



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Madison, Wisconsin on January 16-17, 2014. Jeffrey D. Boldt, Administrative Law Judge presiding. The parties requested an opportunity to submit written closing arguments, and the last was received on June 16, 2014.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

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FINDINGS OF FACT

1. New Chester Dairy, Inc. (Dairy) obtained a Wisconsin Pollutant Discharge Elimination System (WPDES) Permit, plans and specifications approval, and high capacity well approval for a new facility in 2011. (Exhibit (Ex.) 2, p. 1)

2. The Dairy applied to modify its WPDES Permit in the spring of 2012, in order to increase the number of cows from 4,300 to 8,600, or 12,540 animal units (AUs), making it the largest dairy facility in the state of Wisconsin. *Id.*

3. Along with its request to modify the WPDES Permit to allow an expansion in AUs, the Dairy applied for a high capacity well approval on April 12, 2012. Since the increased water withdrawal necessitated by the expansion in AUs could cause a significant adverse impact to nearby Patrick Lake, the Dairy submitted a numeric groundwater model from Dr. Charles Andrews of S.S. Papadopoulos & Associates, Inc. (SSPA) to evaluate potential impacts of the proposed wells on nearby water resources. Based on the SSPA model results, the Dairy proposed to construct the wells further from Patrick Lake. (Ex. 11)

4. It is undisputed that it was reasonable to relocate the pumping wells, since the existing wells would probably cause a significant adverse impact to Patrick Lake. (Transcript (TR), Vol. 1, 23:4-10; 79:7-25)

5. Because the Dairy proposed to add more than 1,000 AUs, DNR was required to prepare an environmental analysis for the project. DNR prepared a draft Environmental Assessment (EA) on July 27, 2012, received and responded to public comments, and certified the EA on September 24, 2012. (Ex. 2, p. 27)

6. The draft EA included an evaluation of potential impacts to nearby water resources caused by the new wells, based on the SSPA model and subsequent memos from SSPA dated May 10, 2012, May 21, 2012 and June 7, 2012. (Exs. 11-14) DNR noted that while the predictive uncertainty of the model was relatively small, DNR intended to require monitoring of pumping and groundwater elevations as part of the high capacity well approval in order to evaluate actual field conditions. (Ex. 2, p. 20)

7. The Dairy submitted public comments on the draft EA, but no comments in opposition to the monitoring requirement. (Ex. 3; TR, Vol. 1, 183:23-184:3) DNR had previously indicated to the Dairy that monitoring may be required, as early as May 18, 2012. (Ex. 105, p. 2)

8. After the EA was certified on September 24, 2012, the Dairy submitted a memo to DNR, on November 6, 2012, from Charles Andrews to Anna Wildeman, titled "Monitoring Requirements – New Chester." Among other things, the memo included the following statements:

- a. "As has been stated many times, the model calculated stream flow and groundwater level changes are only as good as the model inputs, and these inputs are not precisely known." Ex. 18, memo, p. 1.

- b. "Monitoring of groundwater levels for changes due to pumping in the immediate vicinity of the proposed high capacity wells could potentially provide information on hydraulic properties of the aquifer in the immediate vicinity of the wells." *Id.*, memo, p. 4.
- c. "Historical water level data on the aquifers are relatively sparse. As more data on aquifer conditions become available in the future, better and more accurate calculations of stream flows (sic) changes from aquifer withdrawals can be made." *Id.*

9. DNR issued a high capacity well approval (Approval) to the Dairy on January 17, 2013. (Ex. 5) DNR considered the November 2012 memo from the Dairy and additional information submitted by the Dairy and others during the EA process, and determined it was necessary and appropriate to include the Monitoring and Reporting Condition, as described in Finding of Fact 10.

10. DNR included a Monitoring and Reporting Condition in the fourth to seventh paragraphs of Condition #1 of the Approval. The Condition is adequately summarized in the Dairy's proposed Findings of Fact 5 and 6, with the important addition that the Approval requires that the monitoring wells and piezometer must be monitored "[b]eginning at least one week before operation of the high capacity wells." (Ex. 5, pp. 7-8)

11. Even though the Dairy challenged the Monitoring and Reporting Condition, the Dairy submitted a monitoring well installation work plan on February 22, 2013, which it requested DNR to review and approve as soon as possible. (Ex. 7) DNR expeditiously reviewed the work plan and approved it on March 1, 2013. (Ex. 8) The Dairy has been recording and reporting groundwater elevation data to DNR since April 2013. (TR, Vol. 1, 21, 24, 50)

12. The Dairy timely requested a contested case hearing under Wis. Stat. § 227.42, which DNR granted on March 7, 2013. Two of the three issues for which a hearing was granted were resolved by stipulated agreement.

13. The other issue on which a hearing was granted was:

Whether DNR properly included a condition in the Approval requiring Petitioners to comply with certain requirements for the construction of monitoring wells and a piezometer near the high capacity wells, collection of groundwater level elevations and reporting of that data to DNR, in order to verify the changes in groundwater levels predicted by groundwater modeling, which was conducted on behalf of Petitioners for the purpose of evaluating the significance of impacts to waters of the state resulting from operation of the high capacity wells. Ex. 9, p. 1.

14. The parties submitted briefs in support of competing motions for summary judgment in July and August 2013. Administrative Law Judge Boldt granted partial summary

judgment to DNR on December 13, 2013, ruling that DNR has legal authority to include conditions in high capacity well approvals.

15. The Division of Hearings and Appeals ruled that the issue of whether the specific conditions in the Approval are reasonable and necessary needed to be heard, since there were disputed issues of material fact on the issue, and a hearing was held on January 16-17, 2014.

16. DNR is charged with ensuring that the waters of the state do not experience significant adverse impacts. (TR, Vol. 1, 204:24-205:19) This duty affects the review of all high capacity well approval applications and requires DNR staff to review high capacity well applications to determine whether or not the wells as proposed would result in significant impacts to waters of the state. (TR, Vol. 1, 171:17-24)

17. All three DNR witnesses who testified at the hearing have extensive experience reviewing groundwater models, issuing high capacity well approvals, or both, in the regulatory context. They are responsible to implement DNR's duty to ensure that operation of high capacity wells will not cause significant adverse environmental impacts to nearby waters of the state.

18. Larry Lynch has worked as a hydrogeologist for the DNR since 1981, and has significant experience in conducting technical reviews of groundwater withdrawals. (Ex. 101) He worked in the Water Use Section of the Bureau of Drinking Water and Groundwater from 2006 to 2013, reviewed high capacity well approval applications and determined when to include conditions in approvals. (TR, Vol. 1, 171:17-24; Ex. 101) He has significant experience in recommending and drafting changes both to state statutes and administrative codes regarding the groundwater quantity law and related issues. (Ex. 101)

19. Dave Johnson has worked as a hydrogeologist for the DNR since 1992. He has primary responsibility for groundwater monitoring well construction oversight and has worked on numerous high capacity well application reviews and ch. NR 820 groundwater quantity reviews. (Ex. 102; TR, Vol. 2, 260:24-25, 261:1-7) Mr. Johnson has specific proficiency with the geology of the Central Sands region, having reviewed hundreds of high capacity well approval applications for that region. (TR, Vol. 2, 263:1-7, 262:15-20) Mr. Johnson also has a great deal of experience with constructing and reviewing groundwater models, including MODFLOW models like the one in this case. (TR, Vol. 2, 264:5-267:2)

20. Adam Freihofer has seven years of experience in reviewing groundwater models in a regulatory setting. He is a water quality modeler for DNR, and provides technical support to the Water Use Section for review of models submitted by third parties. (Ex. 100; TR, Vol. 1, 133:4-7) Before his work at DNR, Mr. Freihofer was a supervisory hydrologist in the Modeling Unit for the Arizona Department of Water Resources, where he oversaw the modeling unit staff and reviewed third party applications for water supply, including the submittal of MODFLOW models. (Ex. 100; TR, Vol. 1, 134:11-25)

21. Charles Andrews, the expert witness for the Dairy, has extensive experience in developing numeric groundwater models, such as MODFLOW models, but does not have experience as a regulator in determining whether groundwater monitoring is necessary to verify

whether a groundwater model has accurately predicted groundwater drawdown from high capacity wells.

22. All three of DNR's expert witnesses, each of whom reviewed the specifics of the SSPA model, found that while it was reasonable for DNR to rely on the model to predict impacts of the Dairy's wells, groundwater monitoring was necessary in order to verify the SSPA model's predictions regarding groundwater drawdown, to ensure that operation of the Dairy's wells will not cause significant adverse environmental impacts to nearby waters of the state.

23. DNR's hydrogeologists identified concerns with specific aspects of the SSPA model when they initially reviewed it. (TR, Vol. 1, 177:9-17) Mr. Freihoefer was concerned with using a regional model to assess localized impacts, especially since there was not much local data available. (TR, Vol. 1, 136:23-137:3) Mr. Johnson had concerns with the sparseness of input parameters for the model. (TR, Vol. 2, 267:12-25)

24. DNR identified site-specific, detailed concerns regarding the SSPA model and relayed the concerns to the Dairy via several e-mails and letters. (Exs. 104, 105 and 107)

25. Mr. Freihoefer had concerns with the model inputs and the wide range of hydraulic conductivity values. (TR, Vol. 1, 137:22-138:6) He would be less concerned if the values were homogeneous, but since the data was sparse and widely variable, this was a concern. (TR Vol. 1, 153:14-21)

26. Mr. Johnson testified regarding his concerns with the sparse data used to construct the model, including the hydraulic conductivity data. (TR, Vol. 2, 267:21-25, 269:10-23)

27. Dr. Andrews admitted that the model calculated stream flow and groundwater level changes are only as good as the model inputs, and these inputs are not precisely known. (Ex. 18, memo, p. 1; TR, Vol. 1, 83:17-25) He stated that the issue with the input parameters was whether they accurately reflected field conditions. (TR, Vol. 1, 89:5-12) He acknowledged that the model does not have a perfectly accurate representation of the subsurface characteristics and has uncertainty. (TR Vol. 1, 96:12-16, 97:7-13) He stated that when his model results do not compare favorably with field conditions it is because he has very little information on the characteristics of the subsurface deposits. (TR, Vol. 1, 101:4-8)

28. Dr. Andrews agreed that there was a lot of variability in the hydraulic conductivity data, yet the hydraulic conductivity was the primary calibration parameter for the model. (TR, Vol. 1, 86:15-25, 87:3-7)

29. Mr. Freihoefer was concerned about using the hydraulic conductivity as the primary calibration parameter because the data was relatively sparse and highly variable and that can ultimately impact how information is calibrated and zoned. (TR, Vol. 1, 138:16-20) Even though the SSPA model included robust calibration methods, the model input uncertainties coupled with residual error in the model output created uncertainty with the predictions.

30. The Dairy conducted a sensitivity analysis in response to DNR's concerns regarding the SSPA model, but the analysis focused on potential surface water impacts, not on

the uncertainty regarding the sparse and variable data for existing groundwater levels and hydraulic conductivity. The sensitivity analysis did not satisfy DNR's concerns regarding the sparseness and variability of input data. (TR, Vol. 1, p. 157:1-5, 169:1-9)

31. Mr. Johnson stated that it is the uncertainty regarding the model inputs which the monitoring requirements are intended to address. (TR, Vol. 2, 286:16-287:6)

32. Mr. Lynch developed the Monitoring and Reporting Condition, in consultation with Mr. Johnson. (TR, Vol. 1, 198:9-14) He explained the basis for the Condition, which was to verify that the groundwater drawdowns predicted by the SSPA model were correct. *Id.*, 192:5-8. He explained the reasons for the specific requirements, such as a monitoring frequency of four hours for the monitoring well and piezometer nearest the production wells, because groundwater levels near the wells could change fairly rapidly in response to the pumps turning on and off, and DNR wanted to capture that change. *Id.*, 198:15-21.

33. Both Mr. Lynch and Mr. Johnson explained that the monitoring data would be compared with the modeled predictions of groundwater drawdown and would be used with other data collected over the same time period, including actual pumping information from the Dairy's production wells, pumping information from other wells in the area, monitoring information from regional groundwater monitoring wells in the area and precipitation information, in order to determine whether the actual reductions in groundwater levels were consistent with what was predicted in the model. *Id.*, 191:21-192:8; 199:17-25.

34. A minimum of three years of groundwater monitoring will allow DNR to accurately check the SSPA model. Mr. Lynch explained that a minimum of three years of monitoring was required because the SSPA report included a five-year projection of groundwater drawdown, and DNR may be able to reasonably determine after three years whether or not groundwater drawdown was occurring as predicted in the SSPA model. *Id.*, 200:7-11. Mr. Johnson stated that DNR should see three feet of groundwater drawdown after the initial three years if the model is accurate. (TR, Vol. 2, 281:13-21)

35. Mr. Lynch testified that Monitoring Wells 2 and 3 were required to be placed in opposite directions to see whether or not drawdown was propagating uniformly in both directions and to check on the model's prediction regarding that drawdown. *Id.*, 202:1-13. The frequency of monitoring required for Monitoring Wells 2 and 3 was once every day (rather than every four hours) since the predicted rate of drawdown is less and the rate of change in drawdown is slower as you get further away from the production wells. *Id.*, 203:15-22.

36. Mr. Lynch explained that more frequent monitoring was required during the period in which irrigation wells in the area are also operating in order to be able to separate out the impacts of the dairy's wells from the irrigation wells. *Id.*, 204:5-9.

37. Both Mr. Lynch and Mr. Johnson were confident that DNR was capable of separating out the impacts of the Dairy's wells, since accounting for well interference is learned in a beginning level hydrogeology course, (TR, Vol. 2, 227:17-21), and because DNR has been doing these kinds of calculations to determine the impacts of pumping wells on municipal wells since 1945. (TR, Vol. 2, 278:23-279:7, 308:2-6, 311:18-22)

38. The Monitoring and Reporting Condition is a reasonable and useful way to collect data to evaluate whether or not the predictions of the model are tracking with what actually occurs in the field. *Id.*, 205:16-19. This is necessary in order to fulfill DNR's responsibility to protect waters of the state when issuing high capacity well approvals.

39. The Dairy's objection to the Monitoring and Reporting Condition is based, at least in part, on misunderstanding the intent of the requirement. The purpose of the Condition is to verify whether the calculated groundwater drawdown is accurate. Although reductions in groundwater levels would have a resultant impact on nearby surface waters, the intent of the monitoring is not to require measuring stream-flow reductions or lake level reductions.

40. The predicted groundwater drawdown in the sandstone aquifer after 5 years of pumping is 60 inches near the wells with predicted drawdown contours decreasing to 48 inches, 36 inches, 24 inches, and then 18 inches of drawdown 0.5 miles from the production wells. (Ex. 16, Fig. 2a) These predicted drawdowns are sufficiently large to be measurable and to be verified by groundwater monitoring.

41. The intent of the Monitoring and Reporting Condition was apparent in several documents. The draft EA stated: "the department intends to require monitoring of pumping and groundwater elevations as part of the high capacity well approval in order to track actual field conditions." (Ex. 2, p. 20) The Approval requires groundwater monitoring wells to measure "water levels" and "water elevation data." (Ex. 5, pp. 7-8)

42. The Monitoring and Reporting Condition is supported by the United States Geological Survey (USGS), whose Sustainability on Groundwater Resources publication recommends continual field monitoring of groundwater systems to reevaluate the original model. (Ex. 118) Mr. Freihoefer testified that documents published by the USGS are typically relied upon in the profession. (TR. Vol. 1, 150:10-25)

43. DNR made reasonable efforts while designing the Condition not to impose any unnecessary burdens on the Dairy. (TR, Vol. 2, 237:22-25, 282:6-11, 306:10-21)

44. The first Richfield Dairy high capacity well approval, issued to the same company, Milk Source, on November 3, 2011, provided that the Department may require monitoring and may impose additional restrictions or conditions on the use of the wells if available information indicates that pumping of the wells is resulting in adverse impacts to private wells or surface water." (Ex. 112) While that approval did not specifically require monitoring, it put Milk Source on notice that monitoring may be required in the future.

45. The second Richfield Dairy well approval, issued to Milk Source on March 13, 2013, contained a monitoring requirement very similar to the one in New Chester Dairy's Approval: "Monitoring of groundwater levels near the high capacity wells is required to confirm the scale of water table drawdown predicted by the S.S. Papadopoulos and Associates model, submitted by the owner during the SEA process." (Ex. 113)

46. The draft EA, dated July 27, 2012, indicated that while the level of error in the SSPA model is relatively small:

[T]he department intends to require monitoring of pumping and groundwater elevations as part of the high capacity well approval in order to track actual field conditions. This information along with information pertaining to surface water conditions will be used to periodically reevaluate the potential impacts associated with groundwater withdrawal for the dairy. (Ex. 2, p. 20)

47. On May 18, 2012, Mr. Lynch sent a letter to Anna Wildeman, attorney for the Dairy, which included the following request: "Please provide a discussion of the contingencies available to the Dairy if the wells are approved and future monitoring related to operation of the Dairy's high capacity wells indicates impacts to surface waters are greater than currently projected and it becomes necessary to reduce water withdrawal from the wells." (Ex. 105, p. 2)

48. Mr. Lynch sent an e-mail to Ms. Wildeman, dated September 20, 2012, which stated as follows: "As we discussed here are two examples of conditions that have been incorporated into recent high capacity well approvals." (Ex. 110) The conditions related to actual or potential monitoring to discern if a high capacity well was causing significant adverse impacts on waters of the state.

49. In addition to the first Richfield Dairy high capacity well approval, which stated that monitoring may be required, the record includes two additional high capacity well approvals that were issued before the Dairy's Approval was issued on January 17, 2013, and which referenced monitoring provisions. (Exs. 114 and 115)

50. If the monitoring data reveals that the Dairy's wells are drawing down groundwater more significantly than predicted by the SSPA model, DNR would require the Dairy to rerun the SSPA model using the data that has been collected, along with the other data DNR compiled, in order to reassess whether operation of the wells is having a significant adverse impact on waters of the state. (TR, Vol. 1, 213:12-20)

51. Dr. Andrews agreed that the new information that is collected on aquifer characteristics since the original analysis was developed could be incorporated into an analysis to determine whether or not it would result in different effects. *Id.*, 105:5-16.

52. If DNR is not permitted to continue monitoring the changes in groundwater elevation caused by the Dairy's wells, modification of the Approval to reduce the authorized water withdrawal amount may be necessary.

DISCUSSION

Most of the legal issues were previously addressed in the December 13, 2013, Ruling on the Motion for Summary Judgment. The Motion of the DNR was granted, in part, on the issue of whether the Department has authority to include conditions in the approval. The Motion on the

issue of whether or not the specific conditions in this approval were reasonable and necessary was denied, because there were disputed issues of material fact relating to that issue.

Accordingly, the legal question of whether the DNR had the authority to impose the Condition was decided in favor of DNR's authority in the ruling on the summary judgment motions. There is no provision allowing the Dairy to "renew" its motion following that ruling and the time for summary judgment has passed and the issue has been preserved for appeal.

On the factual question of whether the specific conditions in the Approval are reasonable and necessary, the Dairy is the moving party, and it bears the burden of proof. The Dairy has not shown that the DNR was required to promulgate a rule prior to including the Monitoring and Reporting Condition in the Approval. As set forth at length in the Summary Judgment Ruling, the DNR has the authority to include the Conditions in the Approval on a case-by-case basis, due to its site-specific concerns with the SSPA model. DNR included the Condition based on "a particular matter as applied to a specific set of facts," as allowed under Wis. Stat. § 227.10(1).

There was no factual basis to conclude that the DNR has developed a general policy requiring groundwater monitoring for all groundwater models. Further, the record established that the DNR provided the Dairy with sufficient notice that a monitoring requirement would be included in the Approval.

Finally, the record supported the scientific basis for the specific monitoring regimen in this permit which will allow a comparison with the predicted groundwater reductions as recommended by the USGS to reevaluate the original model. (Ex. 118) This seems especially appropriate in this case, given that Dr. Andrews agreed that there was a lot of variability in the hydraulic conductivity data, yet the hydraulic conductivity was the primary calibration parameter for the model.

The Conditional Approval is accordingly affirmed and the petition for review dismissed.

CONCLUSIONS OF LAW

1. The Dairy bears the burden of proof on all disputed facts related to the issues, since it brought a challenge under Wis. Stat. § 227.42.

2. Under *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73 (*Lake Beulah*), DNR has the authority and a general duty to consider the environmental impacts of any proposed high capacity well. DNR is authorized to condition a high capacity well approval if necessary to avoid adverse environmental impacts. *Lake Beulah* at ¶39. See also Wis. Stat. §§ 281.11 and 281.12.

3. DNR's decision to include the Monitoring and Reporting Condition in the Approval, based on DNR's determination that this was necessary to ensure that the proposed wells will not cause significant adverse impact to nearby waters of the state, is reasonable and supported by substantial evidence in the record.

4. The Condition was reasonably based on DNR's specific concerns regarding the SSPA model. DNR's three hydrogeologists who reviewed the approval application possess extensive expertise in reviewing groundwater models, high capacity well applications, or both, and reasonably concluded that there was sufficient uncertainty with the SSPA model that verification of the modeled reductions in groundwater levels with groundwater monitoring is necessary.

5. The monitoring data on groundwater levels being gathered pursuant to the Condition will reliably assess the predictions regarding groundwater drawdown made by the SSPA model.

6. DNR has the authority to modify or rescind high capacity well approvals, under Wis. Stat. § 281.34(7).

7. DNR has the authority to utilize the monitoring data generated pursuant to the Monitoring and Reporting Condition to require the Dairy to re-run the SSPA Model, and to modify or rescind the Approval, based on the results of re-running the Model, if necessary to fulfill DNR's duty to protect waters of the state.

8. The Dairy has not met its burden of proving that the condition was unreasonable by the preponderance of the evidence pursuant to Wis. Admin. Code § HA 1.17(2).

ORDER

WHEREFORE IT IS HEREBY ORDERED, that Conditional Approval remain in full force and effect and the petition for review be Dismissed.

Dated at Madison, Wisconsin on September 18, 2014.

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By: 

Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.