

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 DEPARTMENT OF  
NATURAL RESOURCES,  
101 South Webster Street  
Madison, WI 53707,

Respondent.

Case Nos. 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

**AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS ON BEHALF OF  
THE TOWN OF ROME**

The Town of Rome (“the Town” or “the Amicus”) submits this amicus curiae brief in support of Petitioners Clean Wisconsin, Inc., *et al.* The Town supports and reiterates Petitioners’ request that: (1) the Court reverse and vacate the well approvals in each of the above-captioned cases; and (2) the Court direct the Wisconsin Department of Natural Resources (“DNR”) to comprehensively fulfill its delegated responsibilities under the Public Trust Doctrine, including the consideration of cumulative impacts, when acting upon high capacity well applications.

It is well established that the Legislature delegated the State’s constitutional duties under the Public Trust Doctrine to DNR to protect navigable surface waters for this and future

generations. *Lake Beulah Mgmt. Dist. v. State*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73; Wis. Const. Art. IX, § 1. That delegation includes the authority and duty to consider and protect public trust resources in its regulatory decisions, including approvals for high capacity wells. *Lake Beulah*, 2011 WI 54, ¶¶ 3, 66. This case is about whether the Legislature has revoked DNR’s constitutional and statutory authority to consider and protect public trust resources, including the cumulative impacts of existing wells along with the proposed well, when issuing high capacity well approvals. Specifically, the question presented is whether Wis. Stat. § 227.10(2m) abrogated DNR’s authority and duty to restrict, condition, or deny a high capacity well approval when DNR has evidence that the well will harm public trust waters such as lakes, streams and wetlands.

**I. Groundwater overuse by the proliferation of high capacity wells leads to surface water declines and harms the Amicus.**

The Amicus is a body corporate and politic, located in Adams County, Wisconsin. The stated mission of the Town is to strive to be a diverse community offering a variety of residential living, year-round recreation and business opportunities with an emphasis on environmental preservation. The Town has an abundance of natural resources and prides itself in its outdoor activity and recreation offerings. Significant to the Town’s reputation as a premiere all-season vacation and outdoor-activity destination are its three large recreational lakes (the “Tri-Lakes.”). Combined, the Tri-Lakes have a surface area of about 1,000 acres, and about 4,000 homes are sited near the lakes. Together with the Wisconsin River, streams, ponds and lakes total about 5,200 acres or 13% of the Town’s total acreage. As further detailed in this *amicus curiae* brief, the mission and efforts of the Town’s Board and community members establish a substantial interest in the State’s ground and surface water resources; in particular, the Tri-Lakes and

connected area waterways upon which tourism, recreation, and other local business opportunities depend.

DNR's restrictive interpretation of its authority and duty to protect Public Trust waters from the impacts of high capacity wells and groundwater use specifically threatens the interests of the Town's elected officials and residents. The Town has an active and substantial interest in protecting the quantity and of area groundwater, lakes, wetlands and other surface water resources from the individual and cumulative adverse impacts of excessive groundwater pumping in the region. This includes the preservation and quality of the Town's lake levels, aesthetic beauty, water biological quality, fishery and navigation.

That interest is even more acute when evaluations of affected flow and ecology of other communities with established high capacity wells show substantial adverse impacts to waters in those communities, both groundwater and Public Trust waters due to excessive groundwater pumping. As the Town looks to continue capitalizing on its natural resources while emphasizing environmental preservation, water resources will continue to play a large role in the Town's vision towards becoming an all-season recreational and tourism hub.

DNR acknowledges that "there have been documented declines in stream flows and lake levels within the central sands."<sup>1</sup> In fact, DNR is currently preparing "a strategic analysis to examine ways to sustainably manage groundwater and surface waters in Wisconsin's central sands region."<sup>2</sup> In public comments on DNR's plan to prepare this strategic analysis, Wisconsin residents raised concerns that are representative of those held by the Town as it works to protect

---

<sup>1</sup> Wisconsin Department of Natural Resources, Central Sands Strategic Analysis (rev'd Nov. 23, 2015), available at <http://dnr.wi.gov/topic/eia/cssa.html>.

<sup>2</sup> *Id.*

its community from the impact of high capacity well proliferation as seen in neighboring communities. Commenters noted, for example:

Many bodies of water, such as lakes and streams, are the main source of attraction to purchase homes and attract tourists to the area. If these lakes and streams dry up or become contaminated, tourism and real estate values will decrease. This will cause a domino effect; businesses will leave the area, causing job loss, causing loss of residency, causing loss of tax dollars, causing new businesses to seek other areas to put up shop, and eventually will have a detrimental impact on the entire Central Sands area if the cumulative effect of high capacity wells is not studied.

...

We have owned property on Lake Camelot, Town of Rome, since 1988, and over the years, we have seen a drastic decline in the quality and quantity of lake water. Understandably, agriculture is important to our economy, but the increase in water use for irrigation and cranberry bogs is severely limiting the amount and quality of water flowing into Lakes Camelot, Sherwood and Arrowhead. Farm run off and growers' various fertilizing agents enter the water supply, destroying our water quality. The lakes get so low and full of algae by mid-July that they are nearly unusable.

...

I own a home on Huron Lake. We purchased this in 1988. Since 1999, we have experienced a steady decline in the water level on our lake. We are currently down approximately 10 vertical feet of depth since 1999. Paralleling the decline has been a dramatic increase in the number of Hi-Cap wells in the immediate vicinity of the lake. Without some relief, our ability to use the lake for recreational and aesthetic purposes will continue to diminish. Further, our property value is negatively impacted due to the loss of water and uncertainty as to the future condition of the lake.<sup>3</sup>

Water level data from the United States Geologic Service confirms dramatic declines in lake levels during years in which irrigation increases. For example, Huron Lake in Waushara County, the county with the third largest groundwater withdrawals in the state, experienced a three foot water level decline during the growing season in 2012 when groundwater withdrawals by high capacity wells increased by 68%.<sup>4</sup>

---

<sup>3</sup> DNR summary of public comments on scope of Central Sands strategic analysis (Exhibit A).

<sup>4</sup> Wisconsin Department of Natural Resources, *Wisconsin Water Use: 2012 Expanded Withdrawal Summary* (Exhibit B); USGS, National Water Information System: Web Interface, USGS 05401063 Lake Huron Near Plainfield, WI, *available at*

The Town has a vested stake in preventing negative economic ramifications that follow the partial or total loss of water quantity in lakes, streams, and other water resources. A study by the UW-Extension office in Waushara County found that property values along six lakes in the Town of Oasis, Waushara County dropped by 4.3% between 2004 and 2009.<sup>5</sup> That decline is in sharp contrast to the 11.6% increase in property values elsewhere in the Town of Oasis during that same period.<sup>6</sup> When lakefront property values decline, property owners and local governments lose money. For example, property values on Long Lake in the Town of Oasis went down by a total of \$1,678,472.50 in 2007 after lake levels dropped between 2006 and 2007. As a result, the local tax district lost \$28,152.45 in revenue. As property values have continued to decline, that local tax district has lost a total of \$225,219.60 in revenue over the past 8 years.<sup>7</sup>

In sum, the Amicus, whose economy relies upon water-based tourism and lakefront property value, will suffer harm if the Town cannot rely upon the DNR to issue high capacity well permits that prevent unchecked decline in quantity and quality of water resources such as the Tri-Lakes.

## **II. DNR's approval of the high capacity wells at issue conflicts with established law and violates its duties under the Public Trust Doctrine.**

Wisconsin maintains a long tradition of protecting water resources that are guaranteed to all people by the Public Trust Doctrine enshrined in our constitution. As the Wisconsin Supreme Court explained over 100 years ago,

---

[https://waterdata.usgs.gov/nwis/dv?cb\\_00065=on&format=gif\\_default&site\\_no=05401063&refe\\_red\\_module=sw&period=&begin\\_date=2012-01-01&end\\_date=2016-08-17](https://waterdata.usgs.gov/nwis/dv?cb_00065=on&format=gif_default&site_no=05401063&refe_red_module=sw&period=&begin_date=2012-01-01&end_date=2016-08-17).

<sup>5</sup> Lee Bergquist, *War over water in the land of plenty: crops clash with lakes and streams in central Wisconsin*, Journal Sentinel, available at <http://www.jsonline.com/story/news/local/wisconsin/2016/09/03/war-over-water-land-plenty/89481060/> (attached hereto as Exhibit C).

<sup>6</sup> Exhibit C.

<sup>7</sup> Values determined based on county assessment rolls for the Town of Oasis.

The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits. Navigable waters are public waters and as such they should inure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing.

*Diana Shooting Club v. Husting*, 156 Wis. 261, 271, 145 N.W. 816 (1914).

The Wisconsin Constitution imposes a duty on the state to hold these public waters in trust for the benefit of the public. *Lake Beulah*, 2011 WI 54. “This ‘public trust’ duty requires the state not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty. The state’s responsibility in the area has long been acknowledged.” *Id.*, ¶ 32 (quoting *Wis. Env’tl. Decade v. DNR*, 85 Wis. 2d at 526).

Consistent with DNR’s role as our state environmental agency, the Legislature delegated much of its authority and duty to protect our state waters to DNR.

While it is primarily the State’s duty to protect and preserve these resources, “[i]n furtherance of the state’s affirmative obligations as trustee of navigable waters, the legislature has delegated substantial authority over water management matters to the DNR. The duties of the DNR are comprehensive, and its role in protecting state waters is clearly dominant.”

*Lake Beulah*, 2011 WI 54, ¶ 33 (quoting *Wis. Env’tl. Decade v. DNR*, 85 Wis. 2d at 527). The statutory chapter governing DNR’s high capacity well program begins with a directive to DNR “to protect, maintain and improve the quality and management of the waters of the state.” Wis. Stat. § 281.11. The Legislature further grants DNR “general supervision and control over the waters of the state.” Wis. Stat. § 281.12(1). In this recent, unanimous decision, the Wisconsin Supreme Court explained the role of DNR in the state’s protection of public trust resources in the context of DNR’s administration of high capacity wells.

[T]hrough Wis. Stat. § 281.11 and § 281.12, the legislature has delegated the State’s public trust duties to the DNR in the context of its regulation of high capacity wells and their potential effect on navigable waters such as Lake Beulah.

*Lake Beulah*, 2011 WI 54, ¶ 34. Based on the statutory scheme governing high capacity wells along with public trust precedent, the Wisconsin Supreme Court concluded:

[T]hrough Wis. Stat. ch. 281, the legislature has explicitly provided the DNR with the broad authority and a general duty, in part through its delegation of the State’s public trust obligations, to manage, protect, and maintain waters of the state. Specifically, for all proposed high capacity wells, the legislature has expressly granted the DNR the authority and a general duty to review all permit applications and to decide whether to issue the permit, to issue the permit with conditions, or to deny the application. The high capacity well permitting framework along with the DNR’s authority and general duty to preserve waters of the state provides the DNR with the discretion to undertake the review it deems necessary for all proposed high capacity wells, including the authority and a general duty to consider the environmental impact of a proposed high capacity well on waters of the state.

*Id.*, ¶ 39 (internal footnotes and citations omitted).

This holding refutes DNR’s argument that it lacks the authority to consider the individual and cumulative impacts of existing high capacity wells and groundwater use when deciding whether to issue a high capacity well approval. DNR’s current position also conflicts with an administrative decision that DNR adopted as its own final decision following a contested case hearing. *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.* (September 3, 2014) (“*Richfield Dairy*”).

In *Richfield Dairy*, the administrative law judge concluded that when DNR is considering an application for a high capacity well, it “must consider cumulative impacts to prevent ‘potential harm to waters of the state’ pursuant to its obligations under chapter 281 and DNR’s public trust duties. *Richfield Dairy* at 3. The DNR did not petition for judicial review, and thus adopted the decision of the administrative law judge as its final decision. Wis. Admin. Code §

NR 2.155(1) (“Unless the department petitions for judicial review as provided in s. 227.46 (8), Stats., the decision shall be the final decision of the department.”). DNR then began to include cumulative impacts in its review of high capacity well applications to determine whether the proposed well would impact public trust resources.

Contrary to *Lake Beulah* and DNR’s interpretation of the law since 2014, DNR changed its position in 2016 in response to nothing more than a shift in opinion by the Attorney General’s office. To be clear, the 2016 AG opinion on which the DNR relies was not based on any contemporaneous change in the law. Instead, the 2016 AG opinion relies on the Attorney General’s misinterpretation of a law that was in place when both *Lake Beulah* was decided and DNR decided to adopt the administrative law judge decision in *Richfield Dairy*. On the basis of the Attorney General’s disagreement with *Lake Beulah* and the decision adopted by DNR in *Richfield Dairy*, DNR ignored this public trust precedent in reliance on the AG’s interpretation of 2011 Wis. Act 21.

The 2016 AG opinion’s outcome-driven analysis acknowledges that the Supreme Court dealt with 2011 Act 21 in the opinion and concluded that it didn’t change its ruling in the *Lake Beulah* case. But the AG dismisses the *Lake Beulah* precedent based on the AG’s assessment that the Supreme Court gave the new law “short shrift.” But it is the AG opinion that gives short shrift to 100 years of public trust precedent and controlling legal opinions.

This Court should not follow the 2016 AG opinion because it is not binding authority and it conflicts with controlling precedent and statutory language. The AG’s biased interpretation is evident in his characterization of public trust precedent, calling it an “ever-expanding doctrine.” “DNR’s public trust authority has been expanded by the courts beyond the plain language of the

Wisconsin Constitution.” 2016 AG opinion. But the AG’s interpretation of the constitution is not controlling and cannot overrule Supreme Court precedent.

Further, the AG incorrectly characterizes the *Lake Beulah* decision as finding that Chapter 281 gives DNR only an “implied” authority to consider and protect public trust resources in its high capacity well decisions. The Supreme Court explicitly held in *Lake Beulah* that “the legislature has explicitly provided the DNR with the broad authority and general duty . . . to manage, protect, and maintain waters of the state.” *Lake Beulah*, 2011 WI 54, ¶ 39.

The *Lake Beulah* decision was based on both the Public Trust Doctrine and the Legislature’s delegation of authority and duty to the DNR in Chapter 281. The flawed AG opinion does not even address section 281.12, and improperly dismisses 281.11 as merely a policy and purpose statement. The AG attempts to dismiss this explicit statutory language by relying on another statutory provision in 2011 Wis. Act 21, section 227.11(2)(a). But this reliance is misplaced. Section 227.11(2)(a) provides only that agencies cannot derive rulemaking authority from general policy statements in statutes. It does not provide that policy statements cannot grant the explicit authority required by section 227.10(2m) to include conditions in permits.

### **III. The Town, as a Body and Corporate Politic, Will Face Regulatory Uncertainty and Other Adverse Local Impacts If Unable to Rely Upon the Constitution and Interpretive Caselaw for Instruction and Guidance.**

Wisconsin, as a “home rule” state, intentionally leaves significant power to local governments. Unless a matter is exclusively a matter of statewide concern, municipalities have broad authority to regulate, and particularly to regulate over local affairs. *See, e.g.*, Wis. Const., Art. 11, § 3(1). Town boards, for example, are afforded with authority to “promote the public health, safety, and general welfare” of their constituents. *See, e.g.*, Wis. Stat. § 60.61.

The state-level regulation of high capacity wells pursuant to Wis. Stat. ch. 281 is detailed in Petitioners' principal brief; the Amicus will therefore not duplicate explanation of that regulatory program herein. One practical outcome of the high capacity well program is that local municipalities such as the Town rely upon the State as the principal agent to regulate high capacity wells and their impacts. That reliance becomes strained at best if local governments cannot expect that DNR will issue high capacity well permits that protect public trust waters and minimize impact upon lakes, streams, and other water resources.

Because the Town has various aesthetic, economic, and related interests in protecting the Tri-Lakes and nearby waters, the Town will be compelled to act in some manner if DNR issues high capacity well permits that allow degradation of the quality and quantity of Public Trust waters. This potential shift to local regulation and protection will strain the discrete staff and budget resources of local governments such as the Amicus. Furthermore, local governments who do wish to protect water quality and quantity against the impacts of high capacity wells will face uncertainty as to the manner and extent to which municipalities can regulate without preemption by Wis. Stat. ch. 281 and implementing regulations.

This uncertainty could result in "patchwork" regulation of high capacity wells throughout the State, with a burden falling on local governments to invest resources if necessary to determine the legality of desired ordinances or other methods of regulation. The likelihood of uncertainty and burden is high because local governments are already limited from certain regulation of agricultural impacts by the Livestock Facility Siting Law at Wis. Stat. § 93.90, which favors state-level, "uniform regulation of livestock facilities." Similarly, local governments and local regulation cannot serve as a guaranteed backstop to DNR's abdication of its Public Trust responsibilities because municipalities do not have delegated authority to protect

navigable waters unless delegation is “clear and unmistakable.” *Vill. of Menomonee Falls v. Wisconsin Dep't of Natural Res.*, 140 Wis. 2d 579, 600, 412 N.W.2d 505, 514 (Ct. App. 1987).

Of course, negative ramifications will extend beyond the high capacity well program if local governments are uncertain as to DNR’s interpretation of its authority to uphold the Public Trust Doctrine. The bulk of local regulation, most notably local planning and zoning, turns upon the State as steadfastly and consistently exercising authorities granted by the state Constitution, statutes, and implementing regulations. In sum, DNR’s issuance of the eight (8) high capacity well permits at issue in this case demonstrate a dangerous trend toward state abdication of constitutional authority that leaves the Amicus with unacceptable uncertainty and the possibility of shouldering significant additional burdens in order to protect public trust waters such as the Tri-Lakes.

### CONCLUSION

For each of the reasons stated herein, the Town supports and reiterates Petitioners’ request that: (1) the Court reverse and vacate the well approvals in each of the above-captioned cases; and (2) the Court direct DNR to comprehensively fulfill its delegated responsibilities under the Public Trust Doctrine when acting upon all high capacity well applications, including the approvals at bar.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2017.

Respectfully submitted,

Attorneys for the Town of Rome

**MIDWEST ENVIRONMENTAL ADVOCATES, INC.**

/s/

---

Tressie Kamp  
SBN 1082298

Sarah Geers  
SBN 1066948

612 West Main Street, Suite 302  
Madison, WI 53703  
tkamp@midwestadvocates.org  
Tel. 608-251-5047 x8  
Fax 608-268-0205