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STATE OF WISCONSIN **01-25-2011**
SUPREME COURT
Appeal No. 2008AP003170 **CLERK OF SUPREME COURT
OF WISCONSIN**

LAKE BEULAH MANAGEMENT DISTRICT

Petitioner-Appellant-Cross-Respondent, Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Co-Petitioner-Co-Appellant-Cross-Respondent,

vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent-Respondent,

VILLAGE OF EAST TROY

Intervening Respondent-Respondent-Cross-Appellant; Petitioner.

**JOINT NON-PARTY *AMICUS* BRIEF OF DAIRY BUSINESS
ASSOCIATION, WISCONSIN MANUFACTURERS & COMMERCE,
WISCONSIN PAPER COUNCIL, AND MIDWEST FOOD PROCESSORS
ASSOCIATION**

On Appeal from a Decision of the Court of Appeals, District II,
dated June 16, 2010, relating to a Final Order Entered
in The Walworth County Circuit Court on September 20, 2008
The Honorable Robert J. Kennedy, Judge
Walworth County Circuit Court Case Nos. 06-CV-172

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TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	2
I. THE COURT OF APPEALS’ DECISION VIOLATES BASIC SEPARATION OF POWERS PRINCIPLES BY GRANTING THE DEPARTMENT OF NATURAL RESOURCES REGULATORY AUTHORITY NOT DELEGATED BY THE LEGISLATURE	2
A. High Capacity Well Statutes Do Not Expressly Confer DNR the Power to Regulate Beyond Legislatively Established Thresholds.....	2
B. The Court of Appeals’ Decision Granting DNR Sweeping Regulatory Authority Has Broad Ramifications Beyond this Particular Case.....	4
II. THE COURT OF APPEALS INCORRECTLY DETERMINED THAT THE PUBLIC TRUST DOCTRINE GRANTS DNR AUTHORITY TO REGULATE HIGH CAPACITY WELLS.....	6
A. The Legislature Has Not Delegated DNR the Authority to Regulate High Capacity Wells Under the Public Trust Doctrine	6
B. The Public Trust Doctrine Applies Only to Navigable Waters and Therefore Should Not Apply to High Capacity Wells	8
CONCLUSION	9
CERTIFICATION	10
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12).....	11
CERTIFICATE OF SERVICE.....	12

TABLE OF AUTHORITIES

Cases

<i>City of Madison v. Tolzman</i> , 7 Wis. 2d 570, 97 N.W.2d 513 (1959)	6
<i>DeGayner & Co., Inc. v. Dep’t of Natural Res.</i> , 70 Wis. 2d 936, 236 N.W.2d 217 (1975).....	8
<i>Elroy-Kendall-Wilton Schools, v. CESA, Dist. 12</i> , 102 Wis. 2d 274, 306 N.W.2d 89 (Ct. App. 1981)	5

<i>Hilton v. Dep't of Natural Res.</i> , 717 N.W. 2d 166, 2006 WI 84 (2005).....	7
<i>J.F. Ahern v. Bldg. Comm'n</i> , 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983).....	3
<i>Kimberly-Clark Corp. v. PSC</i> , 110 Wis. 2d 455, 329 N.W.2d 143 (1983).....	3
<i>Maple Farms, Inc. v. State Dep't of Natural Res.</i> , 247 Wis. 2d 96, 633 N.W.2d 720 (Ct. App. 2001)	5
<i>Martineau v. State Conservation Comm'n</i> , 46 Wis. 2d 443, 175 N.W.2d 206 (1970).....	5
<i>Oneida County v. Converse</i> , 180 Wis. 2d 120, 508 N.W.2d 416 (1993).....	3
<i>Rusk County Citizen Action Group, Inc. v. Wisconsin Dep't of Natural Res.</i> , 203 Wis. 2d 1, 552 N.W.2d 110 (1996)	5
<i>State v. Deetz</i> , 66 Wis. 2d 1, 224 N.W. 2d 407 (1974).....	7
<i>Thomson v. Racine</i> , 242 Wis. 591, 597. 9 N.W.2d 91 (Ct. App. 1996).....	2
<i>Village of Menomonee Falls v. Dep't Natural Res.</i> , 140 Wis. 2d 579, 412 N.W.2d 505 (Ct. App. 1987)	8

Statutes

Wis. Stat § 16.004	4
Wis. Stat. § 103.005	4
Wis. Stat. § 115.28	4
Wis. Stat. § 115.29	4
Wis. Stat. § 16.001	4
Wis. Stat. § 196.02	4
Wis. Stat. § 250.04	4
Wis. Stat. § 281.11	passim
Wis. Stat. § 281.31	7
Wis. Stat. § 281.33	7
Wis. Stat. § 281.34	2, 3
Wis. Stat. § 281.35	2, 3
Wis. Stat. § 283.001	5
Wis. Stat. § 40.01	4
Wis. Stat. § 40.03	4

Wis. Stat. § 5.05	4
Wis. Stat. § 93.06	4
Wis. Stat. § 93.07	4
Wis. Stat. §§ 321.02 – 321.04	4
Wis. Stat. §281.12	passim
Wis. Stat. ch. 281	1

Other Authorities

Wis. Admin. Code § NR 310.03(5)	8
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INTRODUCTION

This case involves the question of whether the Department of Natural Resources (DNR) has the broad authority to regulate high capacity wells beyond the specific statutory language enacted by the legislature. The court of appeals' decision, which granted DNR authority to regulate high capacity wells under Chapter 281 general duties provisions, violates basic principles of separation of powers. In addition, the lower court's decision greatly expands DNR's regulatory authority by concluding that the public trust doctrine applies to high capacity wells. This decision adversely affects more than the parties involved in this case; therefore, *amici* Dairy Business Association, Midwest Food Processors Association, Wisconsin Manufacturers and Commerce, and the Wisconsin Paper Council (hereinafter referred to as "*Amici*") file this non-party brief.

If the court of appeals' decision is upheld, specific statutory language enacted by the legislature regulating high capacity wells will be rendered meaningless. In essence, the legislature will become irrelevant and subservient to agency bureaucrats. The Court has the opportunity to place a meaningful check on the regulatory authority of state agencies by declaring that a statute's general powers and duties provisions do not grant state agencies unbridled regulatory authority.

This Court should make clear that DNR, and other 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. In addition, the Court should clarify that the legislature has not delegated DNR the authority to regulate high capacity wells under the public trust doctrine.

ARGUMENT

I. THE COURT OF APPEALS' DECISION VIOLATES BASIC SEPARATION OF POWERS PRINCIPLES BY GRANTING THE DEPARTMENT OF NATURAL RESOURCES REGULATORY AUTHORITY NOT DELEGATED BY THE LEGISLATURE

The court of appeals concluded that the general statutes (Wis. Stat. §§ 281.11 and 281.12) grant DNR additional authority to regulate high capacity wells beyond the specific statutes (Wis. Stat. §§ 281.34 and 281.35) regulating high capacity wells. According to the court of appeals, the source of this authority is the public trust doctrine through the general duties provisions of Chapter 281. As demonstrated below, neither the general duties provisions (281.11 and 281.12) nor the public trust doctrine confer to DNR sweeping regulatory authority.

A. High Capacity Well Statutes Do Not Expressly Confer DNR the Power to Regulate Beyond Legislatively Established Thresholds

Wisconsin courts have long recognized that administrative agencies are creations of the legislature and that they can exercise only those powers granted by the legislature. *Thomson v. Racine*, 242 Wis. 591, 597, 9 N.W.2d 91 (1943).

Legislative power may be delegated to an administrative agency as long as adequate standards for conducting the allocated power are in place to preserve the

separation of powers doctrine. *See J.F. Ahern v. Bldg. Comm'n*, 114 Wis. 2d 69, 88, 336 N.W.2d 679 (Ct. App. 1983).

Under the separation of powers doctrine, “[a]n administrative agency has only those powers which are expressly conferred or can be fairly implied from the statutes under which it operates.” *Oneida County v. Converse*, 180 Wis. 2d 120, 125, 508 N.W.2d 416 (1993). “Any reasonable doubt as to the existence of an implied power in an agency should be resolved against the exercise of such authority.” *Kimberly-Clark Corp. v. PSC*, 110 Wis. 2d 455, 462, 329 N.W.2d 143 (1983).

The legislature conferred DNR limited authority to regulate high capacity wells under Wis. Stat. §§ 281.34 and 281.35. Those sections establish a comprehensive, three-tiered permitting framework based on specific criteria. *See* Wis. Stat. §§ 281.34 and § 281.35. Neither by statute, nor by implication, has the legislature granted DNR any further regulatory authority over high capacity wells.

Yet, despite the clear statutory language, the court of appeals concluded that DNR had the authority under the general delegation statutes (Wis. Stat. §§ 281.11 and 281.12) to regulate high capacity wells beyond those powers expressed in the more specific statutes (Wis. Stat. §§ 281.34 and 281.35).

Not only did the court of appeals hand DNR newfound regulatory authority under a nebulous reading of general authority statutes (Wis. Stat. §§ 281.11 and 281.12), it gave DNR unlimited discretion in deciding when to use that power to

“investigate public trust concerns.” According to the lower court, since DNR is the “central unit of state government in charge of water quality and management matters,” it would “leave it to DNR to determine the type and quantum that it deems enough to investigate.” This decision violates traditional principles of separation of powers by stripping the authority to legislate and provide oversight from the legislature.

Accordingly, the Court should reverse the court of appeals and reject this unbridled expansion of DNR power.

B. The Court of Appeals’ Decision Granting DNR Sweeping Regulatory Authority Has Broad Ramifications Beyond this Particular Case

The Court’s decision will have an impact beyond the parties involved in this case because numerous other state agencies have general powers and duties provisions similar to those contained in Wis. Stat. §§ 281.11 and 281.12. Those agencies include: Department of Workforce Development (Wis. Stat. § 103.005); Government Accountability Board (Wis. Stat. § 5.05); Department of Administration (Wis. Stat. §§ 16.001 & 16.004); Department of Employee Trust Funds (Wis. Stat. §§ 40.01 & 40.03); Department of Agriculture, Trade and Consumer Protection (Wis. Stat. §§ 93.06 & 93.07); Department of Public Instruction (Wis. Stat. §§ 115.28 & 115.29); Department of Health Services (Wis. Stat. § 250.04); Department of Military Affairs (Wis. Stat. §§ 321.02 – 321.04); and Public Service Commission (Wis. Stat. § 196.02).

Moreover, the Court's decision will clarify conflicting case law concerning an agency's authority to regulate based on those general duties and powers provisions.

For example, in *Elroy-Kendall-Wilton Schools, v. CESA, Dist. 12*, 102 Wis. 2d 274, 306 N.W.2d 89 (Ct. App. 1981), the court of appeals concluded that the legislature did not delegate the cooperative educational service agency the authority to expend money to purchase real estate under the general duties statute. *Id.* At 279-280. *But see Maple Farms, Inc. v. State Dep't of Natural Res.*, 247 Wis. 2d 96, 633 N.W.2d 720 (Ct. App. 2001), (court finding that the statute's broad statement of policy and purpose provision (Wis. Stat. § 283.001) did grant the agency authority to regulate groundwater beyond the statute enacted by the legislature.)

In addition, the Court has an opportunity to confirm that "[i]f a specific statutory grant of authority to a state agency conflicts with a more general grant to the agency, the specific statute controls." *Martineau v. State Conservation Comm'n*, 46 Wis. 2d 443, 449, 175 N.W.2d 206 (1970); *see also Rusk County Citizen Action Group, Inc. v. Wisconsin Dep't of Natural Res.*, 203 Wis. 2d 1, 10, 552 N.W.2d 110 (1996) (holding that "when a specific grant of authority to an agency conflicts with a more general grant of authority, the specific statute controls.").

As highly regulated entities, *Amici* urge the Court to clarify that state agencies do not have broad regulatory authority through their general duties provisions.

II. THE COURT OF APPEALS INCORRECTLY DETERMINED THAT THE PUBLIC TRUST DOCTRINE GRANTS DNR AUTHORITY TO REGULATE HIGH CAPACITY WELLS

The court of appeals concluded that DNR’s authority was not restricted to the specific statutory scheme contained under Wis. Stat. §§ 281.11 and 281.12. Specifically, the court held that “the legislature’s mandate that the DNR complete a formal environmental review for only certain wells does not prohibit or rescind the DNR’s authority to review middling wells under Wis. Stat. §§ 281.11 and 281.12.” The court determined this newfound authority is contained in Wis. Stat. §§ 281.11 and 281.12 under the public trust doctrine.

The court of appeals’ interpretation of the public trust doctrine is erroneous and should be reversed.

A. **The Legislature Has Not Delegated DNR the Authority to Regulate High Capacity Wells Under the Public Trust Doctrine**

When the state legislature is delegating authority based on the public trust doctrine, “such delegation of authority should be in clear and unmistakable language and cannot be implied from the language of a general statute...” *City of Madison v. Tolzman*, 7 Wis. 2d 570, 575, 97 N.W.2d 513 (1959).

Moreover, the legislature has the “primary authority to administer the public trust for the protection of the public’s rights, and to effectuate the purposes

of the trust.” *Hilton v. Dep’t of Natural Res.*, 717 N.W. 2d 166, 173, 2006 WI 84 (2005). In fact, this Court has held that the public trust doctrine does not itself create any substantive rights. *State v. Deetz*, 66 Wis. 2d 1, 11, 224 N.W. 2d 407 (1974).

Contrary to DNR’s position, neither Wis. Stat. § 281.11 nor Wis. Stat. § 281.12 clearly grant the agency specific authority to regulate high capacity wells. Nor can it be implied from these general statutes that the legislature intended to delegate to DNR authority to regulate high capacity wells under the public trust doctrine.

There are specific instances where the legislature has in fact delegated DNR authority under the public trust doctrine. *See e.g.*, Wis. Stat. § 281.31 (authorizing shoreland zoning); Wis. Stat. § 281.33 (authorizing municipal construction site erosion control and storm water management). However, a plain reading of Wis. Stat. §§ 281.11 and 281.12 reveal that in no way did the legislature delegate to DNR through these provisions regulatory authority based on the public trust doctrine.

Accordingly, the Court should clarify that absent express delegation, the legislature has not conferred DNR broad authority to regulate based on the public trust doctrine, and has not provided such authority within the framework of high capacity well regulation. In addition, the Court should reject the argument that the

legislature impliedly granted DNR such regulatory authority under the public trust doctrine.

B. The Public Trust Doctrine Applies Only to Navigable Waters and Therefore Should Not Apply to High Capacity Wells

Under the public trust doctrine, the definition of navigability is central to the determination of public rights because the doctrine traditionally applies only to navigable waters. The court of appeals' decision is the first case expanding the public trust doctrine to groundwater and wells.

To be navigable, a waterway must have regularly recurring periods when it is possible to float a canoe or small recreational craft on that waterway, or have navigable periods lasting long enough to allow for recreational use. *DeGayner & Co., Inc. v. Dep't of Natural Res.*, 70 Wis. 2d 936, 942–46, 236 N.W.2d 217 (1975); *Village of Menomonee Falls v. Dep't Natural Res.*, 140 Wis. 2d 579, 412 N.W.2d 505 (Ct. App. 1987).

“Navigable waterway” has been defined by DNR to mean “any body of water with a defined bed and bank that is navigable under Wisconsin law. In Wisconsin a body of water is navigable if it is capable of floating on a regularly recurring basis the lightest boat or skiff used for recreation or any other purpose.” Wis. Admin. Code § NR 310.03(5).

Although Wisconsin courts have considered expanding the definition of navigability, to date they have not done so. *See, e.g., DeGayner*, 70 Wis. 2d at 949. In fact, the parties in this case fail to cite a Wisconsin case that supports the

proposition that the public trust doctrine applies beyond navigable waters, or to groundwater or the regulation of high capacity wells, as in this case. Such a reading of the law would expand the public trust doctrine in a manner not envisioned by the legislature.

CONCLUSION

Amici urge the Court to affirm that state agencies only possess those powers expressly conferred by the legislature. The Court should further clarify that general duties provisions do not confer plenary regulatory authority to a state agency, especially where the legislature has enacted a specific legislative scheme regulating high capacity wells. Last, the Court should recognize the public trust doctrine does not grant authority under DNR's general delegation statutes (Wis. Stat. §§ 281.11 and 281.12) or apply beyond navigable waterways.

DATED this 25th day of January, 2011.

Respectfully submitted,
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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(7), (8)(b) and (c) for a brief and appendix produced with Times New Roman, 13 point font. The length of this brief is 1,964 words.

Dated this 25th day of January, 2011.

s/Andrew C. Cook
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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 80.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 25th day of January, 2011.

s/Andrew C. Cook

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CERTIFICATE OF SERVICE

I, Andrew Cook, hereby certify that I caused three true and correct copies of this Joint Amicus Curiae Brief of Wisconsin Manufacturers & Commerce, Inc., Wisconsin Paper Council, Inc. and Midwest Food Processors Association, Inc. in Support of the Village of East Troy's Petition for Review to be served on counsel by placing the same in U.S. mail, first class postage, on this date:

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