

AN OVERVIEW OF THE WISCONSIN SUPREME COURT'S LAKE BEULAH DECISION

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I. BACKGROUND

- A. Village of East Troy sought approval from the DNR to construct a new municipal well
- B. Proposed well was located approximately 1400 feet from Lake Beulah, an 834-acre lake located in Walworth County
- C. Proposed well would have a 1.4 MGD capacity
- D. Village submitted with its application an April 2003 report that its consultant prepared that indicated that based upon analysis of pump test data, "a well producing [1,440,000 gpd] would avoid any serious disruption of groundwater discharge to Lake Beulah."
- E. DNR granted approval for the proposed well
- F. The legal challenge to DNR's approval of the well resulted in the Lake Beulah decision. *Lake Beulah Management District v. State*, 2011 WI 54, 335 Wis.2d 47, 799 N.W.2d 73 (Decided July 6, 2011)

II. THE PARTIES

- A. Village of East Troy - seeking to construct a new municipal well
- B. Lake Beulah Management District (LBMD) and Lake Beulah Protective and Improvement Association (LBPIA) - the "Conservancies" - seeking to halt or restrict the construction of the well
- C. Wisconsin Department of Natural Resources - reviewing Village's application to construct a well

III. CHRONOLOGY OF THE DISPUTE

2003 - Village applies to the DNR to construct a high capacity municipal well with a capacity of 1.4 MGD

9/4/2003 - DNR grants approval for proposed well. Requires construction to commence within 2 years

10/3/2003 - Lake Beulah Management District files a request for a contested case hearing to challenge the approval

10/2003 - DNR initially denies the petition for a contested case hearing on the basis that it lacks the authority to consider the environmental concerns presented by the District

1/13/2004 - DNR reverses its position and grants a contested case hearing on the issue of whether the DNR should have considered any potentially adverse effects to the waters when it granted approval for the well

3/26/2004 - Village asks the administrative law judge (ALJ) for the contested case to dismiss the petition. Village argues the DNR lacks the statutory authority to consider the environmental effects of the well because the well is not located in a place where Wisconsin statutes require environmental review prior to permit approval

6/11/2004 - ALJ grants Village's motion. Agrees that because the statute requires the DNR to consider certain impacts related to the well, the statute should be construed to exclude consideration of other factors.

7/16/2004 - Lake Beulah Management District and Lake Beulah Protective and Improvement Association (referred to as the "Conservancies") file a petition for judicial review of the 2003 permit in Walworth County

6/24/2005 - Walworth County Circuit Court dismisses the petition and affirms the ALJ's decision

8/3/2005 - Construction of well not yet begun. Village requests an extension of the 2003 permit from the DNR for an additional two years.

9/6/2005 -- DNR grants the Village a two-year extension of the 2003 permit. Courts subsequently treat this as the issuance of a new permit

8/4/2005 - Conservancies move for reconsideration of the Circuit Court's decision regarding the 2003 permit. Circuit Court denies motion for reconsideration. Conservancies appeal the decision to the Court of Appeals

3/3/2006 - Conservancies petition the Walworth County Circuit Court for judicial review of the DNR's decision to issue the 2005 permit

6/28/2006 - Court of Appeals dismisses the appeal because the 2003 permit had expired

8/1/2008 - Village's well begins operating

9/23/2008 - Walworth County Circuit Court denies the petition challenging the 2005 permit

12/22/2008 - Conservancies file notice of appeal to Court of Appeals regarding the 2005 permit

6/16/2010 - Court of Appeals issues decision

7/16/2010 - Village files petition for review with Supreme Court

7/6/2011 - Supreme Court issues decision

IV. ISSUE

- A. Extent of DNR's authority to consider environmental impacts from proposed high capacity well
- B. Village's Position: Specific high capacity well statutes govern. DNR is to limit its review to the criteria set forth in those specific statutes
- C. Conservancies' Position: DNR has an obligation and broad authority to protect State waters. DNR's review should not be limited to the criteria set forth in the high capacity well statutes
- D. DNR's Position: DNR may consider impacts beyond those set forth in the high capacity well statutes if there is evidence that a proposed well may impact State waters

V. SUPREME COURT'S DECISION

- A. DNR has a duty -- and broad authority -- to consider the impact of a proposed high capacity well on State waters
 - 1. DNR duty and broad authority is found in Wis. Stat. §§ 281.11 & 281.12.
 - a. Wis. Stat. § 281.11 provides:

"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."
 - b. Wis. Stat. § 281.12(1) further provides:

"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."
 - c. "Waters of the state" includes "those portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding

reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction." Wis. Stat. § 281.01(18).

2. Duty and broad authority arises in part from Wisconsin's Public Trust Doctrine
 - a. Public trust doctrine is rooted in Article IX, Section 1 of the Wisconsin Constitution.

"[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."
 - b. Under the public trust doctrine, the State holds the navigable waters and the beds underlying those waters in trust for the public
 - c. Court cases have recognized that this public trust duty requires the state to not only promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty
 - d. Delegation of public trust duties to the DNR is found in Wis. Stat. chs. 29, 30, 31, 33, 281
 - e. 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

B. DNR's broad authority is not limited by specific high capacity well statutes

1. Wis. Stat. § 281.34
 - a. Requires that for a well with a capacity of between 100,000 and 2,000,000 gpd, the DNR must review the well permit application using the formal environmental review process in Wis. Stat. § 1.11 if the well is (1) "located in a groundwater protection area," (2) would have "a water loss of more than 95 percent of the amount of water withdrawn," or (3) would have "a significant environmental impact on a spring."
 - b. Does not prohibit additional DNR review under Wis. Stat. §§ 281.11 and 281.12
 - c. Does not mandate that DNR approval be granted if the conditions in § 281.34 are not triggered
2. Wis. Stat. § 281.35

- a. Imposes additional mandatory requirements for a proposed well which would result in an average water loss of more than 2,000,000 gpd
 - b. Does not prohibit additional DNR review under Wis. Stat. §§ 281.11 and 281.12
- C. DNR's duty is a "general duty" -- a broad obligation to protect State waters
 - 1. General duty does not require the DNR to investigate the potential environmental harm of every high capacity well permit application or to undertake a formal environmental review for every application
 - 2. General duty requires the DNR to consider the impact of a proposed high capacity well on waters of the state only if the DNR decision makers are presented with sufficient concrete, scientific evidence that the proposed well poses potential harm to waters of the state
- D. DNR's duty may be triggered by information presented by the applicant or citizens
 - 1. Duty may be triggered by information presented to the DNR in the well permit application or by citizens and other entities while the permit application is under review
 - 2. DNR is to use its expertise to determine whether its duty is triggered. Whether information and circumstances are sufficient to trigger the DNR's duty is a highly fact specific matter
- E. If DNR's duty is triggered, the DNR must consider the environmental impact of the proposed high capacity well
 - 1. The DNR has the discretion to undertake the review it deems necessary
 - 2. DNR is to use its expertise and exercise its discretion to make what, by necessity, are fact-specific determinations. The DNR often makes fact-specific determinations to comply with its obligations under other environmental statutes
 - 3. DNR's long history of conducting public trust analyses provides sufficient standards and guidance for permittees
 - 4. The DNR is not required to issue a permit for a proposed well. The DNR may in some cases deny a permit application or include conditions in a well permit
- F. Court review of the DNR's decision on the well application is limited by the record on review

1. The Court's review of the DNR's administrative decision is conducted under Wis. Stat. ch. 227
 2. Wis. Stat. § 227.57 limits judicial power over administrative decisions to a review of the agency's actions, based on the record developed before the agency
 3. "Record on review" is the entire record of the proceedings in which the decision under review was made, including all pleadings, notices, testimony, exhibits, findings, decisions, orders and exceptions, therein that the agency submits to the circuit court
 - a. Information submitted to the DNR decision makers while they are considering the well permit application becomes part of the record
 - b. After the DNR makes its initial decision on the well application, if a citizen petitions and is granted a contested case hearing, the citizen may present additional evidence on the impact of the proposed well during the hearing and this evidence will become part of the record. Wis. Stat. § 227.42(1).
 - c. There are very limited opportunities to add information to the record after the contested case hearing
 - d. A court may consider evidence outside the record on review only in cases of alleged irregularities in procedure before the agency
 - e. If citizens do not present evidence of potential harm to the DNR before the decision is made, they risk losing the ability to challenge the DNR's decision based on such evidence
- G. The failure of the Conservancies to submit information to DNR decision makers resulted in the Court upholding the DNR's decision approving the Village's well
1. Documents submitted with the Village's application supported the conclusion that the proposed well pumping at its full capacity, "would avoid any serious disruption of groundwater discharge to Lake Beulah."
 2. The Conservancies did not submit information of potential harm to waters of the state to the DNR decision maker. Later information provided to the Court did not become part of the record.
 3. As a result, there was no concrete, scientific evidence in the record that would trigger the DNR's duty to consider the impact of the proposed well on waters of the state
 4. The DNR's decision to issue the 2005 permit was affirmed