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

RULING ON MOTIONS FOR SUMMARY JUDGMENT

The PARTIES to this proceeding were previously certified on a preliminary basis as follows:

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Motions for Summary Judgment were filed by the Petitioners, New Chester Diary and by the DNR on July 19, 2013. The last reply brief was received on September 1, 2013. On November 29, 2013, the parties stipulated to dismiss Issues 1 and 3, leaving Issue 2 in the petition, the subject of the Motions, and the sole remaining issue in this contested case.

Issue 2 was set forth as following in the Prehearing Conference Notice:

> 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.

Summary Judgment Methodology

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. (Wis. Stat. § 802.08(2)) The inferences to be drawn from the underlying facts are to be viewed in the light most favorable to the party opposing the motion. (*Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751)

If there is any reasonable doubt regarding whether there exists a genuine issue of material fact, that doubt must be resolved in favor of the nonmoving party. (*Schmidt v. Northern States Power Co.*, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294)

The Wisconsin Court of Appeals recently restated longstanding Wisconsin summary judgment methodology: We first examine the complaint to determine whether it states a claim and then review the answer to determine whether it joins a material issue of fact or law. If we conclude that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial. (*State of Wisconsin v. Basil E. Ryan, JR.*, 2011 WI App 21, ¶21)

We first examine the complaint to determine whether it states a claim and then review the answer to determine whether it joins a material issue of fact or law.

Undisputed Material Facts

The ALJ essentially accepts the statement of undisputed material facts as described by the permit holder at pp. 1-4 of its brief, but rejects the language on page 2 that the DNR disputes.

In 2011, New Chester Dairy obtained from the DNR a WPDES permit, approval to construct reviewable facilities, and a high capacity well approval, all related to its planned construction of a dairy operation in the Town of New Chester, Adams County. In the spring of 2012, New Chester Dairy submitted to the DNR an application to modify its WPDES permit to accommodate an expansion in the number of cows to be housed at the facility. During the WPDES permit modification process, the DNR high capacity well permitting staff notified the Petitioners that the DNR had re-reviewed the dairy's previously issued high capacity well approval and determined that, with the production expansion, the water withdrawal may cause an impact on nearby Patrick Lake.

The Petitioners then hired S.S. Papadopulos & Associates, Inc. (SSPA) to undertake a groundwater modeling study to demonstrate that New Chester Dairy's wells would not cause a significant impact on Patrick Lake. Petitioners also instructed SSPA to identify alternate well locations in order to minimize the potential impact on Patrick Lake and other surface waters. After additional analysis, SSPA identified a location nearly 2.5 miles from the New Chester Dairy production area and generated a report to the DNR explaining the proposed location of the wells and the modeled impacts to nearby surface waters. After multiple rounds of requests for additional information, the DNR accepted the SSPA report and signaled it should approve the new well locations. However, the DNR indicated that it would condition it approval of the new well locations by requiring New Chester Dairy to install groundwater monitoring wells, collect monitoring data, and provide that data to the DNR, in the expectation that the DNR would be able to evaluate in the future whether SSPA's groundwater flow model accurately predicted drawdown levels.

On January 17, 2013, the DNR issued the conditional high capacity well approval (the Well Approval) that is at issue in this proceeding, and included within Condition #2 of the Well Approval a requirement that New Chester Diary install monitoring wells and a piezometer (collectively, Monitoring Wells) in the vicinity of the two proposed wells (the High Capacity Wells) and collect, monitor and report data associated with the Monitoring Wells (the Monitoring and Reporting Condition).

The Monitoring and Report Condition requires the Petitioners to install groundwater monitoring wells at two different locations. First, Petitioners must "construct a paired water table monitoring well and piezometer within the area projected [by SSPA] to experience at least 24 inches of groundwater drawdown after a simulation period of five years." (Well Approval, p. 7) The Petitioners must collect water level elevations in this location every four hours for the first year of operation, after which the frequency "may be reduced" to every two days. *Id.* Second, Petitioners must "construct two water table monitoring wells within the area projected [by SSPA] to experience at least 12 inches of groundwater drawdown after a simulation period of five years." *Id.* These two wells may not be located in close proximity to each other; rather, one must be located generally northwest of the High Capacity Wells and the other southwest of the High Capacity Wells. *Id.* The Petitioners must collect water elevation data from these two monitoring wells daily for the first year of operation, after which the required frequency "may be reduced" to weekly (bi-weekly during the winter months). *Id.;* pp. 7-8

The Petitioners are required to compile the collected water elevation data in a spreadsheet format and submit the data to the DNR on a quarterly basis. *Id.*, p. 8 The obligation to collect and report water elevation data will persist for at least three years, after which Petitioners can seek a modification of the requirement "if the monitoring data indicates groundwater level changes attributable to (the High Capacity Wells) are substantially consistent with the changes in groundwater levels predicted by [SSPA]." *Id.*

Ruling

Administrative agencies "have only such powers as are expressly granted to them or necessarily implied...." by an act of the legislature. *American Brass Co. v. State Board of Health*, 245 Wis. 440, 448, 15 N.W.2d 27 (1944). In this instance, the legislature has conferred both express and necessarily implied authority of the DNR to set reasonably necessary conditions on approvals of high capacity wells.

Under Wis. Stat. § 281.34(2) no person may construct or withdraw water from a high capacity well without the approval of the DNR. Wisconsin Stat. § 281.34(7) gives the DNR the explicit authority to modify or rescind an approval if the approval is not in conformance with standards or conditions applicable to the approval. The Legislature's authorization to the DNR to modify or rescind an approval if the well or use of the well is not in conformance with standards or conditions applicable to the approval necessarily implies that the DNR has authority to include conditions in all well approvals. (*See* pp. 18-19 of the DNR's Initial Brief)

Further, Wis. Admin. Code § NR 812.09(4) provides the DNR with explicit authority to condition both existing and proposed high capacity well approvals when necessary and appropriate to protect public safety, safe drinking water and the groundwater resource. (See p. 19 of the DNR's Initial Brief) In this case, the DNR asserts that the groundwater monitoring conditions are necessary to verify that the model's predicted drawdown of groundwater in the vicinity of Petitioners' high capacity wells is accurate, in order to protect the groundwater resource, which has an impact on nearby surface waters.

The DNR has also been granted the authority and duty to implement the state's public trust responsibilities when issuing all high capacity well approvals. This authority and duty includes the permissive statutory authority to condition high capacity well approvals when necessary to protect the public's interest in navigable waters. As the Wisconsin Supreme Court found in *Lake Beulah Management District v. DNR*, 2011 WI 54, 335 Wis.2d 47, 799 N.W.2d 73, the Legislature explicitly granted the DNR the broad authority and a duty to regulate high capacity wells through Wis. Stat. §§ 281.11 and 281.12 and the authority was not revoked by the language in Wis. Stat. §§ 281.34 and 281.35. To briefly review, Wis. Stat. § 281.11 provides in part that "The department shall serve as the central unit of state government to protect, maintain and improve the quality and *management of the waters of the state*, ground and surface, public and private." (emphasis added) Wisconsin Stat. § 281.12 provides in part that "The department shall have *general supervision and control over the water of the state.* It shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter." (emphasis added) The *Lake Beulah* Court interpreted these statutes to

mean that the Legislature has delegated the authority to regulate high capacity wells to the DNR, including, as the Court specifically stated, the authority to require conditions as necessary. (*See Lake Beulah*, ¶¶4, 37, 39, 63)

New Chester Dairy argues that the legislature, in adopting Wis. Stat. § 227.10(2m), has overturned the longstanding common law doctrine cited above in the venerable *American Brass* case from 1944, that state agencies have those powers which are reasonably and necessarily implied by a grant of authority from the legislature. That provision provides as follows:

> Wis. Stat. § 227.10 (2m)
>
> No agency may implement or enforce any standard, requirement, or threshold . . . 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.

The ALJ simply does not have authority to wipe away seventy years of established precedential common law relating to "necessarily implied" powers of a state agency. An administrative agency does not have authority to overrule decisions of the Wisconsin Supreme Court, nor even an administrative rule. Further, on its face, Chapter 227 relates to administrative rule making, and Subchapter II where § 227.10(2m) is found, to Administrative Rules. Subchapter III of Chapter 227 specifically requires that the "exclusive means" of challenging whether a specific rule has exceeded an agency's authority is reserved to a proceeding in circuit court. (*See*: Wis. Stat. § 227.40). The same logic applies to the sweeping view of § 227.10(2m) New Chester asserts here. Any such determination must come from the circuit or appellate court.

Further, the Wisconsin Supreme Court was petitioned by a group of amici to address any impact of § 227.10(2m) on the DNR's authority to regulate high capacity wells or to impose conditions relating to well approvals. However, the Wisconsin Supreme Court expressly declined to analyze the meaning of § 227.10(2m) in this context. *Lake Beulah Mgmt. Dist. V. DNR*, 2011 WI 54, ¶ 39, N. 31, 335 Wis. 2d 47, 799 N.W.2d 73. Given that the Wisconsin Supreme Court specifically declined to address this issue, it would be the height of administrative arrogance for the ALJ to presume to do so and to ignore the Supreme Court's own decision in *Lake Beulah* in doing so.

In any event, the issue of the effect, if any, of § 227.10(2m) on the Department's necessarily implied authority is not necessary for purposes of ruling on this Motion for Summary Judgment because the Department has express delegating regulatory authority under Wis. Stat. §§ 281.11, 281.12, 281.34 and 281.35.

The unanimous Wisconsin Supreme Court could not have been clearer on this point.

> ¶3 We conclude that, pursuant to Wis. Stat. § 281.11, § 281.12, § 281.34, and § 281.35 (2005-06),[5] along with the legislature's delegation of the State's public trust duties,[6] the DNR has the authority and a general duty[7] to consider whether a proposed high capacity well may harm waters of the state.[8]

> Upon what evidence, and under what circumstances, the DNR's general duty is implicated by a proposed high capacity well is a highly fact specific matter that depends upon what information is presented to the DNR decision makers by the well owner in the well permit application and by citizens and other entities regarding that permit application while it is under review by the DNR.
>
> ¶4 We further hold that to comply with this general duty, the DNR must consider the environmental impact of a proposed high capacity well when presented with sufficient concrete, scientific evidence of potential harm to waters of the state. The DNR should use both its expertise in water resources management and its discretion to determine whether its duty as trustee of public trust resources is implicated by a proposed high capacity well permit application, such that it must consider the environmental impact of the well or in some cases deny a permit application or **include conditions in a well permit**. (emphasis added)

See Lake Beulah, ¶¶3-4

The DNR is granted partial summary judgment on the issue of the DNR's legal authority to include conditions in high capacity well approvals. However, there are disputed issues of material fact on the question of whether or not the specific conditions in the permit are reasonable and necessary. (*See*: Affidavit of Lawrence Lynch and Affidavit of Screnock, Attachment C and D)

The dispute relates to the reasonableness of the "Water Quality Conditions for Proposed Wells #3 and #4." This condition provides in part:

> Prior to use of the high capacity wells, the owner shall construct a paired water table monitoring well and piezometer within the area projected to experience at least 24 inches of groundwater drawdown after a simulation period of five years as predicted by [SSPA in June 25, 2012 memorandum]. The location and proposed well construction details shall be submitted to the Department for approval. . . . The owner shall collect water level elevations in the water table well and the piezometer at a frequency of at least once every 4 hours. . . . Following the first year of operation, the frequency of water level determination may be reduced to once every 2 days. . . .
> [T]he owner shall construct two water table monitoring wells within the area projected to experience at least 12 inches of groundwater drawdown after a simulation period of five years as predicted by [SSPA in June 25, 2012 memorandum]. Proposed locations and construction details for the monitoring wells shall be submitted to the Department for approval. To the extent feasible, one of the monitoring wells shall be located northwest of the proposed wells #3 and #4 and the other well shall be located generally south or southwest of the [sic] proposed wells. . . .
> [T]he owner shall determine water level elevations in the water table monitoring wells at a frequency of at least once every day. . . Following the first year of

> operation, the frequency of water level determinations may be reduced to [weekly (biweekly in winter)]. Water elevation data shall be compiled and submitted to the Department on a quarterly basis. . . Data shall be compiled into a spreadsheet and submitted in electronic format within 20 days following completion of each quarterly monitoring period. Groundwater elevation monitoring shall continue for at least three full years. . . At the end of the initial three year monitoring period, the owner may petition the Department to modify the monitoring requirements if the monitoring data indicated groundwater level changes. . . are substantially consistent with the changes in groundwater levels predicted by groundwater modeling conducted [by SSPA in June 25, 2012 memorandum].

The Petitioners dispute that the conditions are reasonable and necessary by way of Attachment C to the Affidavit of Michael Screnock. The Petitioners site the SSPA report which questions whether groundwater monitoring would generate any useful data.

> "Though there is a perceived need for monitoring to validate the model results, in practice because of the very small magnitude of the effects, the long distance from the wells to the creeks, and the confounding factors of scores of irrigation wells in the vicinity of the proposed high capacity wells and seasonal and long-term changes in stream flows and groundwater levels as a result of climatic factors, there is really no scientifically sound and practical way to monitor the effect of the pumping on stream flows." (Screnock Aff., Ex. C, pp. 1-2)

However, the counter-affidavit of Mr. Lynch sets forth in detail the Department's reasoning of why the conditions are necessary at paragraphs 16 and 17:

> "The Water Quality Conditions are necessary despite the claims by New Chester that there will be a very small likelihood that the modeling will not be accurate, the long distance from the wells to nearby streams, the confounding factors of scores of irrigation wells in the vicinity, and the seasonal and long-term changes in stream flows and groundwater levels as a result of climatic factors. The DNR recognizes the difficulty of trying to draw direct linkages between pumping from wells and changes in stream flow or lake levels. Modeled impacts to stream flow or lake levels are directly related to changes in groundwater levels. For that reason, the approval only requires monitoring of groundwater levels in the vicinity of the high capacity wells. Given the lack of site-specific information available for incorporation into the groundwater model, comparison of actual water level data to modeled results will provide an indication of whether the groundwater model provides an accurate representation of the natural environment around the high capacity wells. Ultimately this comparison will allow the DNR to determine whether the observed impacts related to operation of the wells are consistent with the predicted impacts generated by the mathematical simulation of the natural environment represented in the groundwater model."

The Screnock and Lynch affidavits raise precisely the kind of "highly fact specific" dispute that the Wisconsin Supreme Court deemed likely and appropriate in its *Lake Beulah*

decision. Further, under *Lake Beulah*, the question for the hearing will be whether there was "sufficient concrete, scientific evidence" to make the disputed permit conditions reasonably necessary.

ORDERS

WHEREFORE, the Motion for Summary Judgment of the DNR is GRANTED, in part, on the issue of whether the Department has authority to include conditions in the approval;

IT IS FURTHER ORDERED that the Motion on the issue of whether or not the specific conditions in this approval were reasonable and necessary be DENIED, because there are disputed issues of material fact on this issue.

Dated at Madison, Wisconsin on December 13, 2013.

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