

Regulating High Capacity Wells in Wisconsin

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High capacity wells, defined as a well that has the capacity to pump more than 100,000 gallons of water per day, or any combination of wells located on the same property that have a total pumping capacity of more than 100,000 gallons per day, pose unique regulatory issues. Indeed, the regulation of high capacity wells continues to be a contentious issue throughout Wisconsin as additional high capacity wells proliferate as various industries seek reliable sources of water.

The state's increased demand for water supply is perhaps most evident in the Central Sands region of the state, which in recent years has witnessed a particularly large increase in the number of high capacity wells being constructed. The Central Sands region is an eight-county region that encompasses portions of Adams, Marathon, Marquette, Shawano, Portage, Waupaca, Waushara, and Wood counties. This region totals approximately 1.75 million acres of land and is defined by its unique topography. Moraines, plains, and other geographic features are seen throughout this region and serve as evidence of the large glaciers that long ago covered this portion of the state. Today, this region is known for its course soils and for being home to a large number of agricultural industries, including potato and vegetable growers. Currently, the Central Sands region has more than 3,000 high capacity wells, and according to the DNR, these wells pumped more than 98 billion gallons of water in 2012.

Recently, Wisconsin Attorney General Brad Schimel issued an opinion that attempts to clarify how the Wisconsin Department of Natural Resources (DNR) oversees the approval and regulation of high capacity wells, and offers broader guidance as to the conditions or draft rules all state administrative agencies may apply when considering permit applications. This article is intended as an overview of the current regulatory environment for high capacity wells.

Constitutional Authority for Regulation

The DNR has historically been the agency that oversees the regulation of high capacity wells via the regulatory authority specifically provided to it under Chapter 281 of the Wisconsin State Statutes, and the more general regulatory authority provided under Article IX, Section 1 of the Wisconsin Constitution.¹ While its interpretation has evolved over time, this provision of the Wisconsin Constitution has come to be known as the state's public trust doctrine. The public trust doctrine has been interpreted by the Wisconsin Supreme Court as designating the Legislature as the trustee for the state's navigable waters and charging the Legislature with the duty of ensuring that the public is able to always enjoy these waters.

The Legislature has delegated its role as trustee for the state's navigable waters to the DNR by statute. Wisconsin Statute § 281.11 states that the DNR "shall serve as the central unit of the state government to protect, maintain and improve the quality of management of the waters of the state, ground and surface, public and private." Wisconsin Statute § 281.12 further provides that the DNR "shall have general supervision and control over the waters of the state."

The DNR has used the regulatory authority granted to it by the Legislature to enact a review process for many of the high capacity well applications submitted by landowners throughout the state. 2003 Wisconsin Act 310 (Act 310) implemented a comprehensive regulatory structure aimed at protecting groundwater and expanding the DNR's authority to consider environmental impacts when reviewing applications for high capacity wells. Act 310 also provided the DNR with the authority to determine whether to issue a permit, issue a permit with conditions, or to deny a permit after completing its review of the application.

When reviewing high capacity well applications, the DNR is required by statute to apply more stringent evaluation standards to certain types of proposed high capacity wells. Wells subject to these more stringent evaluation standards are those that are proposed within 1,200 feet of a designated groundwater protection area, have a large amount of water loss, and those that have the potential to have an environmental impact on springs.²

The Wisconsin Supreme Court Weighs In

In *Lake Beulah Management District v. Department of Natural Resources*, 2011 WI 54, 355 Wis. 2d 47, 700 N.W.2d 72, the Wisconsin Supreme Court found that the DNR has a duty and the implied authority to impose conditions on high capacity well applications in order to protect Wisconsin's water resources. The Court determined that when reviewing applications for high capacity wells, the DNR may enact review criteria and standards beyond what is explicitly stated in the statutes governing high capacity well approvals.

The Court also determined that in order for the DNR to comply with its general duty to manage, protect, and maintain the waters of the state, it must be presented with sufficient concrete, scientific evidence of the potential harm to waters of the state so that it may consider the environmental impacts of the high capacity well. *Id.*

Following the Court's decision, the DNR began to review all high capacity well applications for potential adverse impacts on the waters of the state. However, this review was limited to only what possible impacts the proposed well, and any other wells on the same property, may have on the waters of the state. It did not include a cumulative impact analysis where the DNR considered what impact the proposed well, in addition to all other existing wells, may have on the waters of state.

In deciding not to consider the cumulative impact of other off-site wells when reviewing a high capacity well application, the DNR stated that it did not believe it had the express statutory authority to consider cumulative impacts, and also relied on a long-standing Wisconsin Supreme Court decision that held that a landowner has the right to use the groundwater beneath their land so long as the withdrawal of such groundwater does not cause any harm.³ However, the DNR's decision to not consider the cumulative impacts of off-site wells when reviewing a high capacity well application did not last long.

The Division of Hearing and Appeals Considers the "Lake Beulah" Decision

Following the Court's decision in *Lake Beulah*, in 2014, the Department of Administration's Division of Hearings and Appeals (DHA) issued two separate decisions that both held that the DNR is obligated to consider the cumulative impacts of other wells and other sources of water withdrawals in the area of the proposed high capacity well when making its decision of whether or not to approve a high capacity well.⁴

In its decisions, the DHA concluded that the *Lake Beulah* decision should be interpreted broadly, and the DNR should be required to consider the cumulative impacts of other wells and other sources of water withdrawals due to its implied statutory authority to protect the state's water resources. While the DHA ultimately decided that the high capacity wells that were the subject of its decisions could be constructed, the approval of these wells was conditioned by how much water the wells could pump on an annual basis.

The DNR's consideration of the cumulative impacts of other wells and other sources of water withdrawals when deciding whether to approve a high capacity well was a significant change in terms of how the DNR reviewed high capacity well applications. These decisions reflect not only a change in the process by which the DNR reviewed high capacity well applications, but also created uncertainty amongst those that desired to construct high capacity wells on their property.

The DNR Revises its Review Process

As the result of these DHA decisions and the Supreme Court's *Lake Beulah* decision, the DNR implemented a review process where each application for a new high capacity well is reviewed to determine whether the well, in conjunction with other existing high capacity wells, will result in significant adverse environmental impacts on nearby streams, lakes, wetlands and public and private wells. If the DNR determines that the well could result in significant adverse environmental impacts, the DNR may impose conditions on the construction and operation of the well or may deny the well entirely.

When determining if a well will result in significant environmental impacts, the DNR will consider the estimated reductions in stream flow or lake level, the impacts to water temperature and fish habitat, and other ecological aspects of the stream or lake that may be impacted by the high capacity well. The DNR will also consider the distance between the proposed well and other existing wells, the possible impact the proposed well may have on surface waters, and the pump capacity, water use, and pumping schedule of the proposed well.

The Legislature Reacts

Many viewed DNR's new review process, promulgated following the *Lake Beulah* decision and the subsequent DHA appeals as agency over-reach. Consequently, the Legislature enacted 2011 Wisconsin Act 21 (Act 21). Act 21 created Wis. Stat. § 227.10(2m), which states that an administrative agency may not implement or enforce a standard, threshold or requirement, including as a term or condition of a permit granted by the administrative agency, unless that requirement is either explicitly required or authorized by statute or a properly promulgated administrative rule. Act 21 not only calls into question the Supreme Court's decision in *Lake Beulah*, but also limits the DNR's authority to utilize review criteria and standards not explicitly required by the statutes when reviewing well applications.

In 2014, the Legislature adopted even more rigid review criteria applicable to DNR by codifying Wis. Stat. § 281.34(5m), which states that "no person may challenge an approval or application of an approval for a high capacity well based on a lack of consideration of the cumulative environmental impacts of that high capacity well together with existing wells." The creation of this statutory provision essentially overturned the above-mentioned DHA decisions and makes unclear if the DNR is even able to consider the cumulative environmental impacts of a high capacity well when considering well applications.

The actions taken by the Legislature to create new statutory provisions limiting what an administrative agency may or may not consider when reviewing a permit application has resulted in additional uncertainty in the high capacity well approval process, and casts doubt on what criteria the DNR may consider when deciding whether or not to approve such wells.

The Attorney General Opinion

While the DNR continues to receive, review, and approve applications for high capacity wells even after the enactment of the legislative provisions discussed above, confusion and uncertainty remains regarding how such applications will be reviewed in the future. On May 10, 2016, Attorney General Brad Schimel released an opinion addressing: (1) whether the Supreme Court considered Wis. Stat. § 227.10(2m) when it released its prior 2011 decision; (2) whether the DNR has the authority to impose monitoring well conditions or require cumulative environmental impact evaluations when reviewing high capacity well applications; (3) whether the Legislature has delegated to the DNR the power to enforce the public trust doctrine in relation to high capacity well permits; and (4) whether there is any explicit statutory authority delegating the DNR with the authority to impose monitoring wells or cumulative impact conditions on high capacity well permits⁵.

In his opinion, the Attorney General opined that the Supreme Court did not consider Wis. Stat. § 227.10(2m) when it issued its *Lake Beulah* decision regarding the review and approval of high capacity wells. The opinion states that because the high capacity well at issue in *Lake Beulah* was approved prior to the creation of Wis. Stat. § 227.10(2m), the Court's holding that the DNR has a duty and implied authority to impose conditions on high capacity wells in order to protect Wisconsin's water resources is not controlling law.

Regarding the DNR's authority to require cumulative environmental impact evaluations when reviewing high capacity wells, the Attorney General's opinion states that no such authority has been granted to the DNR and that "permit conditions are lawful only if they are permitted or required in a manner that is fully expressed by statute or rule." *Id.* The opinion further states that the Legislature has not provided the DNR with any explicit authority to condition high capacity well permits and that the DNR, or any other administrative agency, "must obtain authorization from the Legislature to impose any specific condition through its rule-making process." *Id.*

Lastly, the Attorney General opines that the DNR may only impose restrictions on high capacity wells based on the statutory authority previously provided to it by Act 310. Specifically, Attorney General Schimel states that the DNR may only restrict the approval of high capacity wells based on their location, depth, pumping capacity, rate of flow, and ultimate use. Furthermore, the Attorney General's opinion states that these restrictions may only be applied to wells that are located in a groundwater protection area, wells that will result in a loss of more than 95% of the water withdrawn, or wells that may have a significant impact on a spring. See Wis. Stat. § 281.34(4).

The Regulatory Landscape for High Capacity Wells Going Forward

Typically, opinions from the Attorney General are provided only when there is confusion regarding the interpretation and impact of various statutory provisions. While opinions issued by the Attorney General are not precedential legal authority, they tend to influence policy makers and may be considered for their persuasive value by judges authoring opinions concerning issues addressed by an Attorney General opinion.

Because of the lack of guidance provided by the courts on this issue, and considering the statements found in Attorney General Schimel's opinion, it is likely that the DNR will stop considering any environmental impact analysis when reviewing high capacity well applications and will limit its review of such applications to only the criteria that is explicitly provided for by statute.

It is also unclear what impact the Attorney General's opinion will have on other state administrative agencies as many of these administrative agencies routinely approve or deny permits based on conditions and regulations that may not be explicitly authorized or required by statute. It will be interesting to follow how administrative agencies, the Legislature, and the courts react to the Attorney General's opinion.

No matter the immediate impact Attorney General Schimel's opinion may have on the approval process of high capacity wells, as long as there continues to be an increased demand for water throughout the state, there will likely continue to be a need for the use of high capacity wells. Until the Legislature or the courts provide definitive guidance as to what may be considered by the DNR when reviewing high capacity well applications, confusion and uncertainty regarding their approval will likely continue.

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¹ Article IX, Section 1 of the Wisconsin Constitution provides that the "river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor."

² See Wis. Stat. § 281.34(4)

³ See *State v. Michaels Pipeline Construction, Inc.*, 63 Wis.2d 278, 217 N.W.2d 339 (1974)

⁴ See *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, IH-12-05, DNR-13-021 (September 3, 2014)* and *In the Matter of a Conditional High Capacity Well Approval for Two Potable Wells to be Located in the Town of New Chester, Adams County Issued to New Chester Dairy, Inc., and Milk Source Holdings, LLC, Case No. DNR-13-011 (September 18, 2014)*.

⁵ OAG-01-16

A copy of Attorney General Schimel's May 10, 2016 opinion is available at: www.doj.state.wi.us/sites/default/files/OAG-01-16%20FINAL.pdf

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