



Department of Natural Resources is Violating 2011 Act 21 by Imposing Unlawful Conditions for High Capacity Well Permits

DNR Argues Landmark Regulatory Reform Law Does Not Apply and the Agency is Free to Impose Unlawful Conditions through Its General Duties and Powers

In 2011, Gov. Scott Walker made regulatory reform one of his top priorities.¹ After being sworn into office, Gov. Walker called a special session focusing on job creation and enhancing Wisconsin's economy.² The result was enactment of 2011 Wisconsin Act 21,³ Gov. Walker's landmark regulatory reform legislation that limits agency authority to promulgate rules and require permit conditions. As explained below, the Wisconsin Department of Natural Resources is continuing to violate Act 21 by imposing unlawful permit conditions.

I. History of Gov. Walker's Regulatory Reform Legislation (2011 Act 21)

One of the first bills introduced in the 2011 special session at the request of Gov. Walker was Special Session Assembly Bill 8/Senate Bill 8.⁴ That legislation was aimed directly at state agencies that had a history of imposing conditions in permits based on general statements of agency powers and duties rather than statutes explicitly providing agencies the authority to impose such conditions.⁵

Act 21 provides in relevant part:

227.10 (2m) 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. The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter. (Emphasis added)

...

227.11 (2) (a) 1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority

¹ "Walker takes aim at agencies' rule-writing authority," Richard Moore, Lakeland Times (Dec. 24, 2010), <http://www.lakelandtimes.com/main.asp?SectionID=9&SubSectionID=9&ArticleID=12382&PollID=32&btnView=1>

² Executive Order #1, https://docs.legis.wisconsin.gov/code/executive_orders/2011_scott_walker/2011-1.pdf.

³ <http://docs.legis.wi.gov/2011/related/acts/21.pdf>.

⁴ <https://docs.legis.wisconsin.gov/2011/proposals/jr1/ab8>.

⁵ "Governor Walker Releases Rules and Regulations Reform," Press Release, Jan. 11, 2011, <http://walker.wi.gov/newsroom/press-release/governor-walker-releases-rules-and-regulation-reform>.

beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

Combined, these provisions make clear that general statements of agency powers and duties cannot be used as the basis for an agency to impose conditions in a permit that are not based on explicit statutory authority.

Through a written statement, Gov. Walker expressed his intent to curtail the practice of state agencies imposing conditions and rules that are not based on explicit statutory authority but which instead are based on an agency's general duties provisions. Below is an excerpt from Gov. Walker's website discussing the proposed legislation:⁶

Details: Unelected bureaucrats are drafting rules and regulations based on the department's general duties provisions, not based on the more specific laws the legislature meant to govern targeted industries or activities. Instead of basing rules on the specific rule of law approved by the legislature, bureaucrats are empowering themselves to use the department's overall duties provision.

Laws are created by the elected officials in the legislature who have been empowered by the taxpayers, not employees of the State of Wisconsin. The practice of creating rules without explicit legislative authority is a constitutionally questionable practice that grants power to individuals who are not accountable to Wisconsin citizens.

Solution: Legislation that states an agency may not create rules more restrictive than the regulatory standards or thresholds provided by the legislatures (sic). Specifically stating that the department's broad statement of policies or general duties or powers provisions do not empower the department to create rules not explicitly authorized in the state statutes.

Purpose: This legislation sends a clear signal that rules are to be based on laws passed by the legislature and not by the agendas of unelected bureaucrats within state agencies. This will force agencies to tailor their rules to the Legislature's

⁶ "Regulatory Reform Info Paper," Office of Governor Scott Walker, Dec. 21, 2010, <http://walker.wi.gov/newsroom/press-release/regulatory-reform-info-paper>.

intent. This will create certainty in Wisconsin's regulatory climate, which will be an important part of ensuring that the private sector can create 250,000 jobs.

The Legislature enacted Special Session Assembly Bill 8 and on May 23, 2011, Gov. Walker signed the bill into law.⁷

II. DNR Continues to Impose Conditions in Permits Not Based on Explicit Statutory Authority, But Instead Based on General Statements of Agency Powers and Duties, Which is No Longer Permitted Under 2011 Act 21 (Wis. Stat. § 227.10(2m))

A. History of High Capacity Well Case – New Chester Dairy, Inc.

Despite the changes made in Act 21, Gov. Walker's agency (DNR) continues to impose unlawful conditions for permit applicants that are not based on explicit statutory authority, but are instead based on general statements of agency powers and duties.

The latest situation involves a high capacity well permit that is currently involved in a contested case hearing. The case involves a request by New Chester Dairy, Inc. and Milk Source Holdings, LLC for two high capacity wells.⁸ The DNR conditioned approval of the new wells on New Chester Dairy installing groundwater monitoring wells and a piezometer in two locations in the vicinity of the proposed wells.

New Chester Dairy filed a petition for a contested case hearing with DNR, which was granted. The parties issued summary judgment briefs, and the Administrative Law Judge (ALJ), Jeffrey Boldt, sided with the DNR.⁹

B. DNR Makes the Extraordinary Legal Argument That Act 21 Doesn't Apply to the High Capacity Well Permits in this Case and That the Agency Has the Authority to Impose the Conditions Even Though It Does Not Have Explicit Statutory Authority to Do So

In its briefing, DNR attorney Judith Ohm made numerous questionable legal arguments. For example, Ms. Ohm disregards Act 21's explicit prohibition of state agencies imposing conditions when no explicit statutory authority exists. Instead, Ms. Ohm argues that the DNR's authority to impose the conditions are derived from the general statements of agency powers or duties under Wis. Stat. § 281.11 and § 281.12 (which Act 21 explicitly prohibits).

DNR made the following legal arguments to the ALJ in the contested case:

- 1) DNR's general duty under Wis. Stats. §§ 281.11 and 281.12 to protect waters of the state provides the agency the authority to impose any condition it chooses for high capacity wells (despite the prohibition in 2011 Act 21);

⁷ <https://docs.legis.wisconsin.gov/2011/related/acts/21.pdf>.

⁸ In the Matter of a Conditional High Capacity Well Approval for Two Potable Wells to be Located in the Town of New Chester, Adams County Issued to New Chester Dairy, Inc. and Milk Source Holdings, LLC., Case No. DNR-13-011 (December 13, 2013).

⁹ Although the ALJ granted DNR's motion for summary judgment on the issue of whether the agency had the authority to include conditions in the approval, the ALJ denied the motion on the issue of whether the specific conditions in the approval were reasonable and necessary because there are disputed issues of material fact. That portion of the case is still pending.

- 2) Even though the Legislature has given DNR limited authority to impose certain types of conditions, DNR has the authority to go beyond those limited provisions and impose any type condition it wishes; and
- 3) The agency can invoke the public trust doctrine under its general duties and agency powers in Wis. Stats. §§ 281.11 and 281.12 to impose any type of condition it chooses even though the legislature has not explicitly authorized the condition.

The ALJ accepted these arguments and ruled in favor of the DNR.

C. DNR Has No Authority to Impose the Conditions in this Case and Act 21 Prohibits the Agency from Imposing Such Conditions Based on General Statements of Agency Power and Duties

New Chester Dairy notes in its briefing that “2011 Act 21 was a landmark piece of legislation affecting agency rulemaking” and that the purpose of Act 21 was to address the exact circumstance in this case – to prevent a state agency from imposing conditions that are not explicitly authorized by statute.

Act 21’s language could not be clearer: “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.*” (Emphasis added).¹⁰

Despite the plain language in Act 21, DNR argues that the new law doesn’t apply to the agency in this case. DNR is wrong for the reasons stated in the briefs filed by Michael Best & Friedrich, LLP on behalf of New Chester Dairy in the case. Below is a summary of the arguments made by the Michael Best & Friedrich attorneys.

1. DNR Has No Explicit Statutory Authority to Impose the Monitoring and Reporting Condition – Act 21 Makes Clear that DNR’s General Duty to Protect State Waters Does Not Provide DNR Such Broad Authority

Act 21 explicitly states that general statements of agency powers and duties do not provide state agencies broad authority to impose conditions or requirements that are not explicitly provided in statute. Therefore, DNR cannot rely on the general duties and powers in Wis. Stat. § 281.11 or § 281.12. As New Chester Dairy explained in its briefing, if DNR’s arguments were to prevail, Act 21 is rendered meaningless. It is surprising and unfortunate that Gov. Walker’s agency attorneys are arguing that his landmark regulatory reform law is inapplicable.

2. The Legislature Has Explicitly Provided DNR Limited Authority to Impose Well Approval Conditions, But Has Not Given DNR Authority to Impose the Types of Conditions in this Case

¹⁰ Wis. Stat. § 227.10(2m).

Wisconsin's high capacity well statutes explicitly limit the circumstances in which DNR can impose standards and conditions for approval of high capacity wells (i.e., those wells that affect a public water supply, a groundwater protection area, or a spring, and additional approval criteria for wells that will have high water loss or are located in a water supply service area plan (see Wis. Stat. § 281.34(5)(a)-(dm)).

It is undisputed, however, that the proposed New Chester Dairy wells do not fall within any of these specific categories. Yet DNR argues that it has broad authority under its general statements of agency power and duties to impose the conditions.

3. DNR's Characterization of the Footnote in the *Lake Beulah* Decision is Incorrect

DNR further makes the extraordinary argument that a footnote in the *Lake Beulah Mgmt. Dist. v. DNR*¹¹ decision grants the agency broad authority to impose conditions based on the nebulous public trust doctrine, regardless of Act 21. The facts simply do not support DNR's assertions.

After oral argument and before the Supreme Court issued its decision in *Lake Beulah*, the Great Lakes Legal Foundation (GLLF) submitted a letter, on behalf of a number of *amici*, alerting the Court that the legislature had enacted Act 21 for the express purpose of resolving the dispute that was currently before the court. In response to GLLF's letter, each party to the case submitted a letter-brief to the court articulating various positions about why Act 21 would not affect the outcome of the *Lake Beulah* case. In particular, the parties noted that Act 21 had not been enacted when DNR took the specific action that was then on appeal before the Supreme Court. In other words, Act 21 was not relevant to that case. In footnote no. 31, the Court agreed that Act 21 was not applicable to that case and explicitly declined to substantively address Act 21. Despite this, in its briefing DNR actually argued that the Supreme Court analyzed Act 21 and that the footnote in the *Lake Beulah* decision "argues in favor of DNR's authority to include conditions in all high capacity wells."

DNR's analysis of the footnote is simply incorrect. The *Lake Beulah* Court did not analyze any element of Act 21. Instead, the Court said that "Act 21 does not affect our analysis in this case" and decided that it would "not address this statutory change any further." The Court's footnote cannot reasonably be read to overrule or otherwise render ineffective Act 21, and certainly does not give the DNR unfettered authority to impose any condition it pleases on any and all high capacity well permits.

Act 21 is aimed directly at the situation in the New Chester Dairy case: preventing a state agency from imposing a condition when it has no explicit statutory authority.

4. The Public Trust Doctrine Is Not Implicated in this Case

The DNR also incorrectly argued that the public trust doctrine gives the agency broad authority to go beyond the specific high capacity wells statutory provisions and to impose permit conditions never envisioned by the legislature. The Supreme Court's decision in *Lake Beulah* did not hold that DNR has authority to impose any condition it so chooses.

¹¹ 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73.

Moreover, a recent Wisconsin Supreme Court decision (*Rock-Koshkonong Lake Dist. Mgmt. v. DNR*¹²) refutes DNR's position that the public trust doctrine provides the broad authority DNR asserts it has. In *Rock-Koshkonong*, the Court rejected an argument by the DNR that the public trust doctrine applies to water resources other than navigable surface waters.

The *Rock-Koshkonong* Court explained the geographic scope of the public trust doctrine:

The DNR's position seeks to extend its public trust jurisdiction beyond navigable waters to non-navigable waters and land. Wetlands are often not "navigable in fact." Non-navigable land is by definition not navigable and may not be marshy or "wet." Eliminating the element of "navigability" from the public trust doctrine would remove one of the prerequisites for the DNR's constitutional basis for regulating and controlling water and land.¹³

Rock-Koshkonong is just another example of the DNR disregarding Act 21 and trying to use and significantly broaden the public trust doctrine beyond its original meaning in the Wisconsin Constitution and broaden its own regulatory power beyond what the legislature envisioned.

III. Conclusion

Governor Walker and the 2011-12 Legislature made clear that one of Act 21's purposes was to prevent state agencies from imposing unlawful conditions and regulations on Wisconsin businesses. Because of Act 21, DNR had no legal authority to impose the monitoring and reporting conditions imposed on the permit applicants in the New Chester Dairy case described above. The fact that the DNR continues to ignore Act 21 is unsettling to the business community that relies on regulatory certainty. It is troubling and unfortunate that the DNR continues to take the position, and has even argued in briefs before the Division of Hearings and Appeals, that one of Gov. Walker's signature pieces of legislation seeking to prevent bureaucratic overreach does not apply to the agency.

¹² 2013 WI 74, 350 Wis.2d 45, 833 N.W.2d 800..

¹³ *Id.*, ¶ 77.