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February 1, 2013

The Honorable J.B. Van Hollen
Attorney General
Wisconsin Department of Justice
Room 114 East State Capitol
Madison, Wisconsin 53702

Subject: High Capacity Well Approvals

Dear Attorney General Van Hollen:

Chapter 281 of the Wisconsin Statutes gives the Department of Natural Resources (DNR) supervisory authority over the waters of the state, including the authority to review and approve high capacity wells. Under s. 281.11, Stats., the Legislature designated DNR as the central unit of state government to protect, maintain, and improve the quality and management of the waters of the state. Under s. 281.12(1), Stats., the Legislature delegated to DNR responsibility to carry out the planning, management, and regulatory programs necessary for implementing the policy and purpose of chapter 281, for the prevention and abatement of water pollution, and for the maintenance and improvement of water quality. Under s. 281.34(2), Stats., no person may construct or withdraw water from a high capacity well without the approval of the DNR.

Under ss. 281.34(4) and (5) and 281.35, Stats., the Legislature has set forth requirements for DNR's review and approval of certain types of high capacity wells. Recently, questions have arisen regarding the DNR's authority to include restrictions and conditions on high capacity well approvals other than those listed in ss. 281.34 and 281.35, Stats. Largely, these questions stem from varying interpretations of a recent Wisconsin Supreme Court case, *Lake Beulah Management District v. DNR*, 2011 WI 54, 335 Wis.2d 47, 799 N.W.2d 73, and the possible effect of 2011 Act 21, which amended s. 227.10(2m), Stats., to prohibit agencies from implementing or enforcing 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 a rule that has been promulgated in accordance with ch. 227, Wis. Stats.

To help provide clarity on these issues and to assist the DNR in performing its duties, DNR requests an opinion regarding the following question:

Under Wis. Stat. ch. 227, as revised by 2011 Act 21, does the DNR have the authority to include conditions and standards in high capacity well approvals (proposed or existing), if the wells do not fall within the criteria in ss. 281.34(4) and (5), 281.35, or 281.41, Stats., without first promulgating those standards and conditions as a rule?

Background information on the types of approvals at issue and analysis of the legal questions that have been raised by high capacity well applicants and others are set forth below. Letters DNR has received from interested parties are attached to this letter as further background.

A. The Legislature Has Explicitly Required DNR to Include Conditions in Some Approvals

DNR is required to review and approve all high capacity wells pursuant to s. 281.34(2), Stats. If a proposed well meets certain criteria, DNR may not approve the well unless it is able to include and does include in the approval conditions, which may include conditions as to location, depth, pumping capacity, rate of flow, and ultimate use necessary to ensure that the water supply of a public utility will not be impaired or that the well will not cause significant adverse environmental impact. The wells for which DNR has specific statutory authority to include conditions are:

- wells that might impair the water supply of a public utility (s. 281.34(5)(a));
- wells in a groundwater protection area (within 1200 feet of a trout stream or outstanding or exceptional resource waters) (s. 281.34(5)(b)1.);
- wells with a water loss of more than 95% of the water withdrawn (s. 281.34(5)(c));
- wells that might have a significant adverse impact on a spring (s. 281.34(5)(d)1.); and
- wells that result in a water loss averaging over 2 million gallons per day water loss in any 30 day period (s. 281. 35(5) and (6)).

In addition to these sections, s. 281.41, Stats., provides DNR with authority to include conditions in plan and specification approvals for municipal and other-than-municipal public water systems (community water systems that are not municipal water systems). Section 281.41(1)(b), Stats., provides, in part, that DNR "shall examine and take action to approve, *approve conditionally* or reject the plans and shall state in writing any conditions of approval or reasons for rejection." *Id.* (emphasis added). Since plans and specifications for municipal and other-than-municipal public water systems most often include high capacity wells, these high capacity well plan and specification approvals may include conditions, pursuant to s. 281.41(1)(b), Stats.

The sections of chapter 281 referenced above provide explicit requirements for review and approval, with conditions, of the specified wells. The question is whether DNR is explicitly permitted to include conditions in a high capacity well approval if the well is not one specified in ss. 281.34(4) and (5), 281.35, or 281.41, Stats.

B. Recently, the Wisconsin Supreme Court Interpreted Chapter 281 to Authorize DNR to Impose Conditions on High Capacity Well Permits If Needed to Protect Waters of the State

In 2011, the Wisconsin Supreme Court issued a decision that addressed DNR's authority to approve, deny or impose conditions on a proposed high capacity well. In *Lake Beulah Management District v. DNR*, 2011 WI 54, 335 Wis.2d 47, 799 N.W.2d 73, a lake management district and a lake improvement association (collectively "lake management districts") sought review of DNR's decision approving a proposed high capacity municipal well for the Village of East Troy. The history of the litigation is reviewed in the Supreme Court's decision (*Lake Beulah* ¶¶ 9-22). Briefly summarized, the DNR approved a well for the Village of East Troy after finding the proposed well would not adversely affect any nearby wells owned by another water utility. DNR also noted the opinion of a consultant hired by the Village that the well "would avoid any serious disruption of groundwater discharge" to a nearby lake.

The lake management districts sought judicial review of the DNR's decision to approve the well. The districts argued that DNR, pursuant to its duties under the public trust doctrine, should have considered evidence of potential harm to the water level in Lake Beulah before issuing its approval. The circuit court found no evidence of potential harm to the lake and affirmed DNR's decision. The Court of Appeals disagreed. *See Lake Beulah Management District v. DNR,* 2010 Wis. App. 85, 327 Wis.2d 222, 787 N.W.2d 926, *affirmed in part, reversed in part,* 2011 WI 54, 335 Wis.2d 47, 799 N.W.2d 73. The Court of Appeals ruled that DNR had the authority and duty under the public trust doctrine and chapter 281 to review the environmental impacts of a proposed high capacity well even if no formal environmental review was mandated under ss. 281.34 or 281.35, Stats.

The Supreme Court affirmed the Court of Appeals' decision regarding DNR's authority under the public trust doctrine.[1] The Supreme Court held that the Legislature had 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. (*Lake Beulah* at ¶34). The Court went on to state that "the statutory scheme governing high capacity wells, in subchapter II of Wis. Stats. ch. 281, combines the DNR's overarching authority and duty to manage and preserve waters of the state with certain specific minimum statutory requirements." (*Id.* at ¶34). Those minimum requirements are the provisions in ss. 281.34 and 281.35, Stats., which the Legislature has granted DNR specific statutory authority to act.

On the issue of DNR's authority to regulate high capacity wells outside of those meeting the criteria in ss. 281.34 or 281.35, the Supreme Court stated as follows: "Finding no language expressly revoking or limiting the DNR's authority and general duty to protect and manage waters of the state, we conclude that the DNR retains such authority and general duty to consider whether a proposed high capacity well may impact waters of the state" (*Id.* at ¶42); and given its general duty, "DNR is required 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." (*Id.* at ¶46).

The Supreme Court's decision in *Lake Beulah* primarily discussed DNR's authority to consider the potential harm of a proposed high capacity well under s. 281.34(2), since that was the fact situation presented in the case. While the Court's decision does not include a thorough discussion of DNR's authority to include conditions in new and existing high capacity well approvals, the Court stated as follows:

> 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.* at ¶ 39) (emphasis added).

The Supreme Court directed DNR to "use both its expertise in water resources management and its discretion to determine whether its duty as trustee of public 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." (*Lake Beulah,* at ¶63) (emphasis added). The Court's decision states that "[u]pon what evidence, and under what circumstances, [DNR's] duty is triggered is a highly fact-specific matter" that depends upon the information submitted and available to DNR decision makers. (*Lake Beulah,* at ¶ 46). The Court does not address further how DNR is to execute its public trust duties.

C. The Impact of s. 227.10(2m), created as part of 2011 Act 21, in the *Lake Beulah* Decision

Prior to the Supreme Court's *Lake Beulah* decision, the Legislature enacted s. 227.10(2m), Stats. (created as part of 2011 Act 21), which places limits on the authority of all state agencies. Section 227.10(2m), Stats., provides, in relevant part, as follows:

> 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*

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[1] Under the public trust doctrine, the State holds the navigable waters and the beds underlying those waters in trust for the public. (*Lake Beulah* ¶ 32). The public trust doctrine stems from Article IX, Section 1 of the Wisconsin Constitution. Article IX, Section 1 provides:

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

> *required or explicitly permitted by statute or by a rule* that has been promulgated in accordance with this subchapter. (emphasis added).

After oral argument in *Lake Beulah*, but before the Supreme Court issued its decision, the Great Lakes Legal Foundation (GLLF) on behalf of certain *amici*, submitted a letter to the Court arguing that "Act 21 was enacted to overturn the court of appeals decision [in *Lake Beulah*]" and to clarify that "state agencies do not have the plenary authority under their general delegation of authority statutes to regulate activities beyond the specific statutory language enacted by the legislature." DNR and the Village of East Troy both submitted responses to this offer of "supplemental authorities" arguing that Act 21 *did not affect DNR's authority in the case at issue*. In addition to arguing that DNR had authority under ch. 281 to consider the public trust doctrine when deciding whether to approve a high capacity well, DNR also argued that *2011 Wisconsin Act 21 was to apply only prospectively, was directed to rulemaking, and did not apply to the facts of the case because DNR had not included any disputed conditions in the well approval at issue*. The Village of East Troy argued that Act 21 did not apply to the 2005 approval by DNR because the law applied only prospectively. The Village further argued that Act 21 was consistent with the notion that the Legislature had granted DNR only limited authority to regulate certain types of high capacity wells (a position that both the Court of Appeals and the Supreme Court rejected). The lake management districts did not submit a response to the GLLF's supplemental letter.

The Supreme Court included a brief discussion of the impact of Act 21 in its decision. In footnote 31, the Court stated that its conclusion was not affected by the argument advanced by GLLF. The Court stated:

> *None of the parties argues that the amendments to Wis. Stats. ch. 227 in 2011 Wisconsin Act 21 affect the DNR's authority in this case*. The DNR responds that Wis. Stats. ch. 281 does explicitly confer authority upon the DNR to consider potential environmental harm presented by a proposed high capacity well. . . . . *We agree with the parties that 2011 Wisconsin Act 21 does not affect our analysis in this case* (*Lake Beulah*, ¶ 39, n.31 (emphasis added)).

This footnote could be interpreted in a number of ways—that the Court found that Act 21 only applies prospectively, that the conditions in high capacity well approvals are explicitly permitted by statute or rule sufficient to meet the requirements of s. 227.10(2m), that no conditions were at issue in the well approval that was being challenged, or that for other reasons the provisions of Act 21 did not apply to the facts of the case.

D. Some Well Owners Assert That Act 21 Prohibits DNR From Including Conditions in High Capacity Well Approvals Without A New Statute or Rule That Explicitly Requires or Explicitly Allows Such Conditions

Some high capacity well owners and applicants assert that the Supreme Court's *Lake Beulah* decision does not grant DNR the authority to impose conditions in high capacity well approvals absent a new statute or rule that explicitly requires or explicitly permits DNR to modify or condition high capacity well approvals that are not governed by ss. 281.34, 281.35, or 281.41, Stats. They argue that to the extent DNR is charged with public trust responsibilities, DNR can execute those responsibilities only as delegated by the Legislature. They contend that by enacting 2011 Wisconsin Act 21, the Legislature intended to alter past agency practices with regard to the implementation of new permit conditions or new guidance materials, as well as rulemaking. They assert that Act 21 was intended to increase transparency, gubernatorial oversight, and legislative oversight of agency actions. They argue that any new conditions on high capacity wells, like monitoring requirements and capacity limitations, are not enforceable absent a specific legislative act or agency rulemaking that provides an opportunity for public input, economic study, and gubernatorial and legislative oversight. As a result, DNR could implement its public trust responsibilities, as outlined in the *Lake Beulah* decision, only by denying a high capacity well approval, not by granting an approval with conditions, unless the Legislature adopts a new statute or DNR adopts a rule to explicitly permit or require conditions in approvals, in order to satisfy s. 227.10(2m), Stats.

Section 227.10(1), Stats. provides that a state agency must promulgate as a rule "each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Section 227.01(13), Stats. defines a rule as 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 or to govern the organization or procedure of the agency." There are exceptions to this definition of a rule in s. 227.01(13)(a)-(zy), Stats. Some high capacity well owners contend that a decision by DNR that it has the authority to impose conditions on any high capacity well approval, if such conditions are necessary to prevent potential harm to waters of the state, does not fall within any exception to the definition of a "rule" and therefore must be preceded by rulemaking.

DNR is aware of a number of Supreme Court cases which provide guidance on when an agency action or new interpretation of its statutory authority would require a rule. For example, in *Wisconsin Electric Power Co. v. DNR,* 93 Wis.2d 222, 287 N.W.2d 113 (1980), the Supreme Court ruled that a decision by DNR to set permit limits by using recommended chlorine limitations in an EPA Region V letter constituted a "rule." The Court found that DNR uniformly applied the suggested limitations in Wisconsin Pollutant Discharge Elimination System (WPDES) permits issued to Wisconsin Electric power plants. *Id.,* at 234-35. The Court held the limitations were therefore of general application and satisfied all of the other requirements for a "rule." The Court found the limitations invalid, in part, because they were imposed without following the notice and hearing procedures required to promulgate a rule. *Id.,* at 234-35, 256. Thus, if DNR were to impose uniform conditions or limitations on all high capacity well approvals, DNR would need to promulgate a rule before including such conditions.

The Supreme Court cited several other cases in which a change in agency policy or interpretation of an ambiguous statute constituted a rule, noting:

> When a party files an application for a license with an administrative agency and the latter points to some announced agency policy of general application as a reason for rejecting the application, such announced policy constitutes a rule . . . However, if the application is rejected because of some ruling which is not applicable generally but is limited to the facts presented by the applicant, then . . . such a ruling does not constitute a 'rule" under ch. 227, Stats.

Id., at 236 (citing *Frankenthal v. Wisconsin R.E. Brokers' Board,* 3 Wis.2d 249, 257b, 88 N.W.2d 352, 89 N.W.2d 825, 826-827 (1958)).

In *Schoolway Transp. Co. v. Div. of Motor Vehicles,* 72 Wis. 2d 223, 240 N.W.2d 403 (1976), the Supreme Court ruled that a change in practice by the Department of Transportation (DOT), based on advice from the Attorney General, did not require rule making, where DOT's prior practice was based on an erroneous interpretation of a statute. The practice in *Schoolway* involved the licensing of school busses. For some years, DOT had issued dual licenses for the Schoolway company's busses when such busses were to be used interchangeably for the transportation of school children and the performance of charter and contract work. Following the receipt of advice from the Attorney General that such a practice was not authorized by the licensing statutes, DOT stopped issuing dual licenses. The Supreme Court ruled that this change in practice was not a "rule," because it brought the agency into conformity with its authority under the plain language of an existing statute. *Id.,* at 237. In contrast, the Court found that another change in DOT's practice involving registrations under the urban mass transportation designation involved a change in the agency's interpretation of an ambiguous statute. This change, according to the Supreme Court, should have been filed as a rule, so that those who are or will be affected have the opportunity to participate in the rulemaking process. *Id.,* at 237-38.

Some well owners have argued that the standard articulated by the Supreme Court in *Lake Beulah* – concrete, scientific evidence of potential harm to waters of the state – is a uniform standard that, when applied to all high capacity wells, represents a change in DNR policy that should be explicitly promulgated in a rule or adopted in a

statute before DNR can condition well approvals based on that standard. These parties contend that existing statutes and administrative rules do not contain the *explicit* permission or authority required by s. 227.10(2m), Stats. for the imposition of such standards.

E. Other Interested Parties Assert DNR Has Authority To Impose Conditions on High Capacity Wells

Other parties contend that DNR has always possessed the authority to regulate high capacity wells. They note that the Supreme Court in *Lake Beulah* stated several times that the Legislature, via ss. 281.11 and 281.12, Stats., has delegated the State's public trust duties to the DNR in the context of the regulation of all high capacity wells and their potential effect on waters of the state. Section 281.11 provides, among other things, that DNR "shall serve as the central unit of government to protect, maintain and improve the quality and management of the waters of the state." Section 281.12, states:

> 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 [chapter 281].

These parties also note that s. 281.34(7), Stats., provides DNR the authority to modify or rescind any high capacity well approval if DNR finds that "the high capacity well or the use of the high capacity well is not in conformance with standards or conditions applicable to the approval of the high capacity well." According to some, the "standards or conditions" referenced in s. 281.34(7) include the standards established to protect waters of the state, as interpreted by the Supreme Court in the *Lake Beulah* decision. Since the ability to modify or rescind an approval references "conditions applicable to the approval," these parties contend that s. 281.34(7) gives DNR the authority to include conditions, as needed, to prevent potential harm to waters of the state without further need for rulemaking.

Those who assert DNR has the authority to include conditions in high capacity well approvals emphasize that all high capacity well approvals are subject to the public trust doctrine, which is part of the State Constitution. These parties contend that DNR's high capacity well approvals must be consistent with the public trust doctrine because state agency approvals cannot supersede constitutional provisions. DNR is aware that prior Supreme Court precedent recognizes that property owners do not have an absolute right to use groundwater beneath their property. In 1974, the Supreme Court adopted a modified reasonable use doctrine for groundwater. *State v. Michels Pipeline Construction, Inc.*, 63 Wis. 2d 278, 298, 301-303, 217 N.W.2d 339 (1974). In *Michels Pipeline*, the Supreme Court specifically stated that a land owner who withdraws groundwater from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless the withdrawal of water "causes unreasonable harm through lowering the water table or reducing artesian pressure," or the water withdrawal "has a direct and substantial effect upon the water of a watercourse or lake" (*Michels Pipeline* at 302-03). The provisions in s. 281.34(7), read in concert with the Supreme Court's decisions, could be interpreted to authorize DNR to include conditions in approvals to protect waters of the state and, in appropriate circumstances, to modify or rescind an approval if the use of the high capacity well is causing substantial adverse impact to waters of the state without the need for the DNR to do further rulemaking.

Finally, some parties note that s. NR 812.09(4), Wis. Adm. Code, authorizes DNR to include conditions on specific aspects of high capacity well construction (well location, construction, or pump installation specifications), if such conditions are necessary and appropriate to protect public safety, safe drinking water, or the groundwater resource. Based on the authorities cited above, some parties assert that DNR does not need a new statute or rule to consider, on a case-by-case basis, whether conditions such as limits on pumping capacity or monitoring requirements are necessary under the public trust doctrine to prevent potential harm to waters of the state.

F. Example of New High Capacity Well Conditions

DNR's practice after *Lake Beulah* has not been to include uniform conditions, such as pumping limitations or monitoring requirements, in *every* high capacity well approval. DNR has considered whether to include these conditions based on the individual circumstances and DNR's expertise in water resource management. In some cases, DNR has included restrictions on pumping capacity and put in place monitoring requirements. DNR has not to date conducted rulemaking to clearly indicate what conditions or standards may be applied to high capacity well approvals or when they would be applied.

One of DNR's recent high capacity well approvals provides an example of a situation where DNR has conditioned a high capacity well approval. This approval is currently pending in litigation. A dairy, Richfield Dairy, LLC, proposed two high capacity wells for a confined animal feeding operation (CAFO). DNR approved the application with a restriction on pumping capacity of 131.2 million gallons in any 365-day period. The approval provided that DNR could impose additional restrictions or conditions on use of the dairy's wells if available information indicates that pumping of the wells is resulting in adverse impacts to waters of the state.

Three separate petitioners filed requests for a contested case hearing under s. 227.42, Stats., regarding the high capacity well approval. Generally the petitioners are individual neighbors and citizen groups, including Family Farm Defenders, Inc., Friends of the Central Sands, Inc., and the Pleasant Lake Management District. The same petitioners sought judicial review of the Environmental Assessment for the project, under s. 227.52, Stats. On July 20, 2012, the Dane County Circuit Court ruled that the Environmental Assessment prepared by DNR did not sufficiently evaluate the impacts of the approved 131.2 million gallons per year pumping rate. This ruling was appealed by the petitioners and is pending at the Court of Appeals. The petitioners also alleged that the pumping limit allowed under the high capacity well approval would result in significant adverse impacts to nearby waters of the state.

DNR does not request an opinion on the particular facts of this case, which is pending in litigation. The facts are provided, however, as an example of a recent high capacity well approval.

G. Summary and Request for Opinion

DNR requests an opinion from the Attorney General to assist DNR in exercising its authority properly under s. 227.10(2m), Wis. Stat., and the *Lake Beulah* decision as the agency continues to make decisions regarding all types of new and existing high capacity well approvals. DNR is aware that current high capacity well owners and pending well applicants are concerned about DNR's exercise of its authority. Those with existing well approvals and those seeking new well approvals have questioned whether s. 227.10(2m) limits DNR's authority to impose conditions such as limiting pumping amounts or requiring monitoring of potential impacts to waters of the state for wells other than those for which DNR is explicitly required to include conditions (in ss. 281.34, 281.35 and 281.41, Stats.), absent a new statute or new rule explicitly requiring or permitting such conditions. Others have stated that the *Lake Beulah* decision and existing statutes and regulations give DNR broad authority to protect waters of the state from being adversely impacted by withdrawals from high capacity wells, that s. 227.10(2m) does not limit DNR's authorization to include conditions in approvals, and that there is no need for further rulemaking.

Any guidance the Attorney General can provide to DNR on the scope of its authority to include conditions in high capacity well approvals, the need for rulemaking, and the ability of DNR to use its discretion on a case-by case basis to review new and existing high capacity well approvals, is greatly appreciated. DNR Attorneys Cheryl Heilman (266-0235; Cheryl.heilman@wisconsin.gov) and Judy Ohm (266-9972; Judith.ohm@wisconsin.gov) will be the liaisons on this request. Thank you for your consideration.

Sincerely,

Cathy Stepp
Secretary

McGILLIVRAY WESTERBERG & BENDER LLC
ATTORNEYS

December 27, 2012

Via U.S. Mail & Email

Cathy L. Stepp, Secretary
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, WI 53707-7921
DNRSecretary@Wisconsin.gov

Re: Department of Natural Resources Authority Regarding High Capacity Wells

Dear Secretary Stepp:

This firm represents Karris Family Farms, LLC, a company that owns and operates three cranberry farms in and around Wood County, Wisconsin. My client is highly concerned about a proposed large-scale dairy and irrigated agriculture project proposed for Wood County and the effect this project will have on area surface water and groundwater supply. The project currently calls for installing 49 high capacity wells to serve the dairy and new irrigated agricultural fields, and will require the Department of Natural Resources ("DNR" or "the Department") to consider high-capacity well approvals under Wis. Stat. §§ 281.34 and .35. Numerous highly-rated trout streams are in the area of the project, as well as private wells and municipal water systems.

We understand the DNR has been engaged in discussions regarding Department authority to study, condition, and restrict high capacity well approvals in the wake of *Lake Beulah Management District v. DNR*, 2011 WI 54, as well as 2011 Wisconsin Act 21 as codified at Wis. Stat. § 227.10(2m).[1] Some outside groups that rely on high-capacity wells have specifically questioned the DNR's authority regarding high-capacity wells, including the Wisconsin Potato & Vegetable Growers Association. (Ltr. fr. Jordan Lamb, DeWitt Ross & Stevens, to Ken Johnson, Administrator, DNR Water Division, 9/6/12.) We understand that the DNR plans to ask the Wisconsin Attorney General for

[1] *See* Peggy Coffeen, *Cooperation between DNR, DATCP poises Wisconsin for dairy growth*, Agri-View, Dec. 13, 2012, *available at* http://www.agriview.com/news/dairy/cooperation-between-dnr-datcp-poises-wisconsin-for-dairy-growth/article_6eb43b78-4483-11e2-a7e5-001a4bcf887a.html?mode=print.

an interpretation of its authority regarding high-capacity well permitting. (*See* Memo fr. Ken Johnson, Water Division Administrator, DNR, to Water Division Staff, 12/20/12.)

This letter is to share the expertise we have gathered in the course of researching the proposed Wood County project, and to comment on the Potato and Vegetable Growers' unduly narrow interpretation of the DNR's authority. The unanimous *Lake Beulah* decision reinforced the DNR's broad authority to regulate high capacity wells and their impacts on waters of the state, and any interpretations by this Department or the Attorney General should confirm this DNR's authority.

I. *Important Resources are At Stake.*

As an initial matter, all concerned must acknowledge the important resources impacted by high-capacity wells, or wells that alone or with others on the same property have a capacity to pump more than 100,000 gallons of water per day. Wis. Stat. § 281.34(1)(b).

High capacity wells can adversely impact groundwater and surface water, among other resources. Excessive high-capacity well pumping, alone or in combination with conditions like drought, can lower the water table and dry up private residential wells or affect other high-capacity well users, like municipal utilities. High capacity well pumping can also draw down surface water resources that are fed by groundwater, including streams and seepage lakes. These are resources used by thousands of Wisconsin residents and visitors every year for fishing, boating, swimming, camping, and other recreational purposes.

The impacts of high-capacity well pumping in the Central Sands area of Wisconsin are particularly well-documented, as a report commissioned by the DNR has shown. George J. Kraft and David J. Mechenich, Center for Watershed Science & Education, University of Wisconsin-Stevens Point/Extension, *Groundwater Pumping Effects on Groundwater Levels, Lake Levels, and Streamflows in the Wisconsin Central Sands: A Report to the Wisconsin Department of Natural Resources in Completion of Project: NMI00000247* (Mar. 15, 2010) (hereinafter, "Kraft & Mechanich 2010").[2] The Central Sands encompasses all or part of about seven counties in central Wisconsin, bordered on the west by the Wisconsin River. (*See* **Exhibit A.**) The area is characterized by

[2] *Available at* http://digicoll.library.wisc.edu/cgi-bin/EcoNatRes/EcoNatRes-idx?type=header;pview=hide;id=EcoNatRes.KraftGround. The Kraft & Mechanich research has also been published in a peer-reviewed scientific journal. George Kraft, Katherine Clancy, David J. Mechenich, and Jessica Haucke, *Irrigation Effects in the Northern Lake States: Wisconsin Central Sands Revisited,* Groundwater (Mar/Apr. 2011).

sandy, highly permeable soils, and has been heavily used for irrigated agriculture in recent decades. The Central Sands is also home to largely groundwater-fed inland lakes and numerous Class I trout streams, including the Mecan River, Chaffee Creek, and Sevenmile Creek.[3]

As the Kraft & Mechanich 2010 report relates,

> Prominent hydrologic studies in the 1960s and 1970s warned that the growth in groundwater pumping for agricultural irrigation in the Wisconsin Central Sands could substantially lower regional water levels and streamflows. Irrigation grew in the succeeding decades, and presently encompasses some 2,300 high capacity wells that service 200,000 acres.
>
> Since 2000, Central Sands water levels and stream discharges have been notably depressed, at least in areas that contain large densities of high capacity wells. For instance, the Little Plover River, a formerly high-quality trout stream and a Wisconsin Exceptional Resource Water, was near dry in 2003 and has dried annually in stretches since 2005. . . . Long Lake near Plainfield, which formerly covered 45 acres and had a maximum depth of about 10 feet, has been near dry to dry since 2005. Other lakes in that vicinity have dried, and some that did not (e.g., Pickerel and Wolf Lakes) winter-killed due to depressed water levels.

Kraft & Mechanich 2010 at iii. The attached Figure I-5 and photos from Kraft & Mechanich 2010 show the locations of high capacity wells in the Central Sands in reference to some of these impacted surface water resources. **(Exhibit A.)**

The Kraft & Mechanich 2010 report set out to determine whether the reduced water levels in the Central Sands were caused by the proliferation of high-capacity well pumping, climatic factors, or both. Employing a groundwater model, and reviewing data from surface waters both inside and outside the high capacity well pumping zone, the report concluded, "climactically driven conditions in 2000-2008 are alone unable to account for the severely depressed water levels and streamflows in areas of the Central Sands that contain high densities of high capacity wells." Kraft & Mechanich 2010 at v. These declines are not insignificant: for lake levels, "[d]eclines of around four feet or more in water levels by pumping are possible beyond climatic influences." *Id.* As for stream flows, "[m]odeling indicates headwater stream[] depletions within the 1.9 in of net recharge reduction are commonly 20-50%" on average. *Id.*

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[3] The DNR has published maps of trout streams, and their ratings, on its webpage, http://dnr.wi.gov/topic/fishing/trout/streammaps.html.

Groundwater supply has also affected wells used for drinking water. For example, the Town of Rome in Adams County has experienced water quantity and quality problems at its municipal water utility. In order to correct high nitrate levels (suspected to be leached from a nearby irrigated agriculture operation) the Town had to expend substantial funds buying property and drilling test wells to find clean water in sufficient quantities, and has had to lower pumps in one well at least twice. Additional high capacity well pumping proposed by the large-scale dairy and irrigated agriculture operation in Wood County will limit the Town's ability to drill additional wells and expand its service even as demand for municipal water grows. **(Exhibit B.)**

The rubber of high-capacity wells for irrigation and other uses is meeting the road of resource limitations. It is in this environment that the DNR must consider applications for new high-capacity wells.

II. *The DNR has Always Possessed Broad Authority to Regulate High Capacity Wells.*

The Wisconsin Statutes broadly empower the DNR to protect navigable waters and waters of the state, including surface water, groundwater, and wetlands, Wis. Stat. § 281.01(18), and to deny or impose conditions on high-capacity well permits, Wis. Stat. ch. 281.

The State's authority to regulate high capacity wells originates in the Public Trust Doctrine, Wis. Const. art. IX, § 1,[4] as well as statute, *e.g.*, Wis. Stat. chs. 30, 281. The Public Trust Doctrine has been broadly interpreted by the courts over time, *Lake Beulah*, 2011 WI 54, ¶¶ 30-32, and the Legislature has similarly directed that statutes regarding water resources be "liberally construed in favor of the policy objectives" favoring water resource protection, Wis. Stat. § 281.11.

The DNR has been delegated wide-ranging authority to manage waters of the state, consistent with the Legislature's intent 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." Wis. Stat.

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[4] The Public Trust Doctrine states,

> "[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.

Wis. Const. art. IX, § 1.

§ 281.11. To that end, the DNR has "general supervision and control over the waters of the state," and must "carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter." *Id.* § 281.12.

The DNR's supervisory authority over waters of the state includes considering approvals for high-capacity wells, *id.* §§ 281.34, .35. In addition to assessing such factors as location of wells in reference to sensitive water resources and the amount of water proposed to be withdrawn, the DNR's review includes other important issues, like ensuring new wells are properly located and designed to prevent contamination. *Id.* §§ 281.34, .35; Wis. Admin. Code chs. NR 812, 820. The DNR's duties for wells in basins subject to the Great Lake Compact are even more elaborate, Wis. Stat. §§ 281.343-.348. Once a well has been approved, the DNR has ongoing oversight of the approved well, including through annual pumping reports submitted by permit holders to the DNR. Wis. Stat. § 281.34(5)(e)2.

The DNR has always possessed authority to require additional information from applicants for high capacity well approvals. Wis. Admin. Code § NR 812.09(2). Options for obtaining this information include environmental impact reports as authorized by Wis. Stat. § 23.11(5) and Wis. Admin. Code § NR 150.25, or the environmental impact statement or environmental assessment process under Wis. Stat. § 1.11 and Wis. Admin. Code ch. NR 150.[5] The DNR has also always been empowered to grant approvals with more stringent conditions "[w]hen deemed necessary and appropriate for the protection of public safety, safe drinking water and the groundwater resource," Wis. Admin. Code § NR 812.09(4); *see also* Wis. Stat. § 281.34(5)(c), Wis. Admin. Code § NR 820.30(3)(b). As acknowledged by the DNR through its regulations, the authority to impose conditions extends to both proposed *and* existing high capacity wells. Wis. Admin. Code § NR 812.09(4).

III. *The* Lake Beulah *Decision Unanimously Affirmed the DNR's Authority to Regulate, Refuse to Permit, and Impose Permit Conditions on High-Capacity Wells.*

Given the breadth of constitutional and statutory authority supporting the

[5] Approvals for high-capacity well permits under Wis. Stat. § 281.34 and .35 are not specifically included on the DNR's "action type" list under Wis. Admin. Code § NR 150. *See* Wis. Admin. Code § NR 150.03(8); see also id. § NR 150.03(8)(h) (discussing water supply approvals under other statutory provisions). Given the nature of such permits, they would be appropriately considered at least Type III when proposed without other department actions. A "Type IV" classification is inappropriate because it assumes the action individually and cumulatively does not significantly affect the quality of the human environment and does not involve unresolved conflicts in the use of available resources. Most high-capacity well approvals will beg these very questions.

DNR's review of high-capacity wells, it is no surprise that the Wisconsin Supreme Court unanimously and permissively interpreted this authority in 2011's *Lake Beulah* decision. 2011 WI 54.

The Wisconsin Supreme Court thoroughly evaluated the DNR's authority over high-capacity wells in *Lake Beulah*, a case where a new municipal well located near a lake threatened groundwater flow to the lake. The municipality had argued the DNR's authority to study, condition, or reject wells was limited to only a certain class of wells specified in Wis. Stat. §§ 281.34(4) and (5) and .35. *Id.* ¶ 29. The court roundly rejected this argument, finding instead that the DNR could thoroughly evaluate all high-capacity wells, including those pumping between 100,000 and 2,000,000 gallons per year. *Id.* ¶¶ 41-42.

Starting with the Public Trust Doctrine and continuing through Wis. Stat. ch. 281, the court concluded that "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 with conditions, or to deny the application." *Id.* ¶ 39. The court additionally stated,

> The high capacity well permitting framework along with the DNR's authority and general duty to preserve waters of the state provides the DNR with the discretion to undertake the review it deems necessary for all proposed high capacity wells, including the authority and a general duty to consider the environmental impact of a proposed high capacity well on waters of the state.

Id.

The court also held that the DNR could not put its head in the sand when presented with "sufficient concrete, scientific evidence of potential harm to waters of the state" posed by a high-capacity well. *Id.* ¶ 78. Rather, as trustee of public trust resources, the DNR has a duty to consider such evidence, as informed by the DNR's expertise in water resources management and its discretion. *Id.* In other words, when the DNR knows of harm or a risk of harm, it cannot blindly grant a high capacity well permit with no conditions to protect water resources. *Id.* ¶¶ 40-42. Instead, it has a duty to conduct further study, or condition or deny the requested approval.

In the case of *Lake Beulah*, a lake management district presented an expert affidavit which stated that the proposed well in that case would "disrupt[] groundwater supply to Lake Beulah and divert[] surface water from Lake Beulah, thereby adversely affecting the lake and the wildlife dependent upon the lake." *Id.* ¶ 69 (Ziegler, J.,

concurring). While the court suggested such evidence would be sufficient to trigger the DNR's duty to thoroughly study a proposed well, it also found the affidavit had not been properly entered into the agency record, and no enhanced environmental review or other measures were required in that case.

In *Lake Beulah*, the DNR argued for the broad interpretation of its authority urged in this letter. *E.g.*, 2011 WI 54, ¶¶ 27-28. The Department should continue with this interpretation and follow the Wisconsin Supreme Court in reiterating the DNR's broad power to regulate high capacity wells for the protection of water resources.

IV. *The Limitations on the DNR's Authority Proposed by the Growers' Association are Unfounded.*

The Wisconsin Potato & Vegetable Growers ("Growers") have urged the DNR to narrowly interpret its authority under *Lake Beulah*, and have claimed the DNR is precluded from taking certain actions relating to existing and proposed high capacity wells pumping less than 2,000,000 gallons per day.[6] The Growers' interpretations are unduly narrow and would undermine the *Lake Beulah* decision and the statutory and constitutional scheme on which it rests.

The Growers contend the DNR can only condition or deny wells based on "concrete scientific evidence" and not "assertions of a potential for harm." Ltr. fr. Growers Ltr. at 5-6. The impetus for their complaint is post-*Beulah* permit conditions they say have been imposed on some wells and that previously were not employed in irrigated agriculture, such as pumping rate limits. *Id.* at 8-9. The Growers claim that in the absence of "concrete scientific evidence," the DNR cannot impose conditions on wells except in the limited circumstances enumerated in Wis. Stat. § 281.34(5) and .35.

First, the Growers seek to impose an unreasonably high burden of proof before the DNR can consider enhanced environmental review for a proposed well, permit conditions, or permit denials. It appears the Growers believe the DNR cannot proceed with enhanced environmental review or impose permit conditions on a well unless scientific evidence of harm beyond a reasonable doubt has been presented. Nothing in the broadly-written language of Wis. Stat. ch. 281 or the *Lake Beulah* opinion supports this high burden. Rather, the court explicitly stated that the evidence and circumstances supporting the DNR's duty to consider a well's environmental impacts is "highly fact-

[6] The Growers' letter does not specify the capacity of well to which it applies. We assume it applies only to wells discussed in *Lake Beulah*—those pumping between 100,000 and 2,000,000 gallons per day—since even the Growers must concede that Wis. Stat. §§ 281.34(5)(e)1. and .35(5)(d) and (6) authorize the DNR to conduct or require a searching environmental review and more stringent conditions on wells with a water loss of more than 2,000,000 gallons per day. *See Lake Beulah*, 2011 WI 54, ¶ 29.

specific." *Lake Beulah*, 2011 WI 54, ¶ 46. And, while the facts in that case centered on when information submitted by outside parties triggers the DNR's duties, evidence in the DNR's own files, or the informed judgment of DNR staff regarding potential risks, will in most cases be enough to justify enhanced review or permit conditions or denials. *See id.* If the declaration of an outside geologist forecasting environmental harm would have been enough to step up the DNR's duties in *Lake Beulah*, then DNR staff making similar conclusions should also be sufficient to support enhanced environmental review, permit conditions, or permit denials.

Second, the conditions the DNR is imposing, such as limits on pumping rates, are reasonable and long overdue. Often, pumps have the capacity to pump 500 to 1,000 gallons of water *per minute*, which equates to 720,000 to 1,440,000 gallons per day and 262,800,000 to 525,600,000 gallons per year. Given that high-capacity well approvals typically have no set expiration date, *see* Wis. Stat. § 281.34(7), it is reasonable for the DNR to place limits on the amount of water that can be pumped. Otherwise, a single well can pump millions of gallons of water per year in perpetuity, limited only by the capacity that the pump manufacturer happens to have used on that particular model of pump.

Third, the Growers claim the DNR cannot conduct a *Beulah*-style review for reconstructed or relocated wells, or wells that have already been permitted. But this argument is not warranted by the language of the applicable rules. In addition to the broad enabling language in Chapter 281, Wis. Stat. § 281.34(7) specifies that approvals remain in effect unless modified or rescinded by the DNR "because the high capacity well or the use of the high capacity well is not in conformance with standards or conditions applicable to the approval of the high capacity well"; *see also* Wis. Stat. § 281.35(6)(c); Wis. Admin. Code § NR 812.09(4) ("failure to comply with any condition of an approval or the construction, reconstruction or operation of any well or water system in violation of any statute, rule or department order shall void the approval"); Wis. Admin. Code § NR 820.30(3)(b). One standard underlying all high capacity well approvals is that no significant harm to waters of the state may occur by operation of the high capacity well. *See* Wis. Stat. §§ 281.11, .12, .34, .35; *see also* Wis. Const. art. IX, § 1. Should such harm occur from an existing well, the DNR clearly possesses authority to address that harm, including by modifying or rescinding a high-capacity well approval. Any other interpretation of the DNR's authority contradicts the broad, permissive reading of this authority found by the court in *Lake Beulah*.[7]

Further, the Growers' position leads to absurd results, because it would require the DNR to ignore evidence that a well was causing ongoing environmental harm. The

[7] For this reason, the Growers' assertion that NR 820.30(3)(b) is in excessive of the DNR's delegated authority is simply incorrect. (Growers' Ltr. at 13.)

Grower's interpretation contradicts the DNR's own position in *Lake Beulah* in a similar context:

> [The conservancies] note that the [municipality's] narrow interpretation of the DNR's authority would lead to an absurd results where the DNR knew a proposed high capacity well would cause harm to waters of the state but had to issue the permit and wait to pursue remedies until after the harm occurred. The DNR asserts that such after-the-fact remedies would not be sufficient to protect public trust resources.

2011 WI 54, ¶ 28. The Growers advocate exactly the head-in-the-sand approach to evidence the court explicitly rejected in *Lake Beulah*, and whether a well is existing or merely proposed does not affect the court's logic in any way.

In fact, the Growers' interpretation of Wis. Stat. ch. 281 is so narrow as to cause the DNR (and by extension, the State) to violate its duties as trustee of navigable waters. If the DNR cannot change an approval for a reconstructed, replacement, or existing high-capacity well that is causing demonstrable harm to public trust resources, its hands in protecting navigable waters for the benefit of the public will be tied.

Finally, the Growers' arguments makes even less sense considering the DNR may have to pay for wells that have gone dry or become contaminated. Wis. Stat. § 281.77. The DNR should not be prohibited from imposing permit conditions on wells that may cause the agency and taxpayers to spend more funds down the road, after pumping has rendered a private well useless.

V. *2011 Wisconsin Act 21 Does Not Affect the DNR's Authority to Regulate High-Capacity Wells.*

We understand that in reviewing its authority to impose conditions on high-capacity wells, the Department is considering whether 2011 Wisconsin Act 21, as codified at Wis. Stat. § 227.10(2m), circumscribes the DNR's authority in any way. The *Lake Beulah* case itself already addressed this question, and answered it with a resounding "no."

Wis. Stat. § 227.10(2m) provides, 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 a rule that has been promulgated in accordance with this subchapter.

Wis. Stat. § 227.10(2m).

An amicus brief in *Lake Beulah* urged the Court to find Wis. Stat. § 227.10(2m) "further circumscribes the DNR's authority to consider environmental harm under Wis. Stat. ch. 281." *Lake Beulah*, 2011 WI 54 ¶ 39, n.31. No party to the case adopted that position, and the DNR responded that regardless, "Wis. Stat. ch. 281 does explicitly confer authority upon the DNR to consider potential environmental harm presented by a proposed high capacity well." *Id.* ¶ 39, n.31. The court concluded, **"[w]e agree with the parties that 2011 Wisconsin Act 21 does not affect our analysis in this case."** *Id.* (emphasis added). In other words, 2011 Wisconsin Act 21 does not matter to this analysis, because the Wisconsin Supreme Court said it does not matter.

While the court's interpretation is determinative, it also makes good policy sense in light of the court's observation that environmental statutes are frequently generally phrased, and rely for specifics on agency expertise in fact-intensive, technical situations. *See id.* ¶¶ 43, 46. In order to execute its duties, the DNR must be able to impose tailor-made conditions on high-capacity well permits as warranted by the facts and science of a particular well, consistent with general standards and the DNR's broadly-stated authority in Chapter 281. As the *Lake Beulah* court put it, "[t]he fact that these are broad standards does not make them non-existent ones." *Id.* ¶ 43.

Given the *Lake Beulah* opinion, and since it would be impractical for statutes and regulations to both anticipate and list all potential permit conditions in the high-capacity well context, Wis. Stat. § 227.10(2m) clearly has no applicability in this case.

VI. *The Attorney General's Office Can Only Offer a Limited Interpretation of the Applicable Statutes.*

To the extent the DNR is intending to request that the Attorney General's Office offer an opinion regarding the DNR's authority to permit high-capacity wells, the Attorney General's interpretation will necessarily be limited.

First, the Attorney General's office is constrained in interpreting Wis. Stat. chs. 30, 227, 281, or any other statute, in a way that will inhibit the DNR's duties in protecting navigable waters or performing its duties as trustee of public rights in navigable waters. Any such interpretation would render the statute unconstitutional under the Public Trust Doctrine. The Wisconsin Attorney General is not empowered to

attack or undermine the constitutionality of statutes. *State v. City of Oak Creek*, 2000 WI 9, ¶ 1, 232 Wis. 2d 612, 605 N.W.2d 526.

Second, the scope of the DNR's authority to consider matters such as cumulative impacts in issuing high-capacity well permits under Chapter 281 is likely to be resolved through litigation in the near future.[8] Since the Attorney General is charged with representing the DNR in any such litigation, the Attorney General cannot offer an independent opinion on these matters. This internal conflict will thus impact the usefulness of any interpretation the Attorney General's office renders.

VII. *The DNR Should Consider the Cumulative Impacts of Proposed Wells and Make Other Changes to the High-Capacity Well Permitting System.*

While some believe the DNR is overstepping its authority to regulate high-capacity wells, the reality is that the DNR is under-regulating the wells by refusing to consider the cumulative impacts of proposed wells with other existing and reasonably foreseeable future wells. In addition to this issue, the DNR should consider other changes in its permitting of high-capacity wells.

Since *Lake Beulah*, the DNR has been forced to face the issue of whether high-capacity well pumping has cumulatively affected groundwater and surface water levels through applications for various high-capacity wells. Unfortunately, the department has concluded that when it comes to individual high-capacity well permit applications, it cannot consider cumulative impacts.[9] *E.g.*, Draft Supplemental Environmental Assessment, Richfield Dairy, 72.5 MGPY at 7 (Nov. 28, 2012).[10] The DNR has based this conclusion on its reading of *Lake Beulah*, which does not address cumulative impacts since such impacts were not an issue in that case, and *State v. Michels Pipeline Constru., Inc.*, 63 Wis. 2d 278, 217 N.W.2d 339 (1974), which recognized the right to sue one's neighbor in tort for unreasonable use of groundwater. We believe the DNR's position is flawed because, *inter alia*, it does not recognize pre-existing authority finding that the

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[8] Whether and to what extent the DNR is required to evaluate the cumulative impacts of high-capacity well pumping under the Wisconsin Environmental Policy Act ("WEPA"), Wis. Stat. § 1.11, when considering a new high-capacity well approval is a question already pending before the Wisconsin Court of Appeals. *See Pleasant Lake Mgmt. Dist. v. DNR*, Case No. 2012AP1882.

[9] At most, the DNR only considers the cumulative impacts of high-capacity wells on the same property. (*See* Memo fr. Ken Johnson, Water Division Administrator, DNR, to Water Division Staff, 12/20/12.)

[10] *Available at* http://dnr.wi.gov/topic/AgBusiness/documents/RichfieldDairy/RichfieldEASupplemental.pdf.

DNR's evaluation of impacts to public trust waters must include an assessment of cumulative impacts. *E.g.*, *Hilton v. DNR*, 2006 WI 84, ¶ 28, 293 Wis. 2d 1, 717 N.W.2d 166; *Hixon v. Public Serv. Comm'n*, 32 Wis. 2dd 608, 631, 146 N.W.2d 577 (1966).

Thus, contrary to the narrative put forth by some that DNR officials are overregulating high-capacity wells in the wake of *Lake Beulah*, the real problem is that the DNR is underregulating high-capacity wells by ignoring the cumulative impacts of these wells. By doing so, it has ensured that new high capacity well permits can be issued without, for example, consideration of the persistent and environmentally disastrous problem of groundwater drawdown in the Central Sands, as discussed at the outset of this letter.

Similarly, recent DNR correspondence indicates the Department does not currently conduct any additional review or impose new conditions and restrictions on applications for well reconstruction or most previously approved wells. (*See* Memo fr. Ken Johnson, Water Division Administrator, DNR, to Water Division Staff, 12/20/12.) As explained above, we do not believe the fact that a well's status as proposed, reconstructed, replacement, or existing makes a difference to the DNR's duties under the Public Trust Doctrine and applicable statutes and rules. The availability of the water resource is clearly subject to change the longer a well or group of wells is pumped, and the DNR cannot ignore this change and its attendant environmental impacts when evaluating an existing well. *See* Wis. Admin. Code § NR 812.09(4); Wis. Admin. Code § NR 820.30(3)(b).

Additionally, while we understand that the DNR has had to adjust its high-capacity well permitting practices since the *Lake Beulah* decision, one adjustment it has yet to make is to create a notice system so that the public can learn about proposed wells and submit evidence of those wells' potential impacts to waters of the state. The *Lake Beulah* case explicitly provided that such third-party information can trigger an enhanced environmental review, permit conditions, or permit denials, but as it stands the public has no systematic way to provide this input or even be alerted to proposed wells.[11] Assuming the public does somehow become alert to a proposed well, it must obtain information through Open Records requests under Wis. Stat. § 19.31 *et seq.*, which can be burdensome to DNR staff if they must respond to multiple requests. The process is haphazard and inefficient, and we hope the Department will consider changes to this process to make it more accessible and efficient. *See* note 5, *supra*.

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[11] We appreciate the effort DNR staff has made to post information regarding the Wood County project on its website and observe the EIS process to allow for maximum public input and participation. However, the website is not regularly updated as to well information, and few well applications see this sort of process.

Consistent with the Wisconsin Supreme Court's decision in *Lake Beulah*, the DNR should also reject the Growers' position that only scientific evidence submitted during the well permitting process can trigger extra agency obligations. (Growers' Ltr. at 6.) As the court made clear, evidence submitting during any contested case hearing, or even in circuit court, will also suffice. *Lake Beulah*, 2011 WI 54, ¶ 56-57.

In sum, we respectfully encourage the Department to follow the Wisconsin Supreme Court and utilize its broad authority to regulate high-capacity wells under the Public Trust Doctrine and applicable statutes and regulations. The DNR is entitled to use its in-house expertise to consider, condition, and deny well approvals, and the DNR cannot ignore its own or any other evidence of environmental harm caused by existing and proposed wells, Further, the DNR must consider the cumulative effects of high capacity well pumping when evaluating a proposed well, and should consider changes to the high-capacity well permitting process to make it more accessible to the public, as described above.

Thank you for your attention to these important matters. We would welcome a meeting with you or your staff if you would like to discuss this letter further. Otherwise, please feel free to contact me with any questions.

Sincerely,

McGILLIVRAY WESTERBERG & BENDER LLC

Christa O. Westerberg

cc: Ken Johnson, DNR (via email)
Eric Ebersberger, DNR (via email)
Attorney Tim Andryk (via email)
Attorney Judy Ohm (via email)
Attorney General J.B. Van Hollen (via U.S. Mail & email)
Nick Karris (via email)

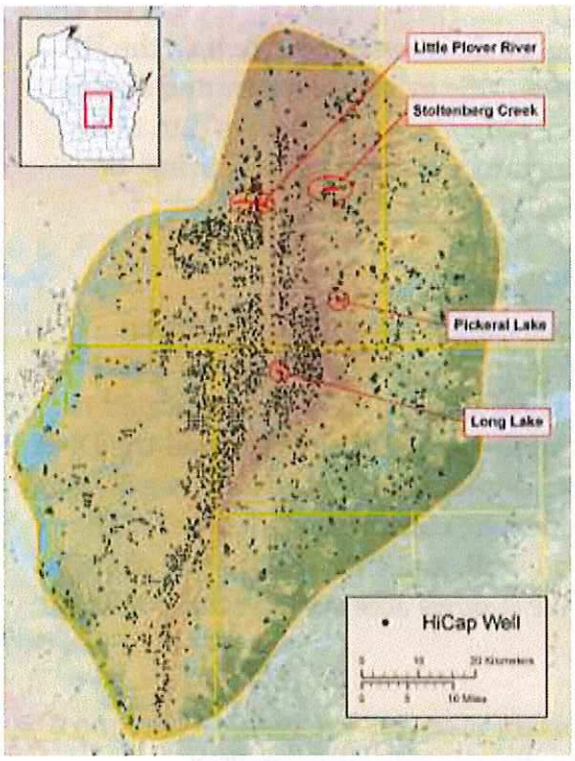

Figure I-5. Central Sands lakes and streams affected by pumping. Clockwise from top left: map of affected lakes and streams, dried up stretch of the Little Plover River, dried up stretch of Stoltenberg Creek, low water levels on Pickerel Lake, and dried up portion of Long Lake.

EXHIBIT A

August 16, 2012

Mr. Dan Baumann
Regional Director WCR DNR

Mr. Baumann,

We, the commissioners of the Town of Rome municipal water utility, would like to voice our opposition to the proposed Wysocki CAFO just upstream from us in the Town of Saratoga. Our wells are about two miles from the project being proposed, and scientific evidence offered up by Dr George Kraft of UWSP, Professor Robert Glennon of the University of Arizona, and other experts, suggests we are extremely vulnerable to water quality and quantity issues resulting from the proposed high capacity wells, concentrated animal feeding operation, and large scale agriculture operation.

We've already experienced the effects of high nitrate levels, being forced to purchase additional property and drill new wells at 85 feet a few years ago. Our original two wells were within two miles of an irrigated ag operation. Although we could not prove it at the time, we suspect nitrate leaching into one of our wells from the ag operation in 1995. The nitrates rose to 16.2 PPM in one of our wells and we were forced to add mains at a substantial cost to mix the two wells. We spent $621,313 between 1995 and 2001 to connect the wells and drill an additional 20 test wells looking for good water in suitable soil. Since that time, we have spent an additional $1,618,260 purchasing additional property and drilling two new wells, and adding required filtering equipment and related infrastructure. We've been told that if nitrates leach into our newer wells, we would need additional filtering equipment at the cost of $2,000,000. Not only does this proposed CAFO pose a threat of contamination of our existing wells, the high potential of water quality and quantity issues resulting from the CAFO limits our ability to drill additional wells and expand our service to the north and west in our town as demand for municipal water grows in our town.

The Town of Rome has 7,046 properties with a total valuation (2011) of $698,344,500. Our utility serves all 7,046 properties in the Town of Rome for fire protection, and provides drinking water to approximately 1,000 residences at this time. As a municipal water utility, we test frequently for water chemistry and water levels, under DNR supervision. Our new wells are free of nitrates and we plan to do all that we can to insure they stay that way. We've invested millions of dollars in this utility to provide safe drinking water to our citizens. We hope the DNR and any other agencies involved will consider the risk to our community this CAFO would represent if it were approved.

Commissioner Tom Birch
CommissionerTom Deckow
Commissioner Don Fornasiere
Commissioner Betty Havlik
Commissioner Don Ystad
Water Utility Manager Chad Ziegler

CC: Glen Falkowsky – DNR
CC: Town of Rome Supervisors

EXHIBIT B

DeWitt
Ross & Stevens s.c. Law Firm

Please respond to: Capitol Square Office
Email: jkl@dewittross.com
Direct: 608-252-9358

September 6, 2012

VIA EMAIL AND U.S. MAIL
Kenneth.Johnson@Wisconsin.gov

Mr. Ken Johnson, Administrator
Wisconsin Department of Natural Resources, Water Division
101 S. Webster Street
P.O. Box 7921
Madison, WI 53707

RE: Analysis of the *Lake Beulah* Decision and Implications for Wisconsin's High Capacity Well Approval Process

Dear Ken:

On July 6, 2011, the Wisconsin Supreme Court rendered a decision in *Lake Beulah Management District, et al v. Wisconsin Department of Natural Resources*, et al, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73 ("*Lake Beulah*") regarding the approval process for High Capacity Wells ("HCW") in Wisconsin. Since then we have learned that Wisconsin Department of Natural Resources ("WDNR") staff have been applying pumping conditions lower than pumping capacity upon recently issued HCW permits, as well as placing conditions upon previously approved HCW permits. We are concerned that WDNR staff is not providing sufficient concrete, scientific evidence for restrictions imposed on new wells, that WDNR is misapplying the law that is applicable to reconstructed and replacement HCWs, and that WDNR has very limited authority to re-open previously approved HCW approvals. We have been asked by our client, the Wisconsin Potato & Vegetable Growers Association to analyze this situation.

Below is an outline of the standard of review for high capacity well approvals prior to *Lake Beulah*, the Court's decision, and some of the practical implications of the Decision upon applicants for new and reconstructed HCWs. We hope to work with the WDNR to establish a process for implementing the *Lake Beulah* decision fairly and consistently.

I. Background: High Capacity Well Approvals.

WDNR's authority to regulate HCWs can be found in subchapter II of Wis. Stat. Ch. 281, Wis. Stat. §§ 281.34-281.35. The owner of a proposed HCW must apply to WDNR for

approval prior to construction.[1] A high capacity well approval issued in accordance with Wis. Stat. § 281.34 is considered a permanent approval.[2] A HCW approval does not automatically expire after a certain period of time and does not need to be renewed after a certain period of time. *Id.* An approval does, however, typically contain limitations concerning approved pumping capacity and maximum daily use as is authorized by rule.[3]

WDNR does not have the broad authority to unilaterally revise a well approval. The Department itself described this authority accurately in a response to a comment filed during the NR 820 rule promulgation in March 2007 when it wrote:

> The department has limited statutory authority to unilaterally modify previously issued approvals. Section 281.34(7), Stats., states that the approval remains in effect unless the department modifies or rescinds the approval because the well or use of the well is not "in conformance with standards or conditions applicable to the approval". Thus, as long as the well has been constructed, maintained and operated in conformance with the applicable code requirements and conditions or approval, the well can continue to operate. [4]

There are two situations in which previously issued well approvals may be revised by WDNR. First, the Department may modify an approval for non-compliance with the terms of the approval. [5] Second, for wells in groundwater protection areas that were constructed before May 7, 2004, the Department may order the owner of the high capacity well to mitigate the effects of the well *if* the Department provides full funding for the cost of that mitigation. [6]

There are also several situations that will trigger the need to apply for a new well approval even for previously approved wells. Wisconsin law requires approvals for the "construction, reconstruction, or operation of a high capacity well or well system."[7] "When an owner or operator relinquishes control of the operation of a high capacity well or well system, a new approval shall be obtained by the new operator, owner or lessee before operation of the high capacity well or well system is continued." Wis. Admin. Code § NR 812.09(4)(a)2. As a

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[1] Wis. Stat. § 281.34(2).
[2] Wis. Stat. § 281.34(7).
[3] Wis. Admin. Code § NR 820.30(3)(b).
[4] *See Adoption of Board Order DG-37-06*, Creation of NR 820, relating to protection of groundwater quantity, March 2007, Dep't Responses to Comments Received January, 2007, p.4.
[5] *See above; see also* Wis. Stat. § 281.34(7).
[6] *See* Wis. Stat. § 281.34(8)(d).
[7] NR 812.09(4)(a); *see also* Wis. Stat. § 281.34(2).

result, approvals are required for new wells, reconstructed wells and for any wells that are part of a property that has had an ownership change.

II. Statutory and Administrative Law Standard of Review for High Capacity Well Approvals – Pre-*Lake Beulah.*

Setting aside the *Lake Beulah* decision, which is discussed later in this memo, Wisconsin statutes do not require WDNR to prepare an environmental assessment for every HCW that is proposed to be constructed – not even every HCW that is proposed to be constructed in a groundwater protection area. Rather, WDNR is directed by the legislature to review applications for approvals using its environmental review process promulgated in administrative rules. [8]

Accordingly, WDNR determined via administrative rule that all proposed HCWs are subject to an environmental review process established under NR 150, Wis. Admin. Code NR 150 delineates an "Action Type List," which assigns a particular level of administrative review to over 300 Department actions. Approvals of HCWs are characterized as a "Type IV" action. [9]

> *(a) Type IV actions.* Except as provided under s. NR 150.20 (2) (b), type IV actions do not require the EA or EIS process, do not require a news release, and are otherwise exempt from the procedural requirements of this chapter. The department may prepare and distribute an EA on the proposed action to aid department decision making if the department determines that critical resources are affected by the proposed action, or there may be substantial risk to human life, health or safety.[10]

Further, Wis. Admin. Code § NR 820 establishes a complementary environmental *review* process through which the Department can establish whether a proposed HCW in a ground water protection area requires a formal environmental *analysis* under NR 150. The combined processes in NR 150 and NR 820 provide a framework within which the Department can determine whether a HCW in a groundwater protection area could lead to significant adverse environmental impacts, thereby triggering the requirement to prepare an environmental assessment. [11]

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[8] *See* Wis. Stat. § 281.34(4)(a); "The Department shall review an application for approval of any of the following using the environmental review process in its rules promulgated under s. 1.11."
[9] *See* Wis. Admin. Code § NR 150.03(8)(h)1.
[10] NR 150.20(1)(a).
[11] *See* Wis. Admin. Code § NR 820.

This process remains unchanged by the *Lake Beulah* decision.

III. The *Lake Beulah* Standard.

Prior to the *Lake Beulah* decision, WDNR's authority and scope of review and approval of a HCW was controlled exclusively by Wis. Stat. §§ 281.34 - 281.35 and applicable provisions of the Wisconsin Administrative Code, NR 812 and NR 820. In *Lake Beulah,* the Court determined that WDNR has authority and duties beyond the explicit statutory provisions.

A. WDNR Has a Duty to Consider Whether a Proposed HCW May Harm Waters of the State.

The *Lake Beulah* decision is a result of WDNR's approval of a request by the Village of East Troy to construct a new 1.4 million gallon per day municipal well in 2005.[12] The proposed well was to be located approximately 1200 feet from Lake Beulah.[13] WDNR approved the well.[14] The approval was challenged by the Lake Beulah Management District ("LBMD") and the Lake Beulah Protective and Improvement Association ("LBPIA").[15] The issue before the Court was the extent of WDNR's authority to consider environmental impacts from proposed HCWs upon waters of the state.[16] The Village of East Troy argued that WDNR's authority was limited to the specific HCW statutes and rules.[17] Those challenging the approval argued that WDNR has an obligation to protect waters of the state, and therefore, must consider potential environmental impacts to those waters when approving HCW applications.[18]

The Court ultimately concluded that:

> [P]ursuant to Wis. Stat. § 281.11, § 281.12, § 281.34, and § 281.35, 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." [19]

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[12] *Lake Beulah* at ¶ 10.
[13] *Id.* at ¶ 12.
[14] *Id.* at ¶ 15.
[15] *Id.* at ¶¶ 1, 16.
[16] *Id.* at ¶ 22.
[17] *Id.* at ¶ 29.
[18] *Id.* at ¶¶ 27-28.
[19] *Lake Beulah* at ¶ *62.*

The Court explained that the HCW statutes and rules, along with WDNR's general duty to preserve waters of the state, form the basis of the WDNR's authority to consider the environmental impact of a proposed HCW. The Court did not expressly require an environmental review of all proposed HCWs. Rather, the Court determined that the circumstances that trigger the WDNR's duty and the level of required environmental review, is left to the WDNR's discretion. The Court held that:

> 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. [20]

The Court further determined that:

> The high capacity well permitting framework along with the DNR's authority and general duty to preserve waters of the state provides the DNR with the discretion to undertake the review it deems necessary for all proposed high capacity wells, including the authority and a general duty to consider the environmental impact of a proposed high capacity well on waters of the state. [21]

In short, how and when WDNR exercises its authority and general duty is highly discretionary.

B. WDNR's Duty is Triggered *Only When* Presented with Sufficient, Concrete Evidence of Potential Harm to Waters of the State During the Approval Process.

The Court did not direct WDNR to consider the environmental impact of all proposed HCWs under all circumstances. The Court made clear that doing so would be inconsistent with the legislature's decision to mandate the level of environmental review for only certain types of HCWs:

> The DNR's general duty certainly 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. Such an interpretation would be inconsistent with the legislature's decision to mandate that level of environmental review for only certain high capacity wells.[22]

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[20] *Id.* at ¶ 4.
[21] *Id.* at ¶ 39.
[22] *Lake Beulah* at ¶ 45.

Rather, the Court held that:

> [T]o 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.*** [23] [24]

The Court further emphasized that this duty is triggered ***ONLY IF*** there is sufficient concrete, scientific evidence of potential harm and repeatedly explained that this evidence must be presented to WDNR ***when the HCW approval is under review.***

> [T]he DNR is required 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. [25] [26]

The Court went on to require that:

> [T]o trigger the DNR's duty to consider the impact of a well on waters of the state, citizens must present sufficient concrete, scientific evidence of potential harm to waters of the state directly to the DNR decision makers ***while they are considering the well permit application.***[27]

The Court did not identify the parameters of WDNR's review of the HCW application. Rather, the Court deferred to WDNR's discretion and acknowledged that the decision to engage in the analysis is a "highly fact-specific matter" that depends on information from the well owner in the application and other information submitted to DNR while the application is under review.[28]

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[23] *Lake Beulah* at ¶ 4 (emphasis added).
[24] "'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).
[25] *Lake Beulah* at ¶ 39, FN 28 (*emphasis added*).
[26] The *Lake Beulah* decision did not address areas of cumulative impacts.
[27] *Id.* at ¶ 55 (emphasis added.)
[28] *Id.* at ¶46.

It further held that:

> [A] legal challenge to the DNR's decision under ch. 227 is limited to the record on review and is deferential to the DNR's expertise in these areas. Thus, citizens must present any evidence of potential harm to the agency *before* the decision is made or risk losing the ability to challenge the DNR's discretionary decision based on such evidence.[29] [30]

Once the WDNR has determined that the duty to perform a further environmental review of a HCW application has been triggered, it must also use its discretion to determine the scope of that additional review.[31] WDNR can require a more comprehensive environmental review, including an environmental analysis or environmental impact statement, and based upon that environmental review, can deny a HCW request or place conditions upon its approval accordingly.[32]

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[29] *Lake Beulah* at ¶ 47 (emphasis in original).

[30] There are two ways members of the public, or an aggrieved HCW applicant, may provide WDNR with the sufficient concrete, scientific evidence necessary to trigger an environmental review after a HCW decision has already been made by WDNR. Following a WDNR decision to grant or deny a HCW approval, the applicant or a member of the public aggrieved by the decision may petition WDNR for a contested case hearing and present such evidence during that hearing. *Id.* at ¶ 56. An applicant or aggrieved citizen has an additional, but more limited, opportunity to submit that evidence if the permit decision is ultimately reviewed judicially pursuant to Wis. Stat. § 227.52. *Id.* at ¶ 57. However, requests to supplement WDNR's record of decision can be denied in both situations. Due to the plaintiffs' failure to properly submit concrete scientific evidence of potential harm to WDNR during the decision-making process and in subsequent court proceedings in *Lake Beulah*, the Court was prohibited from considering it, and WDNR's decision to approve the HCW was affirmed. *Lake Beulah* at ¶¶ 65-66.

[31] *Id.*

[32] *Id.* at ¶ 4.

IV. Implications of the *Lake Beulah* Decision.

The practical implications on the HCW approval process following *Lake Beulah* are many, for applicants, WDNR, and the public. Below are just a few requiring WDNR's attention.

A. Restrictions on New HCW Applications Must be Supported by Sufficient Concrete, Scientific Evidence of Harm to a Water of the State.

In addition to the statutory factors WDNR must consider when reviewing an application for a new (*i.e.*, a new withdrawal[33]) HCW in groundwater protection areas or near springs,[34] WDNR staff is now screening all HCW applications for potential harm to waters of the state, prior to approval, in light of *Lake Beulah.* If WDNR determines that a HCW is likely to cause "significant environmental impacts to a water of the state," then WDNR is now either denying the approval or conditioning the approval in order to minimize those impacts. [35] [36]

In some circumstances, WDNR is imposing restrictions that have been previously very rare in irrigated agriculture, such as specifying pumping at rates that are significantly below a well's pumping capacity. For these permit denials or restrictions to be warranted, *Lake Beulah* requires that WDNR be presented with "sufficient concrete, scientific evidence" that the HCW has the potential to harm waters of the state. [37] It is not enough to merely assert a potential for harm. Evidence – concrete scientific evidence – is required.

This evidence can come from the well applicant, the public, or WDNR.[38] However, without that evidence, WDNR's authority is limited to imposing restrictions on the specific HCW enumerated by the statute and administrative code.[39] As such, if WDNR is going to impose a restriction upon a HCW that does not meet the Wis. Stat. § 281.34 standards based upon

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[33] In this section, when we refer to "new" HCWs we are referring to new withdrawals - wells that are entirely new from an environmental perspective. "New" in this section does not include reconstructed, replacement or previously approved HCWS, which are addressed separately.

[34] *See* Wis. Stat. § 281.34 (5).

[35] *See Larry Lynch, High Capacity Well Applications, DNR Reviews following the "Lake Beulah" Decision* (July 19, 2012) available at http://www.wiawwa.org/sites/default/files/permitting_high_cap_combined_7-19-12.pdf

[36] "Significant adverse environmental impact" means alteration of groundwater levels, groundwater discharge, surface water levels, surface water discharge, groundwater temperature, surface water temperature, groundwater chemistry, surface water chemistry, or other factors to the extent such alterations cause significant degradation of environmental quality including biological and ecological aspects of the affected water resource. NR 820.12(19).

[37] *Lake Beulah* at ¶¶ 39, 46, 55.

[38] *Id.* at ¶ 46.

[39] Wis. Stats. §§. 281-34-281.35, NR 812, NR 820.

Lake Beulah, then WDNR must provide the applicant with the sufficient concrete, scientific evidence behind that restriction *before* the approval is issued. [40] The applicant must be afforded the opportunity to review the evidence, refute the evidence and provide additional evidence prior to final issuance of an approval.

We request that the WDNR immediately amend its protocol for issuing approvals of HCWs to allow such a review and not impose use restrictions on HCWs without sufficient concrete scientific evidence required by the *Lake Beulah* standard.

B. Applications for Reconstruction of HCWs Should Not Be Subject to Environmental Review and Do Not Warrant New Conditions or Modifications.

In response to *Lake Beulah*, WDNR staff appears to be applying a new or heightened standard of review to applications for the reconstruction of HCWs. This approach constitutes a denial of the applicant's rights granted when the well was originally approved.

We acknowledge that Wis. Admin. Code § NR 812 applies to reconstructed wells and that a WDNR approval is required for a reconstructed HCW. However, approvals for reconstructed HCWs are not required because reconstructed wells constitute a "new" high capacity well. Rather, the approval is required because WDNR needs to ensure that current and proper technical standards are applied to the reconstruction process.

By definition, an application to "reconstruct" a well is an application to re-establish an already approved well.[41] Well reconstruction is essentially the *maintenance* of a previously approved HCW. After reconstruction, the HCW will be repaired or restored to its full working condition as originally approved.

The *Lake Beulah* Court was clear in its instructions to WDNR. The WDNR has the discretion to determine when the duty to review environmental impacts *of a proposed high capacity well* is triggered.[42] Because a reconstructed HCW is simply the restoration of an existing HCW, a reconstructed well is not a "proposed" high capacity well. It is an existing high capacity well that needs maintenance. Reconstructed wells do not present anything

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[40] *Lake Beulah* at ¶¶ 39, 46, 55.
[41] "Reconstruction" means "modifying the original construction of a well. Reconstruction includes, but is not limited to deepening, lining, installing or replacing a screen, underreaming, hydrofracturing and blasting." NR 812.07(85).
[42] *See Lake Beulah* at ¶¶ 39, 45 and 46.

"new" to review from an environmental perspective. Therefore, the duty under *Lake Beulah* is not triggered by an application to reconstruct a HCW.

In addition, absent a compliance problem with the original approval, there is no trigger for any authority under Wis. Stat. ch. 281 for WDNR to impose any new conditions, restrictions or modifications on the well approval. A reconstructed HCW, restored to its previously approved status, should maintain the same approval parameters contained in its original approval unless the statutory criteria for modifying or rescinding a HCW approval are met.

Accordingly, we ask that WDNR immediately establish a protocol for reviewing applications to reconstruct HCWs that requires no additional environmental review and allows no imposition of new modifications or new restrictions beyond those contained in the original approval unless the statutory criteria for modification of a well approval are triggered.

C. Replacement Wells are Not New Wells from an Environmental Perspective and Therefore Should Not Trigger a New Well Environmental Review.

When a HCW fails, it needs to be "replaced." Unlike the reconstruction of a HCW, which is the re-establishment of the same well in the same location, a well that needs to be "replaced" needs to be moved and re-drilled in a different location. However, HCWs that are replaced for purposes of irrigated agriculture are typically moved as little as possible from their original location and are drilled in manner that maintains the use of the water by the same irrigation equipment that has been installed in the field.

From the perspective of Wis. Admin. Code §§ NR 812 and NR 820, a replacement well is considered a new well. And, prior to the *Lake Beulah* decision, the WDNR did not apply an environmental review process to replacement wells unless the Wis. Stat. § 281.34 criteria were triggered. We argue that post-*lake Beulah* this process should remain unchanged.

Importantly, *from an environmental perspective*, a replacement HCW is not a new HCW. For example, a property that contains two wells at the time one well fails and needs replacement, still contains two wells after the failed well is replaced. The same amount of water at the same pumping rate is being withdrawn from substantially the same location simply because (for purposes of irrigated agriculture), the same irrigation equipment must be used for the replacement well as was used for the original well.

The Legislature, in Wis. Stat. ch. 281 did enumerate several circumstances when all wells should be reviewed. That statute must still be applied to replacement wells.

The sections of Wis. Admin. Code §§ NR 812 and NR 820 apply to replacement wells not because something has changed from an environmental perspective, but because the WDNR needs to ensure that the most current and proper technical standards are applied to the well drilling process.

An environmental review of a replacement well that is equivalent to the review afforded to a truly new well is unwarranted. The *Lake Beulah* court said clearly to WDNR, you not only *have* the discretion to determine when the duty to review environmental impacts of a proposed HCW is triggered, but *you also must use that discretion* to determine when that duty is triggered.[43] The WDNR should use that discretion to circumstances under which a HCW is truly new from an environmental perspective. For purposes of irrigated agriculture, replacement wells are not equivalent to new wells.

Accordingly, we ask that the WDNR use its discretion to apply a very limited review to applications to replace HCWs for irrigated agriculture, as the environmental effects of replacement wells under these circumstances are known and unchanged.

D. Imposing New Restrictions or Modifications on Already Approved High Capacity Wells on a High Capacity Property is Limited to the Authority Granted to the Department Under Wis. Stat. § 281.34 (7).

As discussed earlier in this memo, HCW approvals are generally considered to be "permanent" approvals. Wisconsin Statutes enumerate very limited circumstances under which the Legislature has granted the WDNR the authority to modify or rescind these permanent approvals after they have been issued.[44]

Recently, WDNR has been aggressively imposing new restrictions on already approv ed HCWs on high capacity properties when property owners apply for an approval of a replacement well or new well on the property. More important, the proposed restrictions and conditions are not just being imposed on the replacement or new well. They are being imposed on fully approved and operational wells that are in compliance with their current approvals, but are located on the high capacity property. We believe that this is a new, post-*Lake Beulah* development, and that it is unwarranted and unauthorized under current law. We look to the language in the statute, administrative rules and the *Lake Beulah* decision to analyze this practice.

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[43] *See Lake Beulah* at ¶¶ 39, 45 and 46.
[44] *See* Wis. Stat. § 281.34(7).

It has been argued that the following language in NR 820 allows the WDNR to review an entire high capacity property when a new or replacement well application is made:

> The department shall include in any approval issued using the standards under s. 281.34, Stats., conditions to ensure that the high capacity well will not result in significant adverse environmental impacts to trout streams, outstanding resource waters and exceptional resource waters. The conditions may include but are not limited to conditions as to location, depth of lower drillhole, depth interval of well screen, pumping capacity, pumpage schedule, months of operation, rate of flow and conservation measures. The department may also modify the approvals or place additional conditions on the approvals of other previously approved wells on the high capacity property to prevent significant adverse environmental impacts.[45]

First, it must be noted that this section of NR 820 applies to HCWs that were approved using the "standards" under Wis. Stat. § 281.34. The first sentence of NR 820.30(3)(b) specifically includes that limitation. Those "standards" apply only to wells that may impair the water supply of a public utility, wells located in a groundwater protection area, wells with high water loss, wells that impact a spring, wells approved under a water supply service plan and wells that involve a new or increased withdrawal that will exceed 2,000,000 gallons per day in any 30-day period.[46] Those standards do not apply to all HCWs.

Second, it is undisputed that this rule, NR 820, was specifically promulgated to provide parameters for the review and approval of HCWs that are subject to the standards in Wis. Stat. § 281.34(5) – not to high capacity wells in general.[47] The only part of NR 820 that was designed to apply to high capacity wells in general are the provisions detailing the required annual pumping reports.[48]

Both before the *Lake* Beulah decision and after the *Lake Beulah* decision, the only well approvals issued using the § 281.34(5) standards are wells that fall into one of the 281.34(5) categories. The *Lake Beulah* court never suggested that those standards or, by extension, the sections of NR 820 designed to establish processes and criteria to guide the review of proposed high capacity wells near springs or within a groundwater protection area, be applied to all previously approved HCWs.

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[45] NR 820.30(3)(b).
[46] *See* Wis. Stat. § 281.34(5).
[47] *See Adoption of Board Order DG-37-06, Creation of NR 820 relating to protection of groundwater quantity, March 2007.*
[48] *See id.*

Further, and more importantly, we believe that the inclusion of this language in the rule expressly exceeds the authority granted to the WDNR by statute and that this section of the rule is void as unauthorized by statute. The situations in which the Department is permitted to modify or rescind a high capacity well approval are expressly limited by the Legislature.[49] The Legislature explicitly listed the only two circumstances in which the Department is authorized to revise well approvals issued under Wis. Stat. § 281.34. The WDNR cannot add language to an administrative rule that goes beyond a legislative mandate and grant itself the authority to "modify the approvals or place additional conditions on the approvals of other previously approved wells on the high capacity property."[50]

We expect that WDNR believes that the *Lake Beulah* decision affected this section of the code because the trigger for the NR 820.30(3)(b) modification of a previously approved well is "to prevent significant adverse environmental impacts," – a phrase that the Court does use in relation to *proposed high capacity wells*. However, the validity or scope of the WDNR's duty in relationship to previously approved wells or with regard to the limitation under Wis. Stat. § 281.34(7) was never considered by the *Lake Beulah* Court. Rather, the Court focused its decision and analysis on proposed high capacity wells – new high capacity wells – and never addressed or suggested that it was changing WDNR's authority with regard to previously approved wells. As a result, that authority remained unchanged by the *Lake Beulah* decision.

To allow the NR 820 rule language to eliminate the meaning of § 281.34(7) would be in direct violation of express and explicit legislative intent. There is no authority under Wis. Stat. ch. 281 for the modification or imposition of new conditions on previously approved high capacity wells unless those wells meet the statutory criteria under Wis. Stat. § 281.34(7). The *Lake Beulah* Court did not address this authority and, therefore, left it unchanged. Accordingly, we respectfully request that WDNR immediately cease the modification or imposition of new conditions on previously approved wells when an application for a new or replacement well is made on a high capacity property.

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[49] *See* Wis. Stat. § 281.34(7).
[50] NR 820.30(3)(b).

V. Conclusion.

Based on our analysis described above, we respectfully request that the WDNR immediately make the following changes to its current protocol regarding the review and approval of high capacity wells in Wisconsin.

1. As required by the *Lake Beulah* Court, we request that the WDNR provide applicants for any new HCW approvals with the sufficient concrete, scientific evidence supporting any proposed restriction on the HCW approval *before* the approval is issued and that the WDNR allow the applicant time to review, refute or respond to that evidence prior to final approval issuance.

2. We ask that the WDNR immediately establish a protocol for reviewing applications to "reconstruct" HCWs that requires no additional environmental review and no imposition of new modifications or new restrictions on the reconstructed HCW.

3. We ask that the WDNR use the discretion afforded to is by the *Lake Beulah* Court to apply a very limited review to applications to "replace" HCWs for irrigated agriculture because such replacement wells are located in substantially similar locations to the original well and such wells request the same pumping rates as the original wells. Therefore, this specific category of agricultural replacement wells presents no new or unknown environmental effects.

4. We request that the WDNR immediately cease the modification, review and/or imposition of new or additional conditions on previously approved HCWs on a high capacity property when an application for a new or replacement well is made for that property because the WDNR lacks any legal authority to modify previously approved HCWs in this manner. We further request that WDNR immediately restore all previously issued HCW approvals that were modified under this impermissible framework to their original approvals.

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Thank you for your consideration of these critical issues to all of the Wisconsin Potato & Vegetable Grower Association members. If you have any questions about this information, please do not hesitate to contact me directly.

Very truly yours,

DeWitt Ross & Stevens s.c.

Jordan K. Lamb

JKL:jkl

cc. Duane Maatz, Executive Director, Wisconsin Potato & Vegetable Growers Assn.
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