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CIRCUIT COURT
DANE COUNTY, WI

STATE OF WISCONSIN CIRCUIT COURT BRANCH 3 DANE COUNTY

CLEAN WISCONSIN, INC.,

Petitioner,

v. Case No. 16-CV-2816

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

RESPONDENT'S BRIEF IN SUPPORT OF MOTION TO DISMISS

Respondent Wisconsin Department of Natural Resources (DNR), by undersigned counsel, submits this brief in support of its motion to dismiss. The petitioner is challenging DNR's September 30, 2016, approval of a high capacity well application. (Petition for Review Ex. A.) As shown by the correspondence attached to this motion, the permittee has withdrawn its application and surrendered the approval for this particular high capacity well. Accordingly, the claims raised in this judicial review action are moot, and the petition for judicial review should be dismissed in its entirety.

In addition, Wis. Stat. § 281.34(5m) prohibits a person from challenging a high capacity well approval on the ground that the agency approved the application without addressing the cumulative impacts of that well. The

petitioner is making this very challenge in its petition for judicial review. Even absent the fact that this case is now moot, this Court lacks jurisdiction to consider the petitioner's claims related to cumulative impacts.

BACKGROUND

In Wisconsin, an applicant must obtain approval from DNR before constructing a high capacity well. Wis. Stat. § 281.34(2). A high capacity well is a well that, together with all other wells on the same property, has a capacity of more than 100,000 gallons of water per day. Wis. Stat. § 281.34(1)(b). DNR must follow detailed and explicit requirements when regulating and approving high capacity well applications. *See, e.g.*, Wis. Stat. §§ 281.34, 281.35; Wis. Admin. Code § NR 812.09.

In 2011, the Legislature created a new statute in Wis. Stat. ch. 227, 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). In an opinion dated May 10, 2016, the Wisconsin Attorney General confirmed that Wis. Stat. § 227.10(2m) precludes DNR from relying on implied authority to regulate high capacity wells. OAG-01-16 (May 10, 2016).

Accordingly, in current practice, DNR does not expand its review of a high capacity well application beyond its explicit statutory and regulatory authority. Specifically, DNR does not conduct a cumulative impact analysis for a high capacity well application absent explicit authority to do so.[1]

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

On September 30, 2016, DNR granted the high capacity well application in the instant case, for high capacity well number 74302. (Petition for Judicial Review Ex. A.) On October 28, 2016, Clean Wisconsin filed a petition for judicial review of DNR's September 30 decision. Clean Wisconsin asserts that DNR approved the well application without addressing the well's

[1] "Cumulative impacts" measure the environmental impacts of all wells and other sources of water drawdown in the vicinity of, and in combination with, the high capacity well proposal in the permit application. *See* Wis. Stat. § 281.34(5m); OAG-01-16 ¶ 36.

cumulative impacts, and that its interests are injured because of this. (Petition for Judicial Review 5–6.)

On November 23, 2016, DNR received correspondence from James E. Wysocki on behalf of Agri-Alliance Land, LLC, the applicant for high capacity well number 74302. (*See* DNR Motion to Dismiss Ex. A.) Mr. Wysocki informed DNR that Agri-Alliance was withdrawing its application and surrendering DNR's approval for construction of this high capacity well, and that it would file a new application if its plans changed. (*Id.*) In a letter dated December 2, 2016, DNR confirmed its receipt of Agri-Alliance's surrender of high capacity well approval number 74302. (DNR Motion to Dismiss Ex. B.) DNR notified Agri-Alliance that if any future high capacity well is proposed for construction in the location identified in the September 30, 2016, approval, DNR must review a new application and issue a new approval before any construction may begin. *Id.* DNR now moves to dismiss.

ARGUMENT

The petitioner asserts an interest in protecting groundwater from excessive water pumping, and further asserts its interest was harmed because DNR incorrectly applied the law when it approved construction of high capacity well number 74302. (Petition for Judicial Review 5–7; Petition for Judicial Review Ex. A.) As shown by the correspondence attached to this motion, the permittee has surrendered its right to construct this well. The

issues in this petition for judicial review are moot, and the petition for judicial review should be dismissed in its entirety.

Setting aside the issue of mootness, Wis. Stat. § 281.34(5m) expressly 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." This is precisely the challenge Clean Wisconsin brings in this judicial review action, and this Court lacks jurisdiction to consider it. This Court should dismiss all claims relating to the allegation that DNR declined to consider the cumulative impacts of the high capacity well.[2]

I. This petition for judicial review is moot.

Wisconsin courts have dismissed judicial review actions on mootness grounds. *See, e.g., PRN Assocs. LLC v. State, Dep't of Admin.*, 2009 WI 53, ¶ 49, 317 Wis. 2d 656, 766 N.W.2d 559. "An issue is moot when its resolution

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[2] The petitioner also claims that DNR failed to address the "individual effects," "cumulative effects," or "individual impacts" of the well. (Petition for Judicial Review 5–7.) It appears the petitioner is using these terms interchangeably with "cumulative impacts," though it is not entirely clear. To the extent the petitioner's reference to these terms proves to be synonymous with cumulative impacts, those claims are also barred by Wis. Stat. § 281.34(5m), and the petition for judicial review should be dismissed in its entirety. Moreover, DNR understands the petition for judicial review to raise only issues of law. In the event it becomes clear that the petitioner is attempting to raise issues of fact in this judicial review action, those issues must be addressed at the agency level, and DNR reserves the right to move to dismiss those claims on the ground that the petitioner failed to exhaust its administrative remedies.

will have no practical effect on the underlying controversy." *Id.* ¶ 25; *see also Managed Health Servs. Ins. Corp. v. Wis. Dep't of Health Servs.*, 2011 WI App 139, ¶ 20, 337 Wis. 2d 447, 806 N.W.2d 260. "In other words, a moot question is one which circumstances have rendered purely academic." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425. Wisconsin courts "'generally decline to reach the merits of an issue that has become moot,' because as a general rule, [courts] do not determine abstract principles of law." *Managed Health Servs. Ins. Corp.*, 337 Wis. 2d 447, ¶ 20 (citation omitted).

In addition, an agency's decision is reviewable only if it adversely affects the substantial interests of a person. Wis. Stat. §§ 227.01(9), 227.52, 227.53(1). In determining whether a party is aggrieved by an administrative decision and thus has standing to challenge it, courts apply a two-part test. *Eller Media, Inc. v. State Div. of Hearings & Appeals*, 2001 WI App 269, ¶ 7, 249 Wis. 2d 198, 637 N.W.2d 96. First, the petitioner must show that it sustained an injury as a result of the agency decision. *Id.* "That injury must not be hypothetical or conjectural, but must be 'injury in fact.'" *Id.* (citation omitted). Second, the petitioner must show that the injury is to an interest which the law recognizes or seeks to regulate or protect. *Id.*

Clean Wisconsin's asserted interest in this case is in "protecting groundwater quality from impacts of excessive groundwater pumping." (Petition for Judicial Review 6.) Clean Wisconsin challenges DNR's decision to grant the high capacity well application for well number 74302, because DNR allegedly failed to consider the impacts this well would have on the waters of the state. (*Id.* at 5.)

The permittee for the subject well has withdrawn its application and surrendered the approval for high capacity well number 74302. (DNR Motion to Dismiss Ex. A.) No high capacity well will be built pursuant to DNR's September 30, 2016, approval. (DNR Motion to Dismiss Ex. B.) Accordingly, the issues raised in this petition for judicial review are moot. The resolution of the issues associated with this well will have no practical effect, and the petition for judicial review should be dismissed.

In addition, Clean Wisconsin cannot show that it will be harmed by the September 30 decision. Wis. Stat. §§ 227.01(9), 227.52, 227.53(1). Because the permittee surrendered its right to construct the well, any alleged injury connected with this well is hypothetical or conjectural, not an "injury in fact." *Eller Media*, 249 Wis. 2d 198, ¶ 7. The first part of the standing test is not met. But even assuming it was, the petitioner has not established the second part of the test, namely, that the alleged injury is to an interest which the

law recognizes or seeks to regulate or protect. *Id.* The petition for judicial review should be dismissed in its entirety.

II. The Court lacks jurisdiction to consider the petitioner's challenge regarding cumulative impacts.

This petition for judicial review is moot, and, and this Court need not go further because the case should be dismissed in its entirety. However, even if the issues were not moot, the petitioner's cumulative impacts claims are barred by statute and must be dismissed.

The right to appeal from an administrative agency's determination is statutory and is "not reviewable unless made so by the statutes." *Pasch v. Wis. Dep't of Revenue*, 58 Wis. 2d 346, 353, 206 N.W.2d 157 (1973) (quoting *Universal Org. of M. F., S. & A. P. v. WERC*, 42 Wis. 2d 315, 322, 166 N.W.2d 239 (1969)). If the statutes do not make an action reviewable, "the . . . court does not have jurisdiction for any purpose, except to dismiss the appeal."[3] *Id.* (alteration in original). More generally, a person does not have a private right of action unless the Legislature grants it. *See Farr v. Alt. Living Servs., Inc.*, 2002 WI App 88, ¶ 14, 253 Wis. 2d 790, 643 N.W.2d 841.

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[3] The Wisconsin Supreme Court has clarified that in many cases, noncompliance with statutory requirements results in a lack of "competency," not subject matter jurisdiction. *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶¶ 2, 9–14, 273 Wis. 2d 76, 681 N.W.2d 190. All claims related to cumulative impacts should be dismissed regardless of whether the basis is characterized as lack of competency or lack of jurisdiction.

The petitioner has the burden to prove jurisdiction; the respondent does not bear the burden to prove the absence of jurisdiction. *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) (the party seeking the affirmative action of a court has the burden of proving or demonstrating its jurisdiction to grant the relief sought).

Here, the Legislature has expressly prohibited a person from challenging DNR's approval of a high capacity well based on the lack of consideration of the cumulative environmental impacts. Wis. Stat. § 281.34(5m). A person therefore does not have a private right of action in this regard. This claim is not reviewable, and this Court lacks jurisdiction to consider it. For this reason alone, all claims pertaining to cumulative impacts must be dismissed.

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

In addition to the lack of statutory authority noted above, the petitioner's cumulative impacts claim is also barred under the doctrine of sovereign immunity. Wisconsin's Constitution provides that "[t]he Legislature shall direct by law in what manner and in what courts suits may be brought against the state." Wis. Const. art. IV, § 27. Courts have consistently held that the state enjoys sovereign immunity and cannot be

sued without its consent. *See Fiala v. Voight*, 93 Wis. 2d 337, 342, 286 N.W.2d 824 (1980); *Chicago, Milwaukee & St. Paul Ry. Co. v. State of Wis.*, 53 Wis. 509, 513, 10 N.W. 560 (1881).

The Legislature "has the exclusive right to consent to a suit against the state." *State v. P.G. Miron Constr. Co., Inc.*, 181 Wis. 2d 1045, 1052, 512 N.W.2d 499 (1994). Wisconsin courts have long held that an action against a state agency is an action against the state. *PRN Assocs. LLC*, 317 Wis. 2d 656, ¶ 51 ("A suit against a state agency constitutes a suit against the State for purposes of sovereign immunity.").

The Legislature waives the state's sovereign immunity only by clear and express language. *See Kegonsa Joint Sanitary Dist. v. City of Stoughton,* 87 Wis. 2d 131, 144, 274 N.W.2d 598 (1979) ("[I]n the absence of express legislative authorization the state may not be subjected to suit."). "If the legislature has not done so and if the defense of sovereign immunity is raised, then the court has no personal jurisdiction over the State." *Koshick v. State*, 2005 WI App 232, ¶ 6, 287 Wis. 2d 608, 706 N.W.2d 174 (citing *Lister v. Bd. of Regents of Univ. Wis. Sys.*, 72 Wis. 2d 282, 291, 240 N.W.2d 610 (1976)).

Sovereign immunity is synonymous with immunity from suit. *See Payment of Witness Fees in State v. Brenizer*, 188 Wis. 2d 665, 673–75, 524 N.W.2d 389 (1994). Thus, Wisconsin's sovereign immunity doctrine bars the pursuit of both monetary and non-monetary relief from the state and

entities that are creations and arms of the state. *See Erickson Oil Prods., Inc. v. State*, 184 Wis. 2d 36, 44, 516 N.W.2d 755 (Ct. App. 1994).

In order to overcome the sovereign immunity defense and maintain this suit, the petitioner must point to a legislative enactment authorizing this type of suit against the respondent. *Turkow v. Wis. Dep't of Nat. Res.*, 216 Wis. 2d 273, 281, 576 N.W.2d 288 (Ct. App. 1998).

In this case, the petitioner cannot identify a statute under which the Legislature has waived the state's immunity regarding a challenge to a high capacity well approval based on cumulative impacts. In fact, Wis. Stat. § 281.34(5m) establishes exactly the opposite, namely, that the Legislature does not consent to the state being sued under these circumstances. While it is true that the Legislature has consented to suits against state agencies as provided in Wis. Stat. ch. 227, that chapter includes specific exceptions and assumes the Legislature will create other exceptions, like it did in Wis. Stat. § 281.34(5m). *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: . . ."). The Legislature has specifically carved out an exception in Wis. Stat. § 281.34(5m) to actions against the state and its arms. Sovereign immunity bars the petitioner's claims against DNR, to the extent they are based on cumulative impacts. All claims related to DNR's lack of consideration of cumulative impacts must be dismissed.

CONCLUSION

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

Dated this 7th day of December, 2016.

Respectfully submitted,

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