STATE OF WISCONSIN | CIRCUIT COURT BRANCH 1 | OUTAGAMIE COUNTY

NEW CHESTER DAIRY, LLC and
MS REAL ESTATE HOLDINGS, LLC,

Petitioners,

WISCONSIN MANUFACTURERS AND
COMMERCE, et al.,

Intervenors-Petitioners,

v.

Case No. 14CV001055

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent.

and

CLEAN WISCONSIN INC.,

Intervenor-Respondent.

PETITIONERS NEW CHESTER DAIRY, LLC AND MS REAL ESTATE HOLDINGS, LLC'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

The Wisconsin Department of Justice withdrew its representation of the Wisconsin Department of Natural Resources ("DNR") in this case after determining it was not in a position to defend DNR's imposition of a groundwater monitoring condition (the "Monitoring and Reporting Condition") on New Chester Dairy, LLC's ("New Chester Dairy") high capacity well approval. DNR – now representing itself – has fallen all but silent, declining the opportunity to defend its imposition of the Monitoring and Reporting Condition. Instead, DNR has filed a one paragraph letter opining that both parties in this case have done a good job of briefing the issues, and in doing so has at best struck a neutral position. Clean Wisconsin Inc. ("CWI") now stands as the sole proponent of the Monitoring and Reporting Condition. This reply answers the arguments contained in CWI's brief.

New Chester Dairy's primary objection to the DNR's imposition of the Monitoring and Reporting Condition is that DNR violated Wis. Stat. § 227.10(2m), a statute which places unambiguous limits on the range of administrative agency prerogative. As the central legal standard to be applied in this case, its language bears repeating:

> **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**, except as provided in s. 186.118 (2) (c) and (3) (b) 3. The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter.

(Emphasis added). This statute is not ambiguous. It prohibits any agency's imposition of requirements or conditions that are not explicitly required or permitted by statute or rule. The reach of this statute is not dampened by jurisprudence that either predates or does not apply it. This Court's role in applying this statute is to provide impulsion to the Legislature's clear intent.

Avoiding head-on discussion of § 227.10(2m), CWI relies on the body of pre-Act 21 decisions holding that agency authority can be "necessarily implied" from the language of enabling statutes. Those cases are inapposite, because the Legislature did away with implicit agency authority with § 227.10(2m). Because CWI has failed to identify any explicit requirement or permission in any statute or rule for DNR to impose the Monitoring and Reporting Condition, that condition must be reversed.

Nor can CWI escape the reach of § 227.10(2m) with arguments that enforcing it in this case would unconstitutionally abrogate DNR's duties under the public trust doctrine. DNR is free to engage, with the Legislature's participation, to promulgate a rule that would explicitly authorize DNR to impose a monitoring and reporting requirement in high capacity well approvals. Put simply, the Legislature has not denied DNR the authority to exercise its duties under the public trust doctrine; it has prescribed how those duties must be exercised. DNR has failed to comply with that prescription.

Finally, CWI cannot repair the absence of any substantial evidence in the record to support DNR's imposition of the Monitoring and Reporting Condition. The doctrine of substantial evidence requires more than the kind of conclusory statements DNR witnesses posed in support of the agency's imposition of the Monitoring and Reporting Condition. The record is uncontroverted that after the first few weeks of pumping there is no reliable way to use the data from the Monitoring and Reporting Condition to achieve the DNR's aim of isolating the impacts of New Chester Dairy's wells. Yet, New Chester Dairy is forced to continue the monitoring, continue providing data to DNR, and must wait a minimum of three years to seek relief from the condition. Even then, DNR has placed the burden on New Chester Dairy to demonstrate that the

monitoring is no longer necessary or useful – a demonstration New Chester Dairy has already made and should not be required to make again.

The time has come for the courts to enforce Act 21. Doing so in this case is not problematic, because there is a glaring absence of any explicit authority – in either statute or administrative rules – for the DNR to impose the Monitoring and Reporting Condition. For these and all of the reasons New Chester Dairy presents below and in its initial brief, the Monitoring and Reporting Condition should be reversed, with instructions to DNR to remove it from New Chester Dairy's well approvals.

ARGUMENT

I. WHETHER DNR EXCEEDED ITS AUTHORITY UNDER WIS. STAT. § 227.10(2M) IS A QUESTION THE COURT REVIEWS *DE NOVO*.

CWI correctly concedes, without qualification, that "DNR is afforded no deference in the interpretation of its own authority" under Wis. Stat. § 227.10(2m). (CWI Br. at 7.) CWI nonetheless pushes for deferential review, by inventing the fiction that New Chester Dairy's Petition for Review does not challenge the limits of DNR's authority under § 227.10(2m), but actually challenges the correctness of DNR's "interpretation of the requirements" of the various statutes and rules pertaining to high capacity wells. (CWI Br. at 7-8.) That is not what New Chester Dairy has asked this Court to do. In the contested case proceeding, New Chester Dairy moved for summary judgment on grounds that DNR's action violates § 227.10(2m). (R. 0525-0528.)[1] The administrative law judge denied New Chester Dairy's motion, concluding that § 227.10(2m) does not limit DNR's authority. (R. 0207-0208.) New Chester Dairy invoked this Court's jurisdiction to review the administrative law judge's decision that § 227.10(2m) does not

[1] The Record of proceedings before DNR is cited as "R. ____" herein.

limit DNR's authority. (Pet., ¶¶ 25d., 30, and 31.) There is no basis in the Petition for Review or in any other New Chester Dairy submission for CWI to suggest otherwise.

The primary question in this case remains straightforward: Whether the Monitoring and Reporting Condition is, in the language of § 227.10(2m), "**explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with" ch. 227.** CWI does not dispute that the Monitoring and Reporting Condition is in fact a requirement or condition that falls within the scope of § 227.10(2m). Because there is no dispute in this regard, the only question is whether DNR exceeded its authority under § 227.10(2m) when it imposed the Monitoring and Reporting Condition. On that question, as CWI concedes, the Court does not accord "any level of deference to an administrative agency." *Wisconsin Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 11-12, 270 Wis. 2d 318, 677 N.W.2d 612. For this reason and those contained in New Chester Dairy's initial brief, the Court must apply *de novo* review to the question of whether DNR exceeded its limitations of its authority under § 227.10(2m).

II. SECTION 227.10(2m) PLAINLY PRECLUDES ANY IMPLICIT BASIS FOR DNR AUTHORITY IN THIS CASE.

CWI counters New Chester Dairy's straightforward application of Wis. Stat. § 227.10(2m) by invoking several judicial canons of statutory construction, including the rules that a statute does not abrogate a common law rule unless it does so clearly and unambiguously, (CWI Br. at 12-15), that a statute must be interpreted to avoid an absurd result, (CWI Br. at 15-16) and that a statute must be interpreted to avoid an unconstitutional result, (CWI Br. at 16-18).

In raising these canons, however, CWI skips the cardinal, predicate rule of statutory interpretation: "In the absence of ambiguity in a statute, ***resort to judicial rules of interpretation and construction is not permitted***, and the words of the statute must be given their obvious and

ordinary meaning." *Wisconsin Bankers Ass'n v. Mut. Sav. & Loan Ass'n*, 96 Wis. 2d 438, 450, 291 N.W.2d 869 (1980) (emphasis added) (citing *State ex rel. Milwaukee County v. WCCJ*, 73 Wis. 2d 237, 241, 241 N.W.2d 485 (1976); *Schoolway Transp. Co. v. Div. of Motor Vehicles*, 72 Wis. 2d 223, 228, 240 N.W.2d 403 (1976)). This principle precludes all employment of interpretive canons in this case, especially that regarding the abrogation of a common law rule. Before a court can employ that canon, "*the statute must be ambiguous on its face*." *NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 836 n.3, 520 N.W.2d 93 (Ct. App. 1994) (emphasis added).

CWI skips right over this most important step in any statutory analysis – that of identifying any ambiguity – speeds down the highway of extrinsic modes of interpretation, and asks this Court to conclude that "the most reasonable interpretation of Wis. Stat. § 227.10(2m) is a codification of the common-law principal interpreting the phrase "explicitly required or explicitly permitted" to encompass both the express authority *and authority that is necessarily* ***implied*** by the terms of the statutes." (*See* CWI Br. at 14 (emphasis added).) Because CWI failed to resort first to the plain language of the statute, and failed to proceed from any claimed ambiguity, CWI's interpretation is dead on arrival.

In the absence of any ambiguity – and CWI has failed to even attempt to identify any – the Court must look to the plain language of the statute to determine its meaning. *See Village of Thiensville v. DNR*, 130 Wis. 2d 276, 283, 386 N.W.2d 519 (Ct. App. 1986). The language of § 227.10(2m) is uncomplicated and not reasonably subject to alternative interpretations – it means very simply that unless the conditions imposed in a permit are "explicitly required or explicitly permitted" by statute or a duly promulgated administrative rule, DNR cannot impose them. Wis. Stat. § 227.10(2m).

Eschewing the English dictionary and basic concepts of language, CWI asserts that "there is no evidence in . . . the words of the statute . . . that the legislature intended to place this rigid restriction on the longstanding common law principle of implied authority." (CWI Br. at 14.) Yet, the plain words of § 227.10(2m) reveal the Legislature's intent to do *precisely* that. Again, the Legislature has commanded in § 227.10(2m) that no agency may impose a condition unless it is "explicitly required or explicitly permitted by statute or by a rule." The operative, pivotal word in § 227.10(2m) is "explicitly." The dictionary defines "explicit" as "fully revealed or expressed *without vagueness, **implication**, or ambiguity*: leaving no question as to meaning or intent." (http://www.merriam-webster.com/dictionary/explicit). Indeed, the dictionary lists the words "implicit and implied" – the very terms CWI asks this Court to add to the statute in support of its "common law codification" theory – as the first two of many ***antonyms*** of the word "explicit." *Id.* An antonym is "a word of opposite meaning." (http://www.merriam-webster.com/dictionary/antonym).

When measured against the plain, dictionary meaning of the word explicit, and the opposite meaning of the words "implied" and "implicit" adopting CWI's interpretation would require nothing less than the abandonment of reason. Because no "reasonably well-informed person"[2] – as that phrase is used by the Wisconsin Supreme Court – could interpret Wis. Stat. § 227.10(2m) as authorizing the imposition of the Monitoring and Reporting Condition on a foundation of implied or implicit authority, all of CWI's arguments justifying the condition on the basis of implied or implicit authority must fail. As described in detail next, DNR acted in direct violation of § 227.10(2m) by imposing the Monitoring and Reporting Condition because

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[2] *See Wis. Bankers Ass'n*, 96 Wis. 2d at 450 ("A statute, phrase, or word is ambiguous when capable of being interpreted by reasonably well-informed persons in either of two or more senses.").

the condition was not "explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with" ch. 227.

III. THE MONITORING AND REPORTING CONDITION IS NOT "EXPLICITLY REQUIRED OR EXPLICITLY PERMITTED BY STATUTE OR BY A RULE THAT HAS BEEN PROMULGATED IN ACCORDANCE WITH" CH. 227.

There is no dispute in this case about what the Monitoring and Reporting Condition actually is. It is a condition on New Chester Dairy's high capacity well approval that requires New Chester Dairy to install three separate groundwater monitoring wells, and to collect and report data from each of those wells. (R. 0955-0956.) It is what DNR calls a "post-audit" program for the purposes of validating the modeled predictions of the high capacity wells' impact on local groundwater levels. (R. 0955-0956.) For purposes of its argument that DNR is expressly authorized to require the Monitoring and Reporting Condition, CWI treats the monitoring wells as though they are merely a feature of the high capacity wells themselves. There is also no dispute, however, that the wells required by the Monitoring and Reporting Condition are not the high capacity wells New Chester Dairy applied for, they are monitoring wells separate and apart from the approved high capacity wells.

CWI argues that Wis. Stat. § 281.34 and Wis. Admin. Code § NR 812.09 contain explicit authority to impose the Monitoring and Reporting Condition – that is, to order the installation of separate monitoring wells for the purpose of reporting groundwater levels and auditing groundwater model predictions. No such authority can be found in either provision, however. Perpetuating its talent for not letting a provision's plain language get in the way of a creative argument, CWI asserts that Wis. Admin. Code § NR 812.09 grants DNR the authority to impose any more stringent requirement it deems necessary to protect groundwater. (CWI Br. at 11.) Wis. Admin. Code § NR 812.09 provides no such authority. That rule deals specifically with

high capacity well pump design and installation, and by its plain language allows DNR to "specify more stringent well and heat exchange drillhole locations, well and heat exchange drillhole construction or pump installation specifications for existing and proposed ***high capacity***, school, or wastewater treatment plant water systems" under certain limited circumstances. Wis. Admin. Code § NR 812.09(4) (emphasis added). By its plain language, NR § 812.09(4) is limited in its applicability for purposes of this case to high capacity wells, and contemplate nothing approaching the installation, maintenance and reporting of wholly separate monitoring wells.

CWI's reliance on Wis. Stat. § 281.34 as a source of DNR's explicit authority to impose the Monitoring and Reporting Condition – to the extent its argument in this regard makes sense at all – is similarly misplaced. CWI points out that the only thing Wis. Stat. § 281.34 "explicitly requires" is that an individual "obtain an approval from DNR before constructing or withdrawing groundwater from a high capacity well." (CWI Br. at 10; citing Wis. Stat. § 281.34(4).) CWI then characterizes this limited requirement as frustrating the purpose of the high capacity well statues and regulations if Wis. Stat. § 227.10(2m) is interpreted to abrogate DNR's implied authority to regulate high capacity wells as it sees fit. While the thrust of CWI's argument on this score is not clear on its face, it seems to conflate the notion of what a high capacity well *applicant* is required to do with what *DNR* is explicitly required or permitted to do in response to a valid application. (See CWI Br. at 10-11.) Wis. Stat. § 227.10(2m) does not deal with a high capacity well applicant at all – it limits DNR's authority to act in response to a high capacity well application. Wis. Stat. § 227.10(2m) ("No ***agency*** may . . .") (emphasis added).

Pursuant to Wis. Stat. § 227.10(2m), DNR may only impose conditions explicitly required or explicitly permitted by a valid statute or administrative rule. In the context of high

capacity well approvals, DNR is *explicitly required* to "include in the approval for each high capacity well requirements that the owner identify the location of the high capacity well and submit an annual pumping report." Wis. Stat. § 281.34(5)(e). DNR is also *explicitly permitted* to impose additional standards and conditions in limited circumstances relating to high capacity well approvals that may affect a public water supply, a groundwater protection area, a spring, or a water supply service area plan. Wis. Stat. § 281.34(5)(a)-(dm). It is undisputed that New Chester Dairy's high capacity wells do not fall into one of these specific categories, but even if they did, CWI has not and cannot identify any explicitly permitted additional requirements or permissive actions that amount to imposition of the Monitoring and Reporting Condition in this or any other case.

In the end, nothing in the relevant statutes or administrative code provisions explicitly requires or explicitly permits DNR to impose the Monitoring and Reporting Condition on New Chester Dairy. For that reason, the Monitoring and Reporting Condition must be reversed and DNR must be ordered to remove it from New Chester Dairy's high capacity well approval.

IV. ENFORCING § 227.10(2m) IN THIS CASE DOES NOT PRODUCE AN ABSURD RESULT.

CWI argues that New Chester Dairy's reading of Wis. Stat. § 227.10(2m) creates an "absurd result." (CWI Br. at 15-16.) In addition to the fact that the unambiguous nature of Wis. Stat. § 227.10(2m) prevents the court from applying this cannon of statutory construction in the first instance, *see Wisconsin Bankers Ass'n*, 96 Wis. 2d at 450, CWI's arguments that enforcing § 227.10(2m) would lead to an absurdity are without merit. CWI's absurdity argument is that if courts do not allow for implied agency authority, agencies would be left "without adequate tools or discretion to implement the statutes as they are written," therefore cannot be expected to function efficiently. (CWI Br. At 15.) CWI attempts to end-run the clear legislative

pronouncement of Wis. Stat. § 227.10(2m) by dredging up appellate decisions standing for this proposition that either predate the enactment of § 227.10(2m), or which were issued after the enactment of § 227.10(2m) but which clearly do not address that statute's reach. For example, CWI cites *Maple Leaf Farms v. DNR,* 2001 WI App 170, ¶ 31, 247 Wis. 2d 96, 633 N.W.2d 720, for the proposition that "the Wisconsin Court of Appeals has considered and rejected the notion that all permit language must (or even could be) written into statute or rule." (CWI Br. at 15.) It also cites *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶ 62, 342 Wis. 2d 444, 820 N.W.2d 404, for the proposition that Wisconsin courts have "consistently found that limiting agency powers to those 'expressly granted' is too restrictive." (CWI Br. at 13.) Though CWI fails to acknowledge or address it, *Maple Leaf* and *Adams* were decided *before* Wis. Stat. § 227.10(2m) was effective. Indeed, the statutory section was enacted to combat the precise ad-hoc permitting decisions that CWI insists must be preserved. *See* Roland Sklansky, *Changing the Rules on Rulemaking*, 84 Wis. Law 10, 14-15 (Aug. 2011) (noting that Act 21 represented the Legislature's decision "to jealously guard their constitutional policy-making authority in the face of unelected state agency personnel who promulgate administrative rules having the force and effect of law.").

CWI is simply wrong to claim that enforcing § 227.10(2m) will deprive DNR of the ability to effectively administer the statutes within its ambit. The sky is not falling. DNR has several explicitly authorized regulatory tools at its disposal to protect groundwater and surface water resources through the high capacity well approval program. For example, DNR has the explicit authority to impose various conditions on wells that may affect a public water supply, a groundwater protection area, or a spring; and may impose additional approval criteria for wells that will have high water loss or are located in a water supply service area. Wis. Stat.

§ 281.34(5)(a)-(dm). It can also impose certain conditions on an applicant's proposed method of obtaining or extracting groundwater and to protect groundwater and aquifers from contamination. Wis. Admin. Code ch. NR 812. While none of these explicitly authorized regulatory tools are at issue in this case, their existence demonstrates that DNR knows how to – and has the ability to – promulgate explicit requirements for groundwater monitoring, because DNR's regulations are clear with respect to those limited circumstances under which it may require groundwater monitoring.

It was precisely the point of the Legislature in enacting § 227.10(2m) that if DNR is to impose requirements, those requirements must be authorized by law, whether a statute or a duly promulgated rule. If DNR thinks that requiring post audit monitoring programs for high capacity wells is a good or necessary policy choice, then DNR must now regulate the imposition of those programs through a duly promulgated administrative statute or rule "explicitly requiring or permitting it." There is a statutorily defined process in Subchapter II of ch. 227 for rule promulgation. Act 21 and § 227.10(2m) in particular requires DNR to regulate through rulemaking, not through ad hoc imposition of requirements. There is no longer any excuse or outlet for imposing ad hoc requirements without explicit authority, including – as discussed next – the excuse that enforcing § 227.10(2m) would deprive DNR of its legislatively delegated constitutional duties under the public trust doctrine.

V. ENFORCING § 227.10(2m) IN THIS CASE DOES NOT PRODUCE AN UNCONSTUTIONAL RESULT.

CWI argues that enforcing § 227.10(2m) to preclude DNR's imposition of the Monitoring and Reporting Condition would unconstitutionally preclude DNR's exercise of its public trust duties as articulated in *Lake Buelah Mgmt. Dist. v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73. Indeed, CWI relies heavily on *Lake Buelah* without once addressing New

Chester Dairy's thorough examination of why that decision provides no guidance to the Court in applying Wis. Stat. § 227.10(2m). For this and the reasons discussed below, CWI's reliance on *Lake Buelah* is simply wrong.

First, and as explained above, nothing in § 227.10(2m) abrogates or otherwise prevents DNR from carrying out its duties under the public trust doctrine and Wis. Stat. §§ 281.11 and 281.12 because after enactment of § 227.10(2m), DNR is merely required to carry out those duties and accomplish the ends of protecting the public trust in a different way – through the implementation of rules which explicitly authorize it to do so. CWI has not suggested and cannot suggest that such an interpretation renders § 227.10(2m) unconstitutional.

Second, the *Lake Buelah* court did not apply or consider the broader impact of § 227.10(2m) at all. While the *Lake Buelah* court indicated that the enactment of § 227.10(2m) "did not affect the DNR's authority in [that] case," *Lake Buelah*, 335 Wis. 2d 47, ¶ 39 n.31, it did so because all of the parties in *Lake Buelah* advised the court that, in their view, § 227.10(2m) was irrelevant to the issue before the court. The court agreed with the parties and left for another day the implication of § 227.10(2m) on permitting and approval conditions. *Id.* ("We agree with the parties that 2011 Wisconsin Act 21 does not affect our analysis in this case. Therefore, we do not address this statutory change any further."). *Lake Buleah* thus stands inapposite to the merits of this case.

Moreover, as the *Lake Buelah* court and numerous courts before it recognized, the DNR's public trust duties were specifically granted to it by the Legislature. *See Lake Buelah*, 335 Wis. 2d 47, ¶ 34 (citing *Wisconsin's Envtl. Decade v. DNR*, 85 Wis. 2d 518, 527-28, 271 N.W.2d 69 (1978) (noting that the Legislature has delegated the state's public trust duties to DNR)). Administrative agencies, including DNR, are creatures of the Legislature created by statute. *Wis.*

Citizens Concerned for Cranes & Doves v. DNR, 2004 WI 40, ¶ 14, 270 Wis. 2d 318, 677 N.W.2d 612. As a creature of statute, DNR has only those powers delegated to it by the Legislature. *Id.* This includes DNR's duty and administration of the public trust in Wisconsin's navigable waters. *See Lake Buelah*, 335 Wis. 2d 47, ¶ 34. It follows that the Legislature may dictate the method by which DNR implements its public trust responsibilities. *See id.; Wis. Citizens Concerned for Cranes & Doves*, 270 Wis. 2d 318, ¶ 14.

Perhaps the only application the *Lake Buelah* opinion has in this case is the court's observation that, in the context of the parties agreeing not to brief or argue the impact of § 227.10(2m), there was "no language expressly revoking or limiting the DNR's authority and general duty to protect and manage waters of the state." *Lake Buelah*, 335 Wis. 2d 47, ¶ 42. The corollary of the court's observation is that the Legislature, as the delegator of DNR's public trust duties, may exercise its will to do exactly that. Even CWI leaves open the possibility of a "direct limitation on [DNR's] delegation of public trust" that could erode the *Lake Buelah* decision. (CWI Br. at 17.) Here, the Legislature's enactment of § 227.10(2m) removes from DNR any authority to use its general duty to protect waters of the state as the basis for its imposition of site-specific conditions in the context of a high capacity well approval in the absence of a statute or rule "expressly requiring or expressly permitting" such conditions. There is nothing unconstitutional about this legislative policy decision.

VI. DNR'S IMPOSITION OF THE MONITORING AND REPORTING CONDITION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

CWI implores this Court not to substitute its judgment on the reasonableness of the Monitoring and Reporting Condition for that of the administrative law judge (ALJ) in this case, citing to a well-established body of law that precludes such substitution. In attempting to vindicate the ALJ's ultimate conclusions, however, CWI fails to address the substance of New

Chester Dairy's claim that the decision was inadequately supported. For example, CWI leads with the ALJ's conclusion that New Chester Dairy's expert witness, Dr. Andrews, was not a regulator and does not have experience evaluating the necessity of a post audit monitoring program to confirm the results of groundwater modeling. (CWI Br. at 20 (citing R. 0043-0044).)

The extent of Dr. Andrews' regulatory experience, however, is not the issue. The real issue, stated broadly, is whether the Monitoring and Reporting Condition is scientifically capable of yielding the data necessary for DNR to achieve the undisputed purpose of the condition: that of isolating the impact of New Chester Dairy's high capacity wells on local groundwater levels for the purpose of ascertaining the accuracy of Dr. Andrews' modeled predictions. There is no dispute that this was the purpose of the Monitoring and Reporting Condition. (R. 0045, 0909, 0955-0956.).

CWI has failed to address several undisputed facts that together reveal DNR's imposition of the Monitoring and Reporting Condition to be so arbitrary, so unsupported by basic science and deliberative consideration, that no reasonable finder of fact could justify DNR's action. Specifically, CWI cites no evidence in the record to overcome these facts:

- Each DNR witness involved with developing the Monitoring and Reporting Condition admitted he failed to ever evaluate whether the data to be produced by the required monitoring was capable of producing scientifically sound conclusions about the impacts of New Chester Dairy's high capacity wells on local groundwater. (R. 1377, 1380-1381, 1439-1442, 1522.).

- The only DNR witness who claimed it possible to evaluate whether the data could produce scientifically sound conclusions about the impacts of New Chester Dairy's wells was unable to testify about how that evaluation would be done. (R. 1440.).

- Every DNR witness agreed that DNR cannot reasonably use the monitoring data to make regulatory decisions impacting New Chester Dairy's wells unless DNR could be sure that all outside influences, including influences of climate and other wells can be accounted for, yet DNR could not cite one example of its experience with successfully isolating those influences, and could not refute that fact that the

> monitoring data for both New Chester Dairy's wells and wells in the surrounding area would be **too infrequent for the data to have any usefulness in isolating the impacts of New Chester Dairy's wells**. (R. 1377, 1380, 1439, 1451, 1511-1512, 1517.).

These unrefuted facts yield only one reasonable conclusion – that DNR imposed the requirement to monitor without bothering to consider with any rigor whether the effort was capable of achieving the intended aim of the monitoring. If an administrative agency is allowed to impose a requirement for a stated purpose without having to demonstrate how that purpose can be achieved by the requirement, then no agency requirement would be subject to challenge on grounds that there is insufficient evidence to support its imposition. To conclude otherwise in this case would be to conclude that an agency can support its actions merely by asserting that its actions are proper because agency says they are proper. That is not evidence, it is caprice, and is precisely the kind of overreaching that judicial review is designed to protect. *See Xcel Energy Servs., Inc. v. LIRC*, 2013 WI 64, ¶ 48, 349 Wis. 2d 234, 833 N.W.2d 665 (holding that DNR action must be supported by "credible and substantial evidence in the record").

Indeed, Wisconsin law has long held that the quantum of evidence necessary to constitute credible and substantial evidence remains "that which is sufficient to exclude speculation or conjecture." *Id.* An agency's factual finding necessary to support the agency's ultimate conclusion is not supported by credible and substantial evidence where uncertainties "predominate" the administrative record. *Miller Rasmussen Ice & Coal Co. v. Industrial Comm'n*, 263 Wis. 538, 543, 57 N.W.2d 736 (1953). In *Miller Rasmussen Ice & Coal Co. v. Industrial Comm'n*, an employee claimed that a relatively minor on-the-job physical injury led to a more serious psychoneurotic condition that totally disabled him and prevented him from working. *Id.* at 542-43. The Wisconsin Industrial Commission agreed, and the employer sought

judicial review. *Id.* After explaining that the commission could only make a disability award based on "substantial evidence," the court concluded that there was not substantial evidence in the record supporting the disability award because there was no evidence linking the employee's psychoneurotic condition to the physical injury he sustained at work. *Id.* at 544. As the court noted:

> To admit the commission's claim in this respect would be to sustain an award on the basis of evidence that is not in the record, and to put beyond the reach of a judicial review a large number of cases in which by any ordinary process of reasoning there is no evidence to sustain the commission, but in which the commission asserts that because of some undisclosed knowledge on its part, or its experience and skill in drawing inferences, the fact has been established. It is our conclusion that such a view cannot be sustained.

Id. at 545 (quotation omitted). The same is true here, where the record before DNR provided no evidence – let alone substantial evidence – that the Monitoring and Reporting Condition would actually allow DNR to test the accuracy of Dr. Andrews' modeled predictions and isolate the impact of New Chester Dairy's well on local groundwater levels. All of DNR's witnesses readily admitted that they had no scientific or rational basis for believing that the Monitoring and Reporting Condition would serve its stated purpose. Rather, DNR merely asserted that it would. "[S]uch a view cannot be sustained," and DNR's assertions do not constitute substantial evidence justifying the reasonableness of the Monitoring and Reporting Condition. *See id.*

At a minimum this Court should conclude that DNR had no rational grounds for, or substantial evidence to support, requiring New Chester Dairy to monitor and report for longer than six months from the start of New Chester Dairy's compliance with the Monitoring and Reporting Condition. Once again, CWI leaves this issue completely unaddressed, and fails to address the unrefuted fact that after the first 180 days of pumping from the high capacity wells, the projected additional incremental impact on groundwater levels are so small that they cannot

be meaningfully observed by the monitoring data. (Tr. Vol. 2, p. 337-38 (R. 1554-1555); Ex. 30, p. 3 (R. 1212).) Moreover, it remains undisputed that after the first 180 days of pumping, the predicted rate of change in groundwater levels is and remains nearly identical for all three monitoring well locations. (Tr. Vol. 2, pp. 327-332 (R. 1544-1549); Ex. 30, pp. 2-3 (R. 1211-1212).) No DNR witness addressed this infirmity in the record and the ALJ completely ignored it in his decision. (ALJ Decision, p. 6, ¶ 34 (R. 0045).)

Thus, even if DNR is allowed to get away without having to provide a rational, scientifically grounded basis for supposing that the monitoring is capable of achieving its purpose of isolating the impacts of New Chester Dairy's wells as a general matter, it should never be allowed to get away with imposing a three year requirement on New Chester Dairy when there is unrefuted evidence in the record that at most, only data gained after the first six months of pumping could be of any use.

CONCLUSION

For the foregoing reasons, and all of those presented in its Petition for Judicial Review and in its Opening Brief on the Merits, New Chester Dairy respectfully requests an Order of the Court invalidating the Monitoring and Reporting Condition that DNR imposed on New Chester Dairy's high capacity well approvals.

Dated this 24th day of July, 2015.

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