

Cases Involve DNR Authority with CAFO's; High Capacity Wells

Apr 19 2019

Practice Area: Environmental Law and Litigation & Government Law

Background

The Wisconsin Supreme Court recently certified two companion cases involving the scope of the Wisconsin Department of Natural Resources' ("DNR") regulatory authority in light of 2011 Wis. Act 21 ("Act 21"). Both of the companion cases are captioned as *Clean Wisconsin, Inc. v. DNR*.¹ The first case involves the DNR's authority to regulate concentrated animal feeding operations ("CAFO"), while the second case involves DNR's authority to regulate high capacity wells. Both cases involve questions of statutory interpretation (involving Wis. Stat. chs. 281 and 283) and constitutional interpretation and application (related to the public trust doctrine).

Analysis

Specifically at issue is defining the impact of Act 21 on the regulatory permit approval process, and determining whether *Lake Beulah Management District v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73 is still controlling law in Wisconsin.

In *Lake Beulah*, the Court concluded that DNR possessed broad authority, and a general duty pursuant to Wis. Stat. ch. 281 and in conjunction with the public trust doctrine, "to manage, protect, and maintain the waters of the state." *Lake Beulah*, 335 Wis. 2d 47, ¶ 39. "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." *Id.* Fundamentally, the Court held that the legislature granted DNR broad authority to impose conditions upon permits in matters involving waters of the state.

The DNR's position in the current *Clean Wisconsin* cases is that Act 21 severely restricted DNR's regulatory authority and implied powers, and that *Lake Beulah* is no longer controlling. Act 21 created Wis. Stat. § 227.10(2m), which provides:

No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter, except as provided in s. 186.118 (2) (c) and (3) (b) 3. The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter.

The DNR's position is that that this section prohibits the DNR from considering any factors with regard to environmental review for applications for CAFO and well permits that are not explicitly provided for in statute. This includes (1) considering environmental impacts of wells outside the defined categories in Wis. Stat. §§ 281.34 and 281.35 as it is not "explicitly required or explicitly permitted by statute or by a rule"; and (2) requiring ground water monitoring or including a maximum number of animal units as permit conditions.

DNR bases its interpretation on a 2016 Opinion of the Wisconsin Attorney General. See OAG01-16. The Attorney General concluded that Act 21 prohibited any environmental review for wells outside the limited types of wells explicitly specified in Wis. Stat. §§ 281.34 and 281.35. OAG-01-16. The Attorney General was further of the opinion that the Wisconsin Supreme Court did not address Act 21 in *Lake Beulah*, and to the extent that it did address Act 21, "*Lake Beulah...is no longer controlling.*" *Id.*

On the other hand, the Petitioners in the *Clean Wisconsin* cases assert that *Lake Beulah* is still controlling and is not impacted by Act 21 because the legislature has explicitly provided DNR with broad implied powers to regulate environmental matters, particularly with respect to the public trust doctrine.

The *Clean Wisconsin* cases are important because in addition to their potential impact on the regulatory authority of DNR, they also have the potential to impact all other state agencies' regulatory authority. A ruling that accepts DNR's position will greatly limit the implied powers of state agencies and otherwise limit the scope of the state agencies' regulatory authority under the DNR's explicit authority standard.

Additionally, the Court's ruling could have an indirect trickledown effect on counties. If DNR's interpretation is accepted, there could be regulatory gaps created where counties and state agencies share concurrent or complimentary jurisdiction. There may be areas in which state agencies have traditionally regulated where counties do not have authority to do so. If state agency authority is limited in the manner in which DNR suggests, these areas would be left uncovered by both state agency and county authority. Further, counties sometimes possess authority to implement regulatory ordinances in conjunction with state agency authority that may be no more restrictive than the state agency's authority (see e.g., Wis. Stat. ch. 281). Indeed, if a state agency's authority is found to be more limited than as previously administered then county authority would possibly also be further restricted.

¹**Note:** Each companion case is also a consolidation of a number of individual cases. The consolidated Wisconsin Supreme Court case numbers are: 2016AP001688, 2016AP002502, and 2018AP0000059.

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