

CITIZENS' ABILITY TO CHALLENGE HIGH CAPACITY WELL PERMITS BROADENED BY NEW COURT DECISION

The Court of Appeals has issued a decision, *Lake Beulah Management District v. Wisconsin Department of Natural Resources*, Appeal No. 2008AP3170 (Ct. App., Dist. II, decided June 16, 2010 and recommended for publication), that significantly broadens a citizen's ability to challenge a high capacity well permit. Under Wisconsin's high capacity well law, Wis. Stat., § 281.34, the DNR must review the environmental impact of a proposed high capacity well if the proposed well will: (1) be located in a groundwater protection area, (2) result in a water loss of more than ninety-five percent of the amount of water withdrawn, or (3) potentially have a significant environmental impact on a spring. In *Lake Beulah*, the Court of Appeals held that the DNR also has the ability to review the environmental impact of a proposed well if it is presented with information that the proposed well will negatively impact waters of the state. The case is being appealed to the Wisconsin Supreme Court.

The case involved the Village of East Troy's efforts to permit a new 1.44 MGD municipal water supply well. The well site chosen was approximately 1400 feet from the shores of Lake Beulah. The Village submitted a pump test report which indicated that the proposed well would not result in any serious disruption of groundwater discharge to Lake Beulah. The DNR granted the well permit in 2003.

After the permit was granted, the Lake Beulah Management District requested a contested case hearing, alleging that the DNR failed to comply with its responsibility to protect navigable waters, groundwater and the environment as a whole in issuing the permit to the Village. The DNR eventually granted the contested case hearing request. However, in the contested case hearing, the administrative law judge held that the DNR did not have the authority to consider the environmental effects of the municipal well because the proposed well would not be located in a protected area identified under Wisconsin's high capacity well statute, Wis. Stat. § 281.34. The ALJ held that because § 281.34 requires the DNR to consider certain impacts, the statute should be construed to exclude consideration of other factors. The District filed for judicial review of the decision, and the Circuit Court affirmed the ALJ's decision and reasoning.

In 2005, the Village applied and received a two year extension of the 2003 permit. The District filed a petition for review of the 2005 permit, restating many of the concerns expressed in the litigation over the 2003 permit. The Circuit Court denied the petition for judicial review holding that although the DNR had a right to consider whether a high capacity well would negatively impact the waters of the State, there was no proof in this case of such an impact, so the DNR did not fail in its obligation to protect the waters of the state. The District appealed to the Court of Appeals.

In a broadly worded decision, the Court of Appeals held that the DNR has very broad authority under its general statutes -- Wis. Stat. §§ 281.11 and 281.12 -- to take action to protect surface water and groundwater. The Court of Appeals interpreted these general statutes as expressly delegating to the DNR the regulatory authority necessary to fulfill a mandatory duty to protect, maintain and improve the quality and management of the waters of the state.

The Village's position was that these general statutes set forth the legislature's intent in adopting Chapter 281, but that Chapter 281 needed to be reviewed in its entirety in order to determine the extent of the DNR's authority. As §§ 281.34 and 281.35 contained specific provisions applicable to high capacity wells, the Village argued that those statutes were controlling because they represented the legislature's policy decision regarding the extent of high capacity well regulation necessary to satisfy the DNR's duties to protect the waters of the state.

The Court rejected the argument that §§ 281.34 and 281.35 limited the extent of the DNR's ability to review environmental impacts from high capacity wells. The Court's decision was principally based upon its initial conclusion that the general statutes expressly delegated broad authority to

the DNR to take the action necessary to fulfill a mandatory duty to protect, maintain and improve the quality and management of the waters of the state.

The Court's rationale raises the question of why the specific provisions of §§ 281.34 and 281.35 are necessary at if the broad authority in §§ 281.11 and 281.12 gives the DNR authority to do anything it deems necessary with regard to waters of the state. The Court appears to answer that the legislature requires the DNR to complete a formal environmental review for all proposed high capacity wells that meet the criteria in § 281.11 and § 281.12. For other wells, the DNR is not required to complete a formal environmental review, but may exercise its discretion to give greater review of a well if the facts warrant it.

The District argued that the DNR always has an affirmative obligation to consider a well's effect on the waters of the state. The Court disagreed and held that the DNR's public trust duty arises only when it has evidence suggesting that waters of the state may be affected by a well. Citizens may submit evidence to the DNR on a proposed well's impact during the permit review process or during a contested case hearing. The DNR is to determine whether the evidence submitted is sufficient to trigger the DNR's duty to investigate public trust concerns. The Court noted, however, that "scientific evidence" suggesting an adverse affect to waters of the state should be enough to warrant further, independent investigation. If the contested case hearing process is used, the Court said, every party, including concerned citizens, will have an opportunity to rebut or offer countervailing evidence. At the conclusion of the testimony, the hearing examiner may then decide whether there is sufficient evidence of a potential adverse impact and, if so, may issue specific orders to the DNR.

In this case, the Court found that a hydrogeologist's affidavit presented by the District to the DNR's attorney as part of the litigation prior to the time the DNR acted on the 2005 permit should have been considered in the 2005 permit application process. The hydrogeologist's affidavit stated that based upon his tests, there would be a lowering of water levels, and the potential for adverse impacts to Lake Beulah. Because the DNR did not consider the affidavit, the Court reversed and remanded the case to the circuit court, with directions to remand the case to the DNR so that it may consider the hydrogeologist's affidavit and any other information the DNR had pertinent to the proposed municipal well before it issued the 2005 approval.

-- Lawrie Kobza

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