STATE OF WISCONSIN CIRCUIT COURT BRANCH 3 DANE COUNTY

CLEAN WISCONSIN, INC., et al.,

Petitioners,

v. Case No. 16-CV-2816

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

The petitioners argue that they are not challenging the high capacity well approvals on the ground that the Department of Natural Resources (DNR) did not consider cumulative impacts. This argument defies a fair reading of the petitions for judicial review, and should be rejected. The petitioners also make the incorrect argument that, because their claims are not solely based on cumulative impacts, DNR's motion to dismiss must be denied. But partial dismissals are routinely granted, and a partial dismissal may be appropriate in this case. Wisconsin Stat. § 281.34(5m) prohibits a person from challenging a high capacity well approval on the ground that DNR approved the application without considering the cumulative impacts of that well. This is precisely the challenge raised in the petitions, and the petitioners admit that they might make that argument in merits briefing. The petitioners' claims related to cumulative impacts must be dismissed.

BACKGROUND

DNR's opening brief includes a short background section to provide context for this case and Wis. Stat. § 281.34(5m), the basis for DNR's motion to dismiss. In their response brief, the petitioners recite an extensive, yet incomplete legal background section that primarily goes to the merits of the petitioners' claims rather than the motion to dismiss. DNR will fully elaborate on the historical and current framework for Wisconsin's high capacity well program if this case proceeds to the merits. At this juncture, however, DNR makes several observations in response to the petitioners' representations.

A. Relevance of the *Lake Beulah* decision.

The petitioners state that *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, is the "seminal case regarding DNR's authority and duties when acting upon a high capacity well application." (Pet'rs' Br. 4.) *Lake Beulah* held that DNR could rely on implied, rather than explicit authority when managing its high capacity well program. *Lake Beulah*, 335 Wis. 2d 47, ¶ 42. When that case was decided, the impact of newly enacted 2011 Wis. Act 21 ("Act 21") was unclear, and the Wisconsin Supreme Court did not address the Act's significance. *Id.* ¶ 39 n.31. As noted in DNR's opening brief, Act 21 created a statute stating that an agency cannot implement or enforce any standard, requirement, or threshold, including as a term or condition of a permit issued by the agency, unless it is explicitly required or explicitly permitted by statute or administrative rule. 2011 Wis. Act 21; *see also* Wis. Stat. § 227.10(2m).

Lake Beulah's relevance to Wisconsin's high capacity well program, especially in light of Act 21, will be a central issue in this case should it proceed to the merits. For the purpose of this motion to dismiss, *Lake Beulah* predates Wis. Stat. § 281.34(5m) by several years, and is therefore not instructive.

B. Relevance of the *Richfield Dairy* decision.

The petitioners state that another case "pertinent to DNR's authority and duties regarding high capacity wells" is *Richfield Dairy*, a decision issued by an administrative law judge (ALJ) in September 2014.[1] (Pet'rs' Br. 6.) Notwithstanding Act 21, the ALJ relied on *Lake Beulah* to conclude that DNR, through implied authority, is obligated to perform an environmental review on all high capacity wells. (Pet'rs' Br. Ex. A:3, 16–18.) In the ALJ's view, this review must include consideration of cumulative impacts when determining whether to approve, condition, or deny the well application. (*Id.* at 3.)

Richfield Dairy is an administrative agency decision concerning a single well approval, applicable to a specific set of facts. In his May 2016 opinion, the Attorney General noted that *Richfield Dairy* directly contradicts Act 21. OAG-01-16, at 18 (May 10, 2016), https://www.doj.state.wi.us/opinions/ag-opinions. Thus, like *Lake Beulah*, *Richfield Dairy's* relevance will likely be at issue in this case should it proceed to the merits. For the purpose of this motion to dismiss, Wis. Stat. § 281.34(5m) took effect in July of 2014, during the *Richfield Dairy* litigation, and

[1] *In the Matter of a Conditional High Capacity Well Approval for Two Potable Wells to be Located in the Town of Richfield, Adams County Issued to Milk Source Holdings, LLC*, Case Nos. IH-12-03, *et al.* (Sept. 3, 2014). (*See* Pet'rs' Br. Ex. A.)

specifies that a person may not challenge a high capacity well approval on the ground that DNR did not consider cumulative impacts.

C. High capacity well program today.

After the Attorney General issued his opinion in May 2016, DNR revised its high capacity well review process to be consistent with the agency's explicit statutory authority and Act 21. DNR now closely monitors its high capacity well program to ensure that an appropriate environmental review is conducted when the Legislature has authorized it.

The petitioners assert that the Attorney General's opinion concludes that "DNR [does] not have the authority to consider cumulative impacts of proposed and existing high capacity wells . . . or include in its decisions conditions necessary to protect those resources." (Pet'rs' Br. 7.) However, this is not what the Attorney General concluded. The Attorney General explained that pursuant to Wis. Stat. § 281.34(4), DNR must undertake an environmental review of certain high capacity well applications, which could lead to the imposition of specific permit conditions under Wis. Stat. § 281.34(5). OAG-01-16, at 21. In other words, DNR has authority to conduct a cumulative impacts analysis as part of an environmental review for certain wells, explicitly identified by statute, that have a high risk of resource impacts and where an environmental impact statement was completed. *See* Wis. Stat. § 281.34(4)(a)1., 2., 3. (requiring an environmental review pursuant to Wis. Stat. § 1.11 for wells with specific geographical or withdrawal characteristics).

A full analysis of these statutory provisions will be provided if this case proceeds to briefing on the merits.

Regarding this case, as noted in its opening brief, DNR did not take cumulative impacts into consideration when issuing the September 30, 2016, well approvals. This is because these wells did not fall within the statutory categories of wells known to have a high risk of resource impacts, and therefore, did not trigger the environmental review that would have allowed for such an analysis. *See* Wis. Stat. § 281.34(4).

Effective July 2014, the Legislature enacted Wis. Stat. § 281.34(5m), which prohibits a person from challenging a high capacity well approval based on DNR's lack of consideration of the cumulative environmental impacts. 2013 Wis. Act 20. This provision does not prohibit DNR from considering cumulative environmental impacts in appropriate circumstances. However, the statute does prohibit a person from challenging the approval of a high capacity well application on the grounds that DNR failed to consider cumulative impacts. DNR moves to dismiss on this ground.

ARGUMENT

The petitioners did not rebut DNR's assertion that the Agri-Alliance petition for judicial review is moot, and based on DNR's opening brief, this petition should be dismissed in its entirety. Regarding the remaining petitions, the petitioners attempt to get around Wis. Stat. § 281.34(5m) by making two arguments: (1) their claims are not solely based on cumulative impacts, and therefore, DNR's motion to dismiss must be denied; and (2) they are not bringing a challenge based on DNR's lack of

consideration of cumulative impacts. They also argue that sovereign immunity does not apply. All of these arguments fail. DNR's motion to dismiss should be granted.

I. The Agri-Alliance petition for judicial review is moot, and should be dismissed in its entirety.

As shown by the correspondence attached to DNR's brief in support of its motion to dismiss No. 16-CV-2816, the permittee has surrendered its right to construct high capacity well No. 74302. DNR informed Agri-Alliance that a new application would need to be submitted if Agri-Alliance changes its mind and decides to build the well, and Agri-Alliance acknowledged the same. For all the reasons stated in DNR's opening brief, this petition for judicial review is moot, and should be dismissed in its entirety.

The petitioners responded to DNR's comprehensive argument with a single footnote stating that they would agree that the case is moot if DNR "rescinds or revokes the approval." (Pet'rs' Br. 2 n.1.) The petitioners provided no legal authority or developed argument in support of this statement, and therefore, this Court should not consider it. *State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992) (declining to review issues inadequately briefed). Moreover, it is a well-known rule of appellate practice that unrefuted arguments are deemed conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Secs., Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Given their insufficient response, the

petitioners have conceded the mootness issue, and the Agri-Alliance petition should be dismissed.[2]

II. Wisconsin Stat. § 281.34(5m) deprives the Court of jurisdiction to consider the petitioners' challenge regarding cumulative impacts.

The petitioners argue that DNR's entire motion must be dismissed because it depends on the "false premise" that the petitions for judicial review raise claims only based on cumulative impacts. (Pet'rs' Br. 9.) This is not only an inaccurate characterization of DNR's position, it is also insupportable as a matter of law. The petitioners also argue that they are not challenging DNR's decisions based on the agency's lack of consideration of cumulative impacts. Given their statements, the petitioners appear to misunderstand what it means to consider cumulative impacts in the context of Wis. Stat. § 281.34(5m). The petitions reveal the exact challenge that Wis. Stat. § 281.34(5m) forbids, and these claims must be dismissed. Finally, the petitioners suggest, without any legal support or developed argument whatsoever, that Wis. Stat. § 281.34(5m) is unconstitutional. The petitioners have missed their opportunity to brief this issue, and this Court should decline to take up any argument regarding the constitutionality of the statute.

[2] Regarding footnote one of the petitioners' response brief, DNR approached the petitioners in an effort to come to an agreement regarding dismissal of the Agri-Alliance petition. To date, the parties have not reached an agreement. These communications are not in the record before the Court, and need not be considered for the purpose of the motion to dismiss.

A. DNR's motion does not depend on the premise that the petitioners' challenges are limited to cumulative impacts.

The petitioners assert that DNR's motion is "based on the premise that . . . the Petitions are based solely on the ground that DNR did not consider cumulative impacts." (Pet'rs' Br. 9.) This is incorrect. DNR explicitly acknowledged that the petitioners might be bringing claims in addition to their claim that DNR did not consider cumulative impacts. (Resp't Br. 5 n.2 (No. 16-CV-2816), 2 (No. 16-CV-2817, *et seq.*).) However, the petitioners did not provide definitions for "individual effects," "cumulative effects," or "individual impacts" in their petitions for judicial review. It was therefore unclear whether the petitioners understood any or all of those terms to mean "cumulative impacts" as defined in Wis. Stat. § 281.34(5m).[3] Left to guess, DNR asserted that if the petitioners' claims fall within the scope of Wis. Stat. § 281.34(5m), they are barred, regardless of how they are characterized in the petitions. (*Id.*)

The petitioners further contend that the petitions are not limited to challenges based on cumulative impacts, and therefore, the motion to dismiss must be denied in its entirety. (Pet'rs' Br. 9.) This argument defies logic and is without legal support. Indeed, courts routinely dismiss or preclude certain claims while allowing others to remain, even in the context of dismissal for failure to state a claim. *See, e.g., H.A. Friend & Co. v. Prof'l Stationery, Inc.*, 2006 WI App 141, ¶ 7, 294 Wis. 2d 754, 720 N.W.2d 96 (circuit court granted parties' motion to dismiss all claims except a

[3] DNR does not refer to their high capacity well review process as an "individual impact" review or anything similar. DNR therefore disagrees that the emails attached as Exhibit B to the petitions for judicial review show that DNR knew that it "evaluated both individual and cumulative impacts in review of the challenged wells." (*See* Pet'rs' Br. 10.)

breach of contract claim); *see also Farr v. Alt. Living Servs., Inc.*, 2002 WI App 88, ¶¶ 13–14, 253 Wis. 2d 790, 643 N.W.2d 841 (holding that allegations in complaint were sufficient to state a claim for negligence, but plaintiff did not have private cause of action for alleged violations of certain statutes and regulations). Assuming the petitioners have sufficiently clarified they are challenging DNR's September 30, 2016, decisions on other grounds besides lack of consideration of cumulative impacts, DNR acknowledges that those claims would survive the motion to dismiss.

B. The petitions clearly challenge DNR's lack of consideration of cumulative impacts, and Wis. Stat. § 281.34(5m) requires that those claims be dismissed.

Wisconsin Stat. § 281.34(5m) states that "[n]o person may challenge an approval, or an application for approval, of a high capacity well based on the lack of consideration of the cumulative environmental impacts of that high capacity well together with existing wells." The statute's plain language expressly prohibits a person from challenging DNR's approval of a high capacity well application based on the lack of consideration of the cumulative environmental impacts. While the petitioners give one definition of "consider," the word is also defined as "[t]o take into account; bear in mind."[4] In other words, if a person claims that DNR did not consider, or take into account, cumulative environmental impacts when issuing an approval of a high capacity well application, that claim is barred under Wis. Stat. § 281.34(5m).

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[4] *"Consider,"* The American Heritage Dictionary, https://ahdictionary.com/word/search.html?q=consider. (last visited Jan. 27, 2017).

Yet this is precisely the challenge the petitioners have made in their petitions for judicial review:

> 13. In September 2014 the Division of Hearings and Appeals ("DHA") further found . . . that "[i]t is scientifically unsupported, and impossible as a practical matter, to manage water resources if cumulative impacts are not considered." . . .
>
> 14. Pursuant to the *Richfield Dairy* decision, DNR adopted a policy and practice of considering individual and cumulative impacts of high capacity wells to nearby waters of the state.
>
> . . . .
>
> 18. On May 10, 2016 Attorney General Brad Schimel issued an opinion renouncing DNR's authority to evaluate or consider impacts analysis of high capacity wells on state waters, including public trust resources, except to the extent expressly set forth in Wis. Stat. § 281.34(2), including cumulative impacts, based on the argument that such authority is not explicitly required or permitted by statute and therefore is prohibited by Wis. Stat. § 227.10(2m).
>
> 19. On June 10, 2016 DNR adopted Attorney General Schimel's opinion and subsequently began approving wells without addressing and irrespective of adverse individual or cumulative impacts to waters of the state, including public trust waters.
>
> 20. On September 30, 2016 DNR approved the [ ] well without any further analysis of impacts . . . .

(Petition for Judicial Review 4–5 (No. 16-CV-2816); *see also* Petition for Judicial Review (No. 16-CV-2817, *et seq.*) (containing substantially similar language).) The fact that the petitioners use the word "address" in paragraph 19 does not change the true nature of their challenge, namely, that DNR began approving high capacity well applications, including the applications at issue in this case, without taking into account the potential cumulative impacts of the wells.

Perhaps in an attempt to get around this statute, the petitioners now argue that they do not assert that DNR failed to consider cumulative impacts. Instead, they contend that their claim centers on the fact that DNR "in each of these cases

considered cumulative and other impacts" (presumably, as evidenced by the Exhibit B emails showing that modeling or other analysis occurred in 2014 and 2015 for some of these cases) and the petitioners "challenge DNR's failure to protect the affected waters from the effects of those impacts in its decisions." (Pet'rs' Br. 13.) This argument is strained at best, and is inconsistent with the petitions for judicial review. Until briefing this motion to dismiss, the petitioners never alleged that any inquiry or modeling DNR did back in 2014 and 2015 was "consideration" of the cumulative impacts of the wells.[5] Fairly read, what the petitions actually plead is that DNR did not take into account the potential cumulative impacts *when it issued the approvals of the wells in question.* This is synonymous with what Wis. Stat. § 281.34(5m) precludes.

The petitioners state that the *Lake Beulah* court recognized that DNR's duty to consider cumulative impacts is distinct from its duty to act on them. (Pet'rs' Br. 12–13 (citing *Lake Beulah*, 335 Wis. 2d 47, ¶ 4).) DNR disagrees that this cited paragraph is evidence of such a distinction, let alone a distinction that matters for the purpose of Wis. Stat. § 281.34(5m). As already noted, Wis. Stat. § 281.34(5m) was enacted several years after *Lake Beulah* was decided, and therefore, that case is not instructive.

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[5] In any event, the emails that appear as Exhibit B to the petitions for judicial review do not support their assertion. Several of the Exhibit B emails only evidence the knowledge or opinion of a single DNR staff person concerning the location of and resources near a proposed well or recommend further analysis. *See* Exhibit B documents for petitions for judicial review Nos. 16-CV-2816, 16-CV-2821, 16-CV-2822, 16-CV-2823. This is simply not evidence that DNR "considered" cumulative impacts, even if one were to accept the petitioners' flawed interpretation.

Wisconsin Stat. § 281.34(5m) is an unambiguous statute because a reasonably well-informed person would understand it in only one sense. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 47, 271 Wis. 2d 633, 681 N.W.2d 110. Although a court does not generally consult legislative history when interpreting an unambiguous statute, legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation. *Id.* ¶ 51. The legislative history of Wis. Stat. § 281.34(5m) shows that the petitioners' position on what it means to "consider" cumulative impacts is incorrect. A note within the drafting records of this statute states:

> Issues have been raised in legal proceedings regarding the extent to which DNR must consider, may consider, or may not consider, the environmental impacts of existing wells *when making a decision* on whether or not to approve a permit for a proposed high capacity well . . . . For example, a recent DNR decision to approve a high capacity well permit for a confined animal feeding operation is currently the subject of a contested case hearing, relating to whether DNR should have considered cumulative environmental impacts when it issued the permit.

(Excerpt of 2013 Drafting Request for Wis. Stat. § 281.34(5m), attached as Ex. A (emphasis added).).[6] This note clearly ties "consideration" to making the decision in question, consistent with the plain language of the statute. In other words, the Legislature enacted Wis. Stat. § 281.34(5m) to clarify that if someone challenges a well approval on the ground that DNR did not consider (or take into account) cumulative impacts when it made the decision in question, that claim is barred.

[6] This drafting request is publically available in the Legislative Reference Bureau's drafting records for 2013 Wis. Act 20.

In addition to the legislative history, the very agency decision attached to the petitioners' response brief contradicts their position on what it means to consider cumulative impacts. In *Richfield Dairy's* "Summary of Issues," the ALJ explained the role of consideration of cumulative impacts as follows:

> - When considering whether to condition or deny a proposed high capacity well approval, does DNR have legal authority *to take into account the cumulative impacts* caused by existing drawdown of groundwater and surface waters . . . .
>
> - Holding: To fulfill its obligations . . . the Department *must consider* cumulative impacts to prevent "potential harm to waters of the state."

(Pet'rs' Br. Ex. A:3 (emphasis added).) The ALJ clearly understood consideration of cumulative impacts to mean take them into account when making a decision regarding a high capacity well approval. (*Id.*) The *Richfield Dairy* decision reaffirms that to "consider" cumulative impacts in the context of Wis. Stat. § 281.34(5m) means to take those potential impacts into account when making the agency decision.

Aside from their incorrect understanding of what it means to "consider" in the context of Wis. Stat. § 281.34(5m), the petitioners even admit that they "may argue that DNR has failed to perform its public trust responsibilities by not even considering – let alone acting upon – cumulative impacts." (Pet'rs' Br. 15–16.) This admission sinks their opposition to DNR's motion to dismiss, because Wis. Stat. § 281.34(5m) expressly precludes such an argument. If DNR was required to respond to briefing regarding a lack of consideration of cumulative impacts during the merits of this case, legislative intent would be ignored, and DNR would be prejudiced.

Wisconsin Stat. § 281.34(5m) provides a clear exception to a circuit court's power to hear cases ordinarily subject to judicial review. The petitioners have not met

their burden to establish that they may challenge DNR's decision based on their cumulative impact claims. *See State v. Advance Mktg. Consultants, Inc.*, 66 Wis. 2d 706, 712–13, 225 N.W.2d 887 (1975); *Lincoln v. Seawright*, 104 Wis. 2d 4, 9, 310 N.W.2d 596 (1981). All claims pertaining to DNR's alleged lack of consideration of cumulative impacts must be dismissed.

C. This Court should decline to entertain the petitioners' undeveloped assertion that Wis. Stat. § 281.34(5m) is unconstitutional.

The petitioners suggest, without any legal support or developed argument whatsoever, that Wis. Stat. § 281.34(5m) is unconstitutional. Yet they also assert that this Court should not entertain this argument. DNR agrees. DNR's motion to dismiss was primarily based on Wis. Stat. § 281.34(5m). If the petitioners believe this statute is unconstitutional, they should have provided a developed legal argument with full legal support in their response brief. Because they did not, this Court need not consider the proposition. *Pettit*, 171 Wis. 2d at 646–47.

The petitioners cite *State v. Hamilton* and *State v. State Fair Park, Inc.* to suggest that this Court should address the constitutionality of the statute only if it concludes that "application of that statute is [ ] inherently raised by the Petitions," or in other words, if the statute bars their claims. (Pet'rs' Br. 16.) Those cases recite a common principle of appellate practice, that is, an appellate court will not ordinarily address a constitutional issue unless it is essential to resolve the issue before it. *State v. Hamilton*, 120 Wis. 2d 532, 537, 540, 356 N.W.2d 169 (1984); *see also State v. State Fair Park, Inc.*, 21 Wis. 2d 451, 453, 124 N.W.2d 612 (1963). Notably, in those

cases, issues regarding the constitutionality of the statute were already developed in lower courts before reaching the supreme court. *Hamilton,* 120 Wis. 2d at 536–37, 540; *State Fair Park, Inc.*, 21 Wis. 2d at 453. Thus, these cases are inapposite, and the cited principle is not applicable here. If there was a time to brief the constitutionality of the statute, that time has passed. This Court should decline to take up the petitioners' unsupported assertion that Wis. Stat. § 281.34(5m) is unconstitutional.

III. Sovereign immunity also bars the petitioner's cumulative impacts claim.

The petitioners appear to make two arguments regarding DNR's sovereign immunity defense: (1) that Wis. Stat. ch. 227 provides express legislative authorization to challenge DNR's decisions in this case; and (2) the courts have provided an exception to sovereign immunity that is applicable here, namely, for suits challenging an agency's actions that exceed its constitutional authority. (Pet'rs' Br. 16–17.) Both arguments are flawed, and should be rejected.

Regarding the first argument, DNR acknowledges that the Legislature consented to suits against state agencies as provided in Wis. Stat. ch. 227. However, that chapter expressly includes specific exceptions and assumes the Legislature will create other exceptions. *See* Wis. Stat. § 227.52 ("Administrative decisions . . . are subject to review as provided in this chapter, *except as otherwise provided by law* and except for the following: . . ."). Such an exception was created with the passage of Wis. Stat. § 281.34(5m). This statute does not bar all actions permitted under Wis. Stat. ch. 227; rather, it creates a specific exception for actions challenging DNR's lack of

consideration of cumulative impacts regarding high capacity well applications and approvals.

Regarding the second argument, the cases that the petitioners cite for the constitutional exception to sovereign immunity are inapplicable to this case. The court in *Lister v. Board of Regents* explains that the exception developed "concerning the right to maintain *a declaratory judgment action* to obtain a ruling as to the constitutionality or proper construction of a statutory provision." 72 Wis. 2d 282, 302–03, 240 N.W.2d 610 (1976) (emphasis added). *Lister* shows that the rule pertains to cases brought under Wisconsin's declaratory judgment statute, and *Town of Eagle v. Christensen* establishes the same. *Id.*; *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 319–20, 529 N.W.2d 245 (Ct. App. 1995). And *Klein v. Bd. of Regents, Univ. of Wis. Sys.*, a case concerning a Title VII claim, merely cited *Lister* and the constitutional exception as an example of the fact that sovereign immunity "is not a defense to all suits against the State." 2003 WI App 118, ¶ 9, 265 Wis. 2d 543, 666 N.W.2d 67.

The petitioners have not pointed to a specific legislative enactment authorizing a challenge to DNR's decisions based on lack of consideration of cumulative impacts. *Turkow v. Wis. Dep't of Nat. Res.*, 216 Wis. 2d 273, 281, 576 N.W.2d 288 (Ct. App. 1998). Without this, the petitioners' claims are barred by sovereign immunity, and must be dismissed.

* * *

Wisconsin Stat. § 281.34(5m) is designed to prevent challenges to well approvals on the ground that DNR did not take cumulative impacts into account when making the decision. Fairly read, that is precisely what the petitions for judicial review are challenging. All claims within the scope of Wis. Stat. § 281.34(5m) must be dismissed. The petitioners have cited no authority regarding why they should be afforded their fees and costs; therefore, that request should be denied.

CONCLUSION

For these reasons, DNR respectfully requests that the Court dismiss Clean Wisconsin's petition for judicial review.

Dated this 27th day of January, 2017.

Respectfully submitted,

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2013 DRAFTING REQUEST

Assembly Amendment (AA-AB40)

Received:	**5/22/2013**	Received By:	**rkite**
Wanted:	**As time permits**	Same as LRB:	
For:	**Legislative Fiscal Bureau**	By/Representing:	**Bonderud**
May Contact:		Drafter:	**rkite**
Subject:	**Environment - water quality**	Addl. Drafters:	
		Extra Copies:	

Submit via email: **YES**
Requester's email: **Legislative Fiscal Bureau**
Carbon copy (CC) to:

Pre Topic:

LFB:.....Bonderud -

Topic:

Cumulative impacts of high capacity wells ✓

Instructions:

See attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	rkite	1 5/23 jld	5/23				

FE Sent For:

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Exhibit A

Representative LeMahieu

NATURAL RESOURCES -- ENVIRONMENTAL QUALITY

Cumulative Environmental Impacts of High Capacity Wells -
Not Grounds to Challenge Permitting Decision

Motion:

Move to specify that a person may not challenge an application for, or a permit for, a high capacity well based on the lack of consideration of the cumulative environmental impacts of the proposed high capacity well together with existing wells when approving the high capacity well permit. This provision would apply to applications for high capacity well permits and high capacity well permits in effect before, on, or after, the effective date of the bill, and for applications and permits for which final administrative or judicial review has not been completed on the effective date of the bill.

Note:

Section 281.34 of the statutes requires an owner to obtain approval from DNR before construction of a high capacity well. A "high capacity well" means a well that, together with all other wells on the same property, has a capacity of more than 100,000 gallons per day.

Section 281.34 (4) relates to environmental review and requires that DNR shall review an application for approval of any of the following using the environmental review process in its rules promulgated under s. 1.11 of the statutes: (1) A high capacity well that is located in a groundwater protection area; (2) A high capacity well with a water loss of more than 95 percent of the amount of water withdrawn; or (3) A high capacity well that may have a significant environmental impact on a spring. If the department requests an environmental impact report under s. 23.11 (5) for a proposed high capacity well, the department may only request information in that report that relates to the decisions that the department makes under this section related to the proposed high capacity well. Section 281.34 (5) includes standards and conditions for approval of high capacity wells.

Issues have been raised in legal proceedings regarding the extent to which DNR must consider, may consider, or may not consider, the environmental impacts of existing wells when making a decision on whether or not to approve a permit for a proposed high capacity well related to both statutory requirements and Article 9, Section 1 of the Wisconsin Constitution (known as the public trust doctrine). For example, a recent DNR decision to approve a high capacity well permit for a confined animal feeding operation is currently the subject of a contested case hearing, relating to whether DNR should have considered cumulative environmental impacts when it issued the permit.

Motion #375

Exhibit A