STATE OF WISCONSIN CIRCUIT COURT Branch 6 DANE COUNTY

CLEAN WISCONSIN, INC.
634 West Main Street, Suite 300
Madison, WI 53703

and

PLEASANT LAKE MANAGEMENT DISTRICT
P.O. Box 230
Coloma, WI 54930,

Petitioners,

v.

WISCONSIN DEPTARMENT OF NATURAL RESOURCES,
101 South Webster Street
Madison, WI 53707,

Respondent.

Case Nos. 16-CV-2816
16-CV-2817
16-CV-2818
16-CV-2819
16-CV-2820
16-CV-2821
16-CV-2822
16-CV-2823
16-CV-2824

Case Code: 30607
Administrative Agency Review

PETITIONERS' SUR-REPLY BRIEF IN OPPOSITION TO MOTION TO DISMISS

ARGUMENT

RESPONDENT'S REPLY BRIEF RELIES ON ERRONEOUS REPRESENTATIONS OF LAW

The Attorney General's brief on behalf of DNR makes convoluted arguments that turn the applicable law on its head, as demonstrated by the following examples:

I. The Motion to Dismiss Case No. 16-CV-2816 Violates Both Civil and Administrative Law.

DNR first argues that the motion to dismiss Case No. 16-CV-2816 should be granted because the recipient of the well approval has withdrawn its application and that Petitioners did

not assert a sufficient defense. Petitioners in fact responded that the case would be moot only if DNR revoked the approval, but DNR has not done so.

Moreover, the motion itself violates both civil and administrative procedure because it is based on a document that is not within the four corners of the petitions and relies on a document outside the administrative record. It is boilerplate law that a motion to dismiss tests the sufficiency of the complaint (here, petitions), assuming all facts pled are true and construing the complaint in a light most favorably to the plaintiff. *See* Petitioners' Br. at 9. DNR's motion, however, is based on information outside the petitions. Such information might be relevant to a motion for summary judgment, but not a motion to dismiss for failure to state a claim.[1]

Additionally, Wis. Stat. ch. 227 contemplates a decision based on the agency's administrative record. Wis. Stat. § 227.57(1) (the review "shall be confined to the record ...."). The document relied upon by DNR is not part of the record, DNR has not alleged any procedural irregularities that would justify considering additional evidence under § 227.57(1), and DNR has not moved the Court to consider additional evidence. DNR's motion therefore does not satisfy the basic requirements for a motion to dismiss.

II. PETITIONERS' CHALLENGES BASED ON IMPACTS UNRELATED TO "CONSIDERATION" OF CUMULATIVE IMPACTS WITH "EXISTING WELLS' REQUIRES DENIAL OF THE MOTION TO DISMISS.

DNR oddly denies that its motion relies on the erroneous assertion that Petitioners' challenges are based solely on DNR's failure to consider cumulative impacts, to the extent precluded by § 281.34(5m). It is in fact DNR's only argument in its motion and principal brief, including its argument on sovereign immunity.

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[1] Motions for summary judgment are not available in a chapter 227 action for judicial review. *Wis. Environmental Decade v. Public Service Comm.*, 79 Wis. 2d 161, 169-70, 255 N.W.2d 917 (1977).

DNR feigns ignorance of the meaning of "individual" versus "cumulative" effects, blaming Petitioners for not defining those terms. As discussed in Petitioners' Br. at 9-11, those terms are well understood in common English, and that "cumulative" under § 281.34(5m) also is limited to consideration of a well's impact in conjunction with other existing wells. Petitioners also highlighted several factual allegations in the petitions that specifically are not related to cumulative impacts with other existing wells. DNR's statement that it was "Left to guess" (DNR Reply Br. at 8) is patently frivolous. Additionally, its argument defies the requirement that all facts are to be construed liberally in favor of reaching the merits.

DNR also misconstrued its cited cases. In *H.A. Friend & Co. v. Professional Stationery, Inc.*, the Court of Appeals dismissed certain claims but allowed other claims. 2006 WI App 141, 294 Wis. 2d 754, 720 N.W.2d 96.[2] Here, however, Petitioners only raised one claim in each case, *i.e.*, that the challenged well approvals violate state law.

DNR's new argument appears to be that the Court should not dismiss the Petitioners in their entirety, but that it should use the motion to dismiss to parse out which arguments can and cannot be made on the merits. That is not the purpose of a motion to dismiss, it wastes judicial and the parties' resources, and it reinforces the impropriety of DNR's motion.

III. DNR Erroneously Conflates "Consideration" with "Action."

DNR's reply brief makes two new and inconsistent arguments: a) that the term "consideration" as used in § 281.34(5m) is unambiguous; and b) that in addition to Petitioners' quoted definition ("careful thought; deliberation"), "consideration" also can be defined as "take into account" or "bear in mind." DNR Reply Br. at 9. It then argues that its definition includes

[2] The Court of Appeals in *Farr v. Alternative living Services, Inc.*, concluded that the complaint at issue did not state a claim based on the asserted private cause of action for statutory violation; but it read into the complaint a cause of action for negligence and thereby allowed the case to proceed. 2002 WI App 88, 253 Wis. 2d 790, 643 N.W.2d 841.

not just deliberation but also action thereon, and that the Court must adopt that definition and dismiss the petitions.

DNR's argument necessarily fails for at least the following reasons, all of which its brief ignores:

1. A statute cannot be unambiguous if there are two reasonable definitions that lead to different results.

2. Section 281.34(5m) is a procedural statute that must be construed in favor or reaching the merits of the case. *See* Petitioners' Br. at 12. This is particularly where the case involves a governmental agency decision. *See* Petitioners' Br. at 13-14.

3. There is nothing in DNR's alternative definitions that necessarily means that "consideration" also includes "action."

4. DNR's argument is inconsistent with the Supreme Court's decision in *Lake Beulah Mgmt. Dist. v. DNR*, which made clear that "consideration" when evaluating a well application is distinct from protecting public trust waters when issuing the decision. 2011 WI 54, ¶ 4, 335 Wis. 2d 47, 799 N.W.2d 73.

This last point is significant. DNR dismisses *Lake Beulah* as moot because it predated enactment of Wis. Stat. § 281.34(5m). However, *Lake Beulah* did not address cumulative impacts: it only addressed whether DNR must consider adverse impacts to public trust waters based on its constitutionally-based duties to protect waters of the state. Nothing in § 281.34(5m) specifically addresses or supersedes *Lake Beulah* or alters the Court's distinction between consideration and action.

Moreover, DNR has the statutory analysis backward. The Legislature is charged with knowledge of existing case law, and its subsequent enactments are presumed to be consistent with existing case law unless expressly changing that law.

> The legislature is presumed to act with full knowledge of existing case law when it enacts a statute.... A statute must be interpreted in light of the common law and the scheme of jurisprudence existing at the time of its enactment....

> Statutes in derogation of the common law are to be strictly construed.... "A statute does not change the common law unless the legislative purpose to do so is clearly expressed in the language of the statute."... "To accomplish a change in the common law, the language of the statute must be clear, unambiguous, and peremptory." ....

Strenke v. Hogner, 2005 WI 25, ¶¶ 28-29, 279 Wis. 2d 52, 694 N.W.2d 296, *reconsid. den.* 2005 WI 134 (citations and quoted sources omitted). Here, the legislature's use of the term "consideration" in § 281.34(5m) – *i.e.*, in the context of high capacity wells – must be read to be consistent with the Supreme Court's understanding and use of that term in *Lake Beulah*.

DNR's argument based on the *Richfield Dairy* decision also is convoluted and unavailing. The Administrative Law Judge in that decision expressly followed *Lake Beulah* when he concluded that DNR must both consider cumulative impacts and fashion its decision to protect public trust waters from those cumulative impacts. He did not conflate the meaning of consideration and action, as DNR argues; nor could he, as he was bound by *Lake Beulah*.

DNR cannot unilaterally broaden the definition of "consideration" to include "actions" necessary to fulfill the state's constitutional duty to protect public trust resources, and then claim that Petitioners have challenged the well approvals for failure to consider cumulative impacts. Petitioners challenge DNR's failure act to deny or condition well approvals as necessary to protect public rights in public trust resources, based on the documented analyses and opinions of its own staff, and nothing in § 281.34(5m) precludes that challenge.

IV. DNR Misconstrues the Constitutional Issue Identified by Petitioners.

DNR erroneously argues that Petitioners challenge § 281.34(5m) as unconstitutional, but did not adequately develop that argument. DNR Reply Br. at 14. Rather, Petitioners have asserted that DNR's interpretation of § 281.34(5m) creates a constitutional issue. *See* Petitioners' Br. at 15 ("The application of § 281.34(5m), *as framed in the motion to dismiss*, also

raises constitutional issues." (emphasis added)) If the statute insulates DNR from protecting public trust resources, based on DNR's expansive definition of "consideration," the statute would violate the Public Trust Doctrine embodied in Wis. Const. Art. IX, Sec. 1. That is, the statute would violate the State's constitutional duty to protect public trust resources, as defined by more than one hundred years of unanimous Supreme Court decisions.

Petitioners alerted the Court to this issue because it undermines DNR's expansive interpretation of § 281.34(5m) and because it turns a motion to dismiss based on the allegations in the pleadings to a broader analysis of the merits of the case. A motion to dismiss simply is not appropriate for piecemeal decision-making of the merits of the case.

CONCLUSION

For each of the reasons stated herein, the Motion to Dismiss must be denied; and Petitioners should be awarded their costs and attorneys' fees.

Dated this 6th day of February, 2017.

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Electronically signed by Carl A. Sinderbrand
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