

COPY

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.

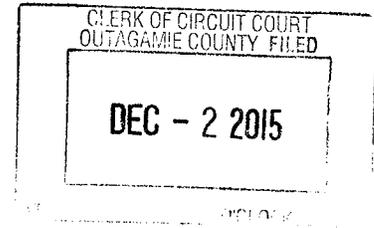
and

CLEAN WISCONSIN INC.,

Intervenor-Respondent.

DECISION AND ORDER

This matter came before the Court for hearing and decision on November 12, 2015, with Attorney Joseph D. Brydges of Michael Best and Friedrich LLP appearing on behalf of Petitioners New Chester Dairy, LLC and MS Real Estate Holdings, LLC ("New Chester"), Attorney Robert I. Fassbender of Great Lakes Legal Foundation appearing on behalf of Intervenors-Petitioners Wisconsin Manufacturers and Commerce, Dairy Business Association, Midwest Food Processors Association, and Wisconsin Potato and Vegetable Growers Association, Attorney Timothy Allen Andryk appearing on behalf of Respondent Wisconsin



Department of Natural Resources (“DNR”), and Attorney Elizabeth Anne Wheeler appearing on behalf of Intervenor-Respondent Clean Wisconsin, Inc. (“Clean Wisconsin”).

NOW, THEREFORE, upon consideration of the entire record of proceedings before DNR and the Wisconsin Division of Hearings and Appeals in this matter, as well as all records, files, pleadings, and proceedings filed in this action, the Court finds as follows:

FINDINGS OF FACT

New Chester operates a dairy farm in Adams County, Wisconsin. It constructed its facilities after receiving a Wisconsin Pollutant Discharge Elimination System (“WPDES”) Permit, an approval to construct reviewable facilities, and a high-capacity well approval from DNR in 2011. In 2012, New Chester applied to modify its WPDES Permit to accommodate an expansion of its facilities. DNR requested that New Chester evaluate surface and groundwater impacts of the increased water use necessitated by the expansion on nearby Patrick Lake. New Chester retained an expert to conduct a groundwater modeling study of the potential impact of the expanded water use on Patrick Lake and to identify possible alternative sites for its high-capacity well. New Chester’s expert identified an alternative well location approximately 2.5 miles from the dairy where the impact on surface waters would be minimized. DNR agreed that the alternate well location was appropriate and issued an environmental assessment concluding that the impacts to water resources from New Chester’s proposed high-capacity well did not have a significant adverse impact on Patrick Lake or area streams.

DNR also included a condition (the “Monitoring Condition”) within New Chester’s high-capacity well approval requiring New Chester to install three separate groundwater monitoring wells at different locations within the area its expert projected would experience at least 24 inches of groundwater drawdown after five years of pumping and two additional wells within the

area its expert projected would experience at least 12 inches of groundwater drawdown after five years. DNR further required New Chester to collect monitoring data from these wells for at least three years and to provide that data to DNR on a quarterly basis.

New Chester challenged DNR's imposition of the Monitoring Condition via contested case hearing and moved for summary judgment, arguing that DNR did not have the requisite authority to impose the Monitoring Condition in light of Wis. Stat. § 227.10(2m), which New Chester argued prohibits an agency from imposing a permit condition that is not explicitly authorized or explicitly permitted by statute or rule. The administrative law judge denied New Chester's motion and granted DNR's motion for partial summary judgment, concluding as a matter of law that DNR did have the authority to impose the Monitoring Condition. A contested case hearing was held on the reasonableness of the Monitoring Condition and the administrative law judge found that the condition was reasonable.

In this judicial review proceeding, New Chester seeks reversal of the administrative law judge's decisions that DNR was authorized to impose the Monitoring Condition and that the Monitoring Condition was reasonable. Specifically, New Chester argues that the Wis. Stat. § 227.10(2m) prohibits DNR from imposing the Monitoring Condition because the Monitoring Condition is not explicitly authorized or explicitly permitted by statute or rule. Clean Wisconsin argues that Wis. Stat. § 227.10(2m) does not change how the Court should interpret DNR's powers but instead codifies DNR's power to act via implied authority. Clean Wisconsin further argues that that DNR is explicitly authorized or permitted to impose the Monitoring Condition pursuant to Wis. Admin. Code § NR 812.09.

CONCLUSIONS OF LAW

New Chester's arguments require the Court to address an issue of first impression, that is, how the newly-enacted Wis. Stat. 227.10(2m) is to be applied. Because this is an issue of first impression, the Court applies a *de novo* standard of review. *RURAL v. PSC*, 200 WI 129, ¶ 22, 239 Wis. 2d 660, 619 N.W.2d 888. *De novo* review is also appropriate because the Court is assessing the scope of DNR's powers, and DNR is not entitled to deference in defining the scope of its own power. *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI App 103, ¶ 11, 270 Wis. 2d 318, 677 N.W.2d 612.

New Chester's arguments also require the Court to interpret Wis. Stat. 227.10(2m). When interpreting a statute, the Court begins by examining the language of the statute, and the analysis ends there if the meaning is plain. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶¶ 44-45, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory language is interpreted in relation to the language of surrounding or closely-related statutes and reasonably to avoid absurd or unreasonable results. This includes the scope, context, and purpose of the statute if it is evident from the statutory language. If the Court's interpretation yields a plain, clear statutory meaning, then the statute is unambiguous and the Court need not resort to other sources such as legislative history to aid in its interpretation.

Wis. Stat. § 227.10(2m) provides, in its entirety:

No agency may implement or enforce any standard, requirement, or threshold, including as a term or a 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.

The language of Wis. Stat. § 227.10(2m) states very clearly that an agency can only implement or enforce a requirement "including as a term or condition of any license" if that requirement is

“explicitly required or explicitly permitted by statute or by a rule.” Thus, under the plain language of Wis. Stat. § 227.10(2m), agencies cannot rely on implied authority to impose conditions. Rather, those agencies must seek amendment to a statute or promulgate a rule.

Clean Wisconsin argues that this interpretation leads to an unconstitutional and absurd result and that Wis. Stat. § 227.10(2m) must be harmonized with other statutes, case law, and constitutional requirements. Clean Wisconsin further argues that courts have consistently found that limiting agency powers to those expressly granted is too restrictive to allow agencies to function in an efficient and effective manner. The language and legislative history of Wis. Stat. § 227.10(2m), however, indicates quite clearly that the legislature disagrees with Clean Wisconsin’s conclusion. Rather, the legislative history indicates that the Legislature wanted to provide subjects of agency regulation more notice and involvement in how regulations will be applied to them. Denying an agency implied authority does not conflict with other statutes or constitutional divisions of power. *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, ¶ 23, 335 Wis. 2d 47, 799 N.W.2d 73.

As a result, the Court finds that the Monitoring Condition is valid only if DNR has explicit authority to impose monitoring conditions on high-capacity well permittees through either a statute or a rule. Clean Wisconsin argues that Wis. Admin. Code § NR 812.09 grants DNR explicit authority to impose the Monitoring Condition because it permits DNR to impose more stringent requirements on high-capacity wells where DNR deems it necessary and appropriate for the protection of public safety, safe drinking water, and the groundwater resource. The provision that Clean Wisconsin relies on, however, is limited to well and heat exchange drill holes and does not explicitly permit DNR to impose groundwater monitoring requirements on high-capacity well permittees as a condition of permit approval. Thus, Wis.

Admin. Code § NR 812.09 does not explicitly authorize or permit DNR to impose the Monitoring Condition.

In summary, the Court finds that no statute or administrative rule explicitly authorizes or explicitly permits DNR to impose the Monitoring Condition and, as a result, DNR does not have the authority to impose the Monitoring Condition pursuant to Wis. Stat. § 227.10(2m).

ORDER

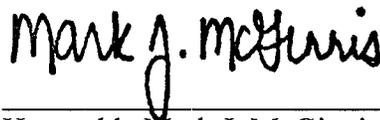
IT IS HEREBY ORDERED THAT:

1. The administrative law judge's decision denying New Chester's motion for summary judgment is reversed; and
2. New Chester's high-capacity well approval is remanded to DNR for removal of the Monitoring Condition.

This is a final Order for purposes of appeal.

Dated this 2nd day of December 2015.

BY THE COURT:



Honorable Mark J. McGinnis
Circuit Court Judge, Branch 1