect public trust resources." *Id.*, ¶ 28. Additionally, there are limitations to the extent that one can bring a nuisance action relating to agricultural practices. *See* Wis. Stat. § 823.08. Furthermore, common law claims would be impractical when the cause of the impact is attributable to multiple sources.

DNR also observes that it may bring actions under § 30.03 to abate a violation of chapter 30 or 31. Here, however, it is the DNR that has authorized the wells. Moreover, these cases do not involve any actions under chapter 30 or 31 that would trigger § 30.03.

WMC cites 2017 Wis. Act 10, a new session law that was enacted less than three months ago – months after the well approvals challenged herein. WMC Br. at 21-23. WMC asserts that the entire scope of that new law: a) allows owners of existing wells to replace, reconstruct or transfer them without any DNR oversight (*i.e.*, further relaxing protection of natural resources); and b) requires DNR to conduct a hydrogeological study of a discrete area in the Central Sands over the course of three years and report its findings to the Legislature. In the meantime, and unless the law is further modified after this study, WMC is effectively asking the Court to rule that there is no constraint to DNR continuing to approve high capacity well withdrawals that will significantly damage or destroy Public Trust waters. WMC does not explain how this new law fulfills the state's Public Trust responsibilities, particularly for the challenged approvals that occurred prior to its enactment, and none is apparent.

IV. DNR BREACHED ITS DUTY TO PROTECT PUBLIC TRUST WATERS.

In the case at bar, the only pertinent facts demonstrate that DNR scientists had determined that groundwater withdrawals from the proposed wells would adversely impact

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environmental consequences and to inform the public, but it does not require, *inter alia*, that a well be denied because it devastates Public Trust waters. *Id*.

Public Trust waters, including lakes and DNR-designated Exceptional Resource Waters, Outstanding Resource Waters, and trout streams. That scientific information triggered DNR's duty to consider impacts to surface waters, as required by *Lake Beulah*.

It also cannot be disputed that DNR did not take the actions necessary to protect those Public Trust waters from significant degradation. As discussed in Petitioners' Principal Brief at 6-7, DNR held the applications in abeyance, creating a backlog to justify a more streamlined process, and then approved them unconditionally, based solely on the AG opinion that DNR lacked the authority to protect those Public Trust waters.

V. THE *AMICUS* BRIEFS PROVIDE VALUABLE CONTEXT THAT HELP INFORM THE COURT OF EXISTING AND LIKELY FUTURE IMPACTS.

DNR argues that the Court should not consider the *amicus* briefs, mischaracterizing their content as advocating legislative policy. To the contrary, neither of the *amicus* briefs suggests that that this Court should change legislative policy embodied in its delegation of Public Trust responsibilities to DNR. Rather, *amici* urge the Court to reinforce DNR's constitutionally and statutorily delegated responsibilities, consistent with Petitioners' briefs. They add value to the Court by presenting the real-world context to and consequences of DNR's and WMC's narrowly constrained approach to DNR's duties.

Additionally, *amici* do not suggest a regulatory oversight that would undermine DNR's administration of the high capacity well program or create undue uncertainty. Rather, they argue that DNR should be required to follow the procedure that it effectively followed for the five years between the *Lake Beulah* decision and the AG opinion. But for DNR's decision to withhold action on well applications that should have been denied, that program created no backlog or unmanageable conditions.

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 23rd day of August, 2017.

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