

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II

Case Nos. 16AP1688 and 16AP2502

---

CLEAN WISCONSIN, INC., LYNDIA COCHART,  
AMY COCHART, ROGER DEJARDIN, SANDRA  
WINNEMUELLER AND CHAD COCHART,  
PETITIONERS-RESPONDENTS,

v.

WISCONSIN DEPARTMENT OF NATURAL  
RESOURCES, RESPONDENT-APPELLANT,  
*and*

KINNARD FARMS, INC.,  
INTERVENOR-CO-APPELLANT

---

***AMICUS CURIAE* BRIEF BY WISCONSIN  
MANUFACTURERS AND COMMERCE, INC.,  
MIDWEST FOOD PRODUCTS ASSOCIATION,  
WISCONSIN CHEESE MAKERS ASSOCIATION,  
DAIRY BUSINESS ASSOCIATION, INC., WISCONSIN  
POTATO AND VEGETABLE GROWERS  
ASSOCIATION, AND WISCONSIN FARM BUREAU  
FEDERATION**

---

On Appeal from The Dane County Circuit Court,  
The Honorable John W. Markson, Presiding,  
Case No. 15-cv-2633

---

Robert I. Fassbender (#1013985)  
Great Lakes Legal Foundation  
10 East Doty Street, Suite 504  
Madison, Wisconsin 53703  
[fassbender@greatlakeslegalfoundation.org](mailto:fassbender@greatlakeslegalfoundation.org)  
(608) 310-5315

Attorney for Amici  
July 16, 2018

## TABLE OF CONTENTS

INTEREST OF THE AMICI .....	1
INTRODUCTION .....	1
STANDARD OF REVIEW .....	3
ARGUMENT	
I Court Decisions Finding “Fairly” or “Reasonably” Implied Agency Authorities Creates Overly Broad Regulatory Powers and Regulatory Uncertainty. ....	4
II The Term “Explicit” Was Purposefully Chosen by The Legislature to Prohibit Ad Hoc Regulatory Mandates Such as an Animal Unit Limit. ....	7
III DNR Lacks Explicit Authority to Impose Off-Site Groundwater Monitoring Requirements in Wastewater Permits. ....	9
CONCLUSION.....	11
APPENDIX	

## INTEREST OF THE AMICI

Amici, on behalf of their members, have an interest in assuring that Wisconsin agencies strictly follow the procedures and limits set forth in Wisconsin Statutes Chapter 227, and for this Case, the requirement of Wis. Stat. § 227.10(2m) that agencies regulate only when explicitly authorized by the legislature to do so.

## INTRODUCTION

It has been reported that Judge Henry J. Friendly told Justice Frankfurter of “his professional experience that indicated the federal administrative agencies ‘did not combine the celerity of Mercury, the wisdom of Minerva, and the purity of Diana’ to quite the extent professor Frankfurter had taught him.”<sup>1</sup> Fifty-seven years later, Chief Justice Roberts articulated the problem more directly – “the danger posed by the growing power of the administrative state cannot be dismissed.”<sup>2</sup>

Despite these well-grounded fears over the ever-expanding power and reach of administrative agencies, Wisconsin courts have on occasion bestowed Wisconsin agencies with unbridled implied authorities with the hope that they will exercise their rule with wisdom and purity. In *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, for example, with respect to high capacity well permits, the Wisconsin Supreme Court found in a statutory preamble that Wisconsin Department of Natural Resources (DNR) had the broad authority and general duty to protect the waters of the state. This authority and duty was not moored to any concrete

---

<sup>1</sup> Arthur J. Keefe, Daniel A. Reznick & Arthur S. Miller, *The Federal Administrative Agencies: The Need for Better Definition of Standards*. Henry J. Friendly, Judge, United States Court of Appeals for the Second Circuit.

<sup>2</sup> *City of Arlington v. FCC*, 133 S.Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).

legislative foundation. The result was bureaucratic paralysis within DNR that created regulatory uncertainty and delays for businesses needing water for agricultural and industrial production. It cost Wisconsin jobs. Certainly, these were all unintended consequences.

Justice William O. Douglas believed that a “constant legislative reappraisal of statutes as construed by the courts... is a healthy practice.”<sup>3</sup> Such reappraisal was undertaken by the Wisconsin legislature as it relates to implied agency authorities, particularly arising from prefatory statutory clauses. Through 2011 Wis. Act 21 (Act 21), the legislature directed the courts to change course on the level of legislative clarity needed to empower unelected regulators. Our elected officials took back their preeminent power to legislate by requiring agencies have *explicit* legislative delegation of authority.

Act 21 created Wis. Stat. § 227.10 (2m) prohibiting administrative agencies from imposing regulatory mandates not explicitly required or allowed by statute or administrative rule. Wis. Stat. §§ 227.11 (2)(a)1. and 2. provide that statutory preambles are not to be used as a regulatory wildcard by agencies (or courts) where explicit statutory authority does not exist. And, Wis. Stat. § 227.11 (2)(a)3. made it clear that statutory standards, requirements and thresholds are ceilings - not floors - to an agency’s authority.

This case involves two wastewater permit conditions – off-site groundwater monitoring wells and animal unit limits – that do not comport with Act 21’s clear directives.

---

<sup>3</sup> Overruled? Legislative Overrides, Pluralism, and Contemporary Court-Congress Relations, Jacob Barnes, pp. 1, (2004).

## STANDARD OF REVIEW

The Wisconsin Supreme Court in *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, 373 Wis. 2d 287, 890 N.W2d 598 (2018), could not be clearer – “We have also decided to end our practice of deferring to administrative agencies’ conclusions of law.” *Tetra Tech* ¶ 108.

However, pursuant to Wis. Stat. § 227.57(10), the Court stated they “will give ‘due weight’ to the experience, technical competence, and specialized knowledge of an administrative agency as we consider its arguments.” *Tetra Tech*, 2018 WI 75, ¶108. But giving “due weight” to an agency’s expertise is not deference, and not to be confused with “due weight deference.” On this, the Court notes that “[t]oday, we restore the principle of ‘due weight’ to its original form by removing the patina of ‘deference’ with which our cases have covered it.” *Tetra Tech*, 2018 WI 75, ¶71.

The “persuasiveness” of the agency’s perspective under Wis. Stat. § 227.57(10) necessarily presumes there is an agency perspective on the issue before the court. Here, there is none.

When Kinnard petitioned the DNR Secretary for reconsideration of ALJ Boldt’s decision, the Secretary denied review on the grounds the issues would best be addressed in the courts. DNR Br. at 11.

ALJ Boldt made no reference to any Act 21 provisions that limit agency authority. In fact, he imposed animal unit limits despite his conclusion that “no applicable rule or statute requires a WPDES permit to specify a number of animal units at a CAFO facility.” App. 12. ¶63. His conclusions relating to DNR authority are irrelevant as nothing in his analysis touches upon the issue before this court, which is whether DNR has “explicit” authority required under Wis. Stat. § 227.10 (2m).

## ARGUMENT

### **I Court Decisions Finding “Fairly” or “Reasonably” Implied Agency Authorities Create Overly Broad Regulatory Powers and Regulatory Uncertainty.**

[“A]dministrative agencies are creations of the Legislature and are responsible to it. Consequently the legislature may withdraw powers which have been granted, prescribed the procedure through which granted powers are to be exercised, and if necessary wipe out the agency entirely.” *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 507, 220 N.W. 929, 941 (1928). The court recognized in *Whitman* the necessity for the legislature to “fix limits” in which the agency may operate. *Whitman*, 220 N.W. 929, 941. And that “every such agency must conform precisely into the statute which grants the power. . .” *Whitman*, 220 N.W. 929, 942. But over the years the courts have unmoored agencies authorities from fixed legislative foundations by finding fairly or reasonably implied authorities, often arising from general prefatory clauses in the statutes.

In *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 354, 190 N.W.2d 529, 532 (1971), *vacated on other grounds by* 408 U.S. 915 (1972), the Wisconsin Supreme Court stated that “agencies have only such powers as expressly granted to them or necessarily implied.” *Id.* But looking to other jurisdictions, the Court then found that “a power which is not expressed [may] be reasonably implied from the express terms of the statute.” *Id.*

In 1981, the Wisconsin Supreme Court reaffirmed that implied powers not be “necessarily implied” when articulating that “an administrative agency has only those powers as are expressly conferred upon it or which may be fairly implied from the statutes.” *Brown Cty.*

*v. Dep't of Health and Soc. Servs.*, 103 Wis. 2d 37, 48, 307 N.W.2d 247, 250 (1981).

So, the courts drifted from a requirement that agencies have a “fixed” legislative foundation in which they “must conform precisely,” to finding authorities if “necessarily implied,” and finally, to the standard that authorities need only be “reasonably” or “fairly” implied.

A defining moment on implied authorities was *Lake Beulah*. “We 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.” *Lake Beulah*, ¶34.

Invariably, unlimited powers come with unintelligible standards without needed guidelines for the regulators or the regulated community. For example, the court in *Lake Beulah* directed DNR to “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 the trustee of the public trust resources is implicated by a proposed high capacity well permit application.” *Lake Beulah*, ¶63.

Rather than bringing clarity to Wisconsin’s high capacity well program, the *Lake Beulah* decision created regulatory uncertainty. DNR management attempted to set forth workable standards to comply with the *Lake Beulah* directive that their staff could apply in the field. The document titled “DNR Reviews Following the *Lake Beulah* Supreme Court Decision,” set forth guidance for more extensive environmental reviews “on a more comprehensive range of waters of the state” than required under the existing program. *Id.* They directed DNR staff to “consider the combined effects of all wells on the property

when evaluating potential impacts.” *Id.* DNR was setting forth requirements that applied to all applicants that would have the force of law. In other words, the two-page guidance document was an unlawful rule. See Wis. Stat. § 227.10(1) and § 227.01(13). To promulgate these requirements legally would take several years. The program came to a halt causing significant backlogs as DNR attempted to comply with conflicting legal requirements.

This regulatory uncertainty had a detrimental impact on Wisconsin businesses needing high capacity well permits for agricultural and industrial production. One company provided a notice to their suppliers stating that because of the *Lake Beulah* decision, “growers’ ability to obtain permits for new or replacement high-capacity irrigation wells is in doubt.” Exhibit B. As a result, they had to “immediately suspend future investment in Wisconsin irrigated agricultural lands and purchases of related agricultural equipment.” *Id.* The dairy industry faced similar problems.<sup>4</sup>

This background is relevant to this case because the *Lake Beulah* scenario is the likely result if the Petitioners convince this Court that the ad hoc requirements for animal unit limits and off-site monitoring wells can and should be imposed on a case-by-case basis. Policies that have such broad implications to an entire industry should be set by the legislature not the courts or ALJs. Fortunately, Act 21 prohibits administrative agencies from imposing such regulatory mandates that not are explicitly required or allowed.

---

<sup>4</sup> John Holevoet, Wisconsin Dairy Business Association (DBA), “The delay caused by the [high capacity permit] backlog cost dairy farmers thousands of dollars in additional attorney, engineering, and construction costs. It also caused more than one DBA member to abandon his proposed project entirely.” Exhibit C.



## II The Term “Explicit” Was Purposefully Chosen by The Legislature to Prohibit Ad Hoc Regulatory Mandates Such as an Animal Unit Limit.

Wis. Stat. § 227.10(2m) provides:

No agency may implement or enforce any standard, requirement, or threshold, including a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter. . . .

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

The dispositive language in Wis. Stat. § 227.10(2m) is the term “explicitly.” It is neither ambiguous nor vague. Its plain meaning is:

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

Given the meaning of explicit, DNR’s authority to impose animal unit limits must be clearly stated in the statutes or rules, and notably, *not* implied.

We agree with ALJ Boldt’s conclusion that “no applicable rule or statute requires a WPDES permit to specify a number of animal units at a CAFO facility.” App.12, ¶63 He thought it “does provide a useful longer-term management tool.” App.12, ¶65. He notes the Petitioners also found the quota “a good idea,” and that it will provide “clarity and transparency.” App.15.

Petitioners assert that ALJ Boldt determined that “an animal unit limit was necessary to assure compliance with the 180-day storage effluent limitation in NR 243.15(3)(k). Pet. Br. 24. But being “useful” or providing “clarity and transparency” is not equivalent to assuring compliance. Nowhere in his findings of fact, conclusions of law and order does ALJ Boldt conclude the animal unit limit is necessary to assure compliance with any statutory regulatory provisions. In fact, he specifically notes that there is no applicable rule or statute requiring such a condition.

NR 243.15(3)(k) allows for an important exception when calculating design volume. “Liquid manure that is not directed to any facility or structure covered by the operation’s WPDES permit may be subtracted from the design volume calculation.” Requiring an animal unit limit deprives Kinnard Farms the ability to exercise its legal right under this section to divert manure off-site, which in turn, would allow additional animal units without breaching the 180-day requirement. Clearly, a limit on cows is not necessary to assure compliance with the 180-day storage requirement.

In addition, NR 423.15 sets forth facility design requirements for CAFO facilities. ALJ Boldt acknowledged that the authority for these design regulations arises from Wis. Stat. § 281.41. App. 4, ¶11. These requirements for approval plans apply to proposed “sewerage systems” that are defined to mean “all structures, conduits and pipelines by which sewage is collected and disposed of.” Wis. Stat. § 281.41 (14). Because cows are not structures, conduits or pipelines, this section of the statute provides no authority for limits on animal units.

There are also some policy considerations beyond the lack of legal authority of concern to the amici organizations that relate to ALJ Boldt’s conclusion that animal unit limit is a useful “management tool.”

From our perspective, DNR's job is to provide effluent limits, not to manage our facilities. We understand our processes better than DNR and have the technical expertise to assure compliance with those standards without limits on production.

### **III DNR Lacks Explicit Authority to Impose Off-Site Groundwater Monitoring Requirements in Wastewater Permits.**

The only requirements in statute or rule that explicitly permit the installation of monitoring systems relating to groundwater contamination is set forth at NR 243.15(3)(c) regarding "leakage collection or monitoring." Under this provision, DNR "may require the installation of a . . . monitoring system" with consideration of the proximity of the facility to areas that "are susceptible to groundwater contamination." NR 243.15(3)(c)2.a.

The attorney general, in OAG-04-16 (Dec. 8, 2017), set forth a three-stepped analytical inquiry that would apply here to determine whether the NR 245 design requirements relating to monitor groundwater monitoring systems contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in Wis. Stat § 281.41. ¶16.

This analysis focuses on Wis. Stat §227.11(2)(a)3., also created by Act 21, that provides:

A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

First, one must determine whether both the rule and the statute contain a "specific standard, requirement, or threshold" governing the same subject matter conduct. ¶17. Here, Wis. Stat § 281.41 governs

plan approvals for “sewerage systems.” ALJ Boldt acknowledge that NR 243.15 design requirements arise from the sewerage system design plan requirements at Wis. Stat § 281.41.

Second, the inquiry requires a comparison of the two standards to determine if the rule is “more restrictive” than the statute. Wis. Stat. § 281.41 applies to “sewerage systems” that are defined to mean “all structures, conduits and pipelines for which sewage is collected and disposed.” Wis. Stat § 281.41. Monitoring wells are not structures, conduits, or pipelines in which sewage is collected or disposed of. Thus, the requirement relating to groundwater monitoring systems in NR 243.15 is more restrictive as it requires costly monitoring wells not required for Wis. Stat § 281.41 systems.

The third step if the rule is more restrictive than the statute is to assess whether the rule is otherwise explicitly required or permitted. The answer is no.

In *Maple Leaf Farms, Inc. v. DNR*, 2001 WI App 170, 247 Wis. 2d 96, 633 N.W.2d 720, Maple Leaf raises a single issue: “the DNR’s authority to regulate the land application of manure on off-site croplands.” *Maple Leaf*, 247 Wis. 2d 100. The Court found that Wis. Stat. ch. 283 does not expressly authorize DNR to regulate off-site manure applications. *Maple Leaf*, 247 Wis. 2d 104. That should end the inquiry. There are no explicit authorities relating to off-site manure application, and by implication, off-site monitoring wells.

Petitioners assert other provisions provide implied authorities for the imposition of off-site monitoring wells. As with the animal unit limit, they assert Wis. Stat. § 283.31(4)’s language relating to assuring compliance. This broad statement is not explicit authority. Should off-site groundwater monitoring wells be a policy objective, it should be enacted by the legislative as were the six enumerated conditions

specified by the legislature to be included in a WPDES permit. See Wis. Stat § 283.31(4)(a)-(f).

It is also noting that a 15-year DNR veteran acknowledged that “he is unaware of any CAFOs that has been required by the WPDES permit program to install background wells and collect groundwater data.” App.9, ¶50. There are hundreds of CAFO facilities with WPDES permits, none of which required off-site monitoring wells to assure compliance. ALJ Boldt’s rationale for requiring off-site monitoring wells appears to be more of an economic consideration rather than a compliance necessity. He found a UW-Oshkosh geology professor “was convincing that an effective groundwater monitoring system can be initiated for as little as \$50,000.” Cost is not relevant to a determination whether a provision is necessary to assure compliance.

### **CONCLUSION**

This Court should reverse the circuit court’s decision.

DATED this 16th day of July, 2018.

Respectfully Submitted,

By:\_\_\_\_\_

Robert I. Fassbender (#1013985)  
GREAT LAKES LEGAL FOUNDATION  
10 East Doty Street, Suite 504  
Madison, WI 53703  
[fassbender@greatlakeslegalfoundation.org](mailto:fassbender@greatlakeslegalfoundation.org)  
Telephone: (608) 310-5315

Attorney for Amici

## **FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for a non-party brief produced with a proportional serif font. The length of this brief, including footnotes, is 2,950 words.

/s/Robert I. Fassbender

---

Robert I. Fassbender

## **CERTIFICATION REGARDING ELECTRONIC BRIEF**

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

/s/Robert I. Fassbender

---

Robert I. Fassbender

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of July, 2018, I caused a copy of this motion to be served upon each of the following persons via U.S. Mail, First Class:

Jordan J. Hemaïdan  
Joseph D. Brydges  
Michael Best & Friedrich LLP  
P.O. Box 1806  
Madison, WI 53701-1806

Attorney Kathryn A. Nekola  
Attorney Evan Feinauer  
Clean Wisconsin, Inc.  
634 W. Main Street, Suite 300  
Madison, WI 53703

Attorney Sarah Catherine Geers  
Attorney Tressie Kelleher Kamp  
Midwest Environmental Advocates, Inc.  
612 West Main Street, Suite 302  
Madison, WI 53703

Attorney Amy Catherine Miller  
Attorney Ryan J. Walsh  
Wisconsin Department of Justice  
P.O. Box 7857  
Madison, WI 53703

By: /s/Robert I. Fassbender

Robert I. Fassbender

# **APPENDIX**



Document Description

Appendix No.

Exhibit A – *High Capacity Well Applications – DNR Reviews following the Lake Beulah Supreme Court Decision* .....App 1-2

Exhibit B – *Heartland Farms notice to suppliers* ..... App 3

Exhibit C – *Affidavit of John Holevoet of the Wisconsin Dairy Business Association, Inc.* .....App 4-6

EXH A  
**High Capacity Well Applications**  
**DNR Reviews following the *Lake Beulah* Supreme Court Decision**

Prior to July 2011, when reviewing high capacity well applications the DNR primarily considered potential impacts to public water supply wells, large springs, and trout streams and outstanding and exceptional resource waters within 1200 feet of the proposed well. In 2011, the Wisconsin Supreme Court's decision in *Lake Beulah Management District v. DNR*, 2011 WI 54 concluded that "the DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state". In order to fulfill this general duty, DNR now conducts environmental reviews of potential impacts of proposed high capacity wells on a more comprehensive range of waters of the state. **This document is intended to provide some general suggestions regarding applications for high capacity wells. By following these suggestions, applications will generally be more complete, which will facilitate DNR review of the application, and the proposed well will be less likely to adversely impact waters of the state.**

- **List and Locate All Wells on a Property**

DNR reviewers consider the combined effect of all wells on a property when evaluating potential impacts. Because of this, it is important that high capacity well applications include accurate locations, well construction information and actual or estimated pumping capacity and water use for all existing wells on the property.

- **Stay as Far Away from Trout Streams, ORWs and ERWs as Feasible**

Applicants for high capacity wells should avoid siting high capacity wells close to trout streams, ORWs and ERWs. New wells should be located as far from one of these types of water bodies as feasible, given the physical, economic and practical limitation of any given property.

- **Avoid Other Surface Water Features**

Applicants should also take into account the presence of other surface water features (lakes, streams and wetlands) and site wells as far from these features as practicable, especially headwater streams, small lakes and other water bodies that have been designated as Areas of Special Natural Resource Interest (ASNRI). The DNR Surface Water viewer (<http://dnrm.wi.gov/imf/imf.jsp?site=SurfaceWaterViewer>) is one tool available to help identify water resources in the vicinity of the proposed well.

- **Try to stay at least 1000' from other wells**

Applicants should similarly attempt to minimize the potential for impacts to private water supply wells on adjacent properties by locating high capacity wells as far away as possible from these wells. If the nearest water supply well is greater than 1000 feet from the proposed high capacity well, it is less likely that the proposed well will impact existing water supply wells. This 1000-foot recommendation generally applies to water table wells constructed in unconsolidated sediments, and there may be cases where additional review is needed at distances greater than 1000 feet.

**An application proposing to site a high capacity well within 2000 feet of other surface waters or wetlands should include:**

- Information about anticipated water use, such as number of acres to be irrigated, dates of water use, projected average and maximum weekly or monthly water use, or whether the well will be used on a regular or back-up basis
- Detailed soil boring logs, if available
- Hydrologic test results, if available
- Photos of the water body/wetland of concern

In some cases, DNR may require groundwater or surface water monitoring, hydrologic testing, or other information in order to accurately assess a well's potential impacts. If DNR determines that a proposed well(s) is likely to cause significant adverse environmental impact to a water of the state, the well application will be denied or the approval conditioned to minimize those impacts. DNR reviewers attempt to work with applicants to arrive at practicable changes to the well location, construction, capacity, and pumping limits that will minimize the potential for significant environmental impacts. A high capacity well application would be denied if no practical and environmentally protective solution were possible.

Reviews to determine potential environmental impacts use the best available information; however, this usually involves using generalized aquifer parameters. Applicants who feel that the results of these analyses are overly conservative are encouraged to provide the DNR with additional information (such as pumping test results and/or drawdown data) to allow an evaluation that is more reflective of conditions at their specific site.

The table on the attached page summarizes the DNR's high capacity well reviews following the *Lake Beulah* decision.

**DNR High Capacity Well Reviews to Avoid Significant Adverse Environmental Impacts**

Water Resource	Legal Authority	Criterion	Action
Public Water Supply Well	s. 281.34 & Chapters NR 812 and NR 820	Drawdown > 10'	Additional Environmental Review Required; DNR must deny or condition any approval so as to avoid significant adverse environmental impact
Trout Streams	s. 281.34 & NR 820	Proposed well is within 1200'	
Outstanding (ORW) & Exceptional (ERW) Resource Waters	s. 281.34 & NR 820	Proposed well is within 1200'	
Large springs (flow > 1cfs 80% of the time)	s. 281.34 & NR 820	Significant environmental impact (e.g. reduced flow)	
Water Loss	ss. 281.34 & 281.35; Chapters NR 820 and 142	Water Loss > 95%; Water Loss averages ≥ 2 MGD in any 30-day period	

**Additional Elements of DNR High Capacity Well Reviews following the Lake Beulah decision**

Water Resource	Legal Authority	Primary Focus	Action
Other streams	ss. 281.11 & 281.12 & <i>Lake Beulah</i>	Perennial streams, headwater streams, and high quality fisheries)	Additional review required if DNR determines that potential harm could occur or is presented with concrete scientific evidence of potential harm; DNR must deny or condition any approval so as to avoid significant adverse environmental impact
Other springs	ss. 281.11 & 281.12 & <i>Lake Beulah</i>	Springs with flow ≥ .25 cfs	
Wetlands	ss. 281.11 & 281.12 & <i>Lake Beulah</i>	High quality/groundwater dependent wetlands	
Lakes	ss. 281.11 & 281.12 & <i>Lake Beulah</i>	Lakes less than 600 acres	
Other water supply wells	ss. 281.11 & 281.12 & <i>Lake Beulah</i>	Potential drawdown ≥ 5' (usually within 1000' of proposed well)	

April 2012

*Rosmarie*



### NOTICE TO SUPPLIERS

Dear Supplier:

A recent Wisconsin Supreme Court decision has triggered significant uncertainty for Wisconsin vegetable growers. As a result of this decision, the growers' ability to obtain permits for new or replacement high capacity irrigation wells is in doubt. In considering well permit applications, the Supreme Court has directed our DNR to consider the "harm" and "environmental impact" of each high capacity well on the "waters of the state." Until definitive regulations are adopted or legislative action taken, growers do not have reasonable assurance that their permit applications for construction of new or replacement wells with requisite water capacity will be granted.

After much internal discussion and consideration of the ramifications of this court action, Heartland Farms, Inc., and related Pavelski Family businesses will immediately suspend future investments in Wisconsin irrigated agricultural lands and purchases of related agricultural equipment. It is with deep regret that we have come to this decision. However, the risk and threat to agriculture arising out of this development have left us, as prudent business people, with no other logical course of action.

★ As this Court decision impacts both growers and agricultural suppliers, we would urge you to contact your state Senators and Assembly Representatives to quickly address the adverse effects of this Court decision on the future of vegetable and dairy farming in our state.

If you have questions regarding this notice, please call me at 715-249-5555, Extension 102.  
Thank you.

Sincerely,

Richard Pavelski, CEO  
Heartland Farms, Inc.

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 3

DANE COUNTY

---

CLEAN WISCONSIN, INC,

Petitioners,

v.

Case No. 16CV2816

WISCONSIN DEPARTMENT OF  
NATURAL RESOURCES,

Respondent.

---

**AFFIDAVIT OF JOHN HOLEVOET**

---

STATE OF WISCONSIN )  
COUNTY OF DANE ) ss  
)

John Holevoet, being first duly sworn on oath, deposes and states as follows:

1. I am employed as the Director of Government Affairs for the Wisconsin Dairy Business Association, Inc. ("DBA"). I make this affidavit based upon my personal knowledge.
2. I joined the DBA's government affairs staff in June 2014. I became DBA's Director of Government Affairs in June 2015. In this role, I also guide the government affairs activities of the Dairy Business Milk Marketing Cooperative ("DBMMC"). I grew up on a farm and have in depth knowledge of agriculture and dairy farming.
3. DBA is a nonprofit, statewide organization of dairy producers, vendors, allied industry partners, and professionals actively working to ensure that dairy producers, large and small, remain an active, thriving part of Wisconsin's economy, communities, and food chain. A large part of DBA's work is fostering a positive business and political environment for dairy farming in Wisconsin. This includes being dedicated to the creation and preservation of consistent water, environmental, and waste management regulation.



4. Water is essential to many parts of the dairy industry, from raising livestock to dairy product production. DBA's members rely on high capacity wells to conduct business, and will be particularly affected if their high capacity well permits are modified or rescinded by the Department of Natural Resources (DNR) by order of this court based upon relief sought by petitioners. Two of the parties in the consolidated cases have dairy cattle. James Wysocki/Agri-Alliance Land, LLC, is a DBA member and has a high capacity well permit that is targeted in this case. Many of our other farmer members also have high capacity wells that are essential to their operations. Furthermore, dairy farming is inextricably linked to dairy processing in this state and almost all dairy processors use high capacity wells. DBA's membership includes at least 17 high capacity well permit holders allowing for the operation of 27 separate wells that are essential to their operations. Those high capacity well permits could be modified or rescinded by DNR based upon the relief sought by petitioners.

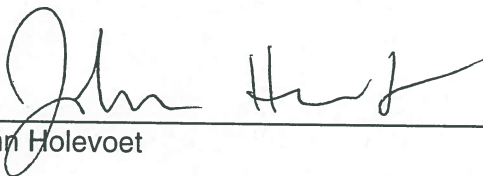
5. When the attorney general's opinion referenced in these consolidated cases was issued, 33 dairy framers had well permit applications languishing in DNR's permit backlog. The delay caused by the backlog cost dairy framers thousands of dollars in additional attorney, engineering, and construction costs. It also caused more than one DBA member to abandon his proposed project entirely. This backlog has been greatly reduced because of DNR policies resulting from the attorney general opinion on the application of 2011 Wis. Act 21 to high capacity well permits. The relief sought by the petitioners would likely return Wisconsin to the ineffective permitting of high capacity wells, including backlogs of permit applications, that was DNR's practice prior to the attorney general's opinion. DBA members will suffer economic harm if that occurs.

6. Finally, DBA has at least three members with existing well permit applications under review that could be denied, approved with unacceptable conditions, or not acted upon by DNR in a timely manner based upon the relief sought by petitioners. Any future filings of well permit applications with the DNR to meet production needs of these and other DBA members

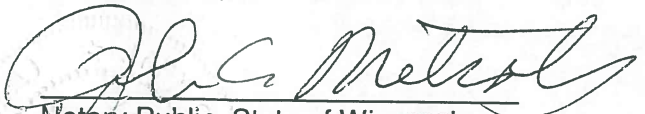
could also be denied, approved with unacceptable conditions, or not acted upon by DNR in a timely manner based upon the relief sought by petitioners.

7. DBA participated in the development of 2011 Wisconsin Act 21, Governor Walker's regulatory reform legislation that was the focus of the attorney general opinion challenged by the petitioners in this case. Eliminating or narrowly construing the requirement that DNR permit decisions be predicated on explicit authority, a requirement found in Wis. Stat. §227.10(2m), a provision created by Act 21, would cause economic injury to DBA members because it would result in DNR modifying or rescinding existing permits, or denying, imposing unacceptable conditions, or delaying action on permit applications.

Dated this \_\_\_\_ day of December, 2016.

  
\_\_\_\_\_  
John Holevoet

Subscribed and sworn to before me  
this 29<sup>th</sup> day of December, 2016

  
\_\_\_\_\_  
Notary Public, State of Wisconsin  
My Commission: Is Permitted