STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 6

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 DEPTARMENT 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 CENTRAL SANDS WATER ACTION COALITION

INTRODUCTION

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 CSWAC's members.

CSWAC is a coalition of 66 groups in Central Wisconsin that have joined together to protect groundwater and surface water in the unique Central Sands region of the state. CSWAC advocates for the fair use of water resources among the diverse interests that live in the region. CSWAC also works to reinforce the indisputable facts that: (1) the supply of groundwater in the Central Sands region is limited; and (2) groundwater and surface waters are connected, such that quantity and quality impacts upon each source of water resource impacts the other. CSWAC believes that smart, science-driven decision-making can guarantee safe and sufficient water for all users.

The goal of CSWAC is to advance sustainable groundwater policies in a six county region in Central Wisconsin known as the Central Sands region. The coalition was formed due to the proliferation of high capacity wells and groundwater use in the Central Sands region, and the resulting impact to lake levels, stream flows, and wetlands. CSWAC believes that Respondent, Wisconsin Department of Natural Resources ("DNR"), must play a lead role in managing groundwater use in Wisconsin. To manage our water resources, DNR must evaluate the success of its management strategies and adapt accordingly to preserve surface and groundwater for all users.

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 CSWAC's members. CSWAC members rely on healthy lakes and streams with adequate water and flow to swim, fish, boat, and enjoy natural scenic beauty. Many CSWAC members own property or businesses on lakes or rivers in the Central Sands, and DNR's failure to protect these surface waters threatens their property value and riparian rights. Members also rely on groundwater for drinking and other potable water uses.

DNR acknowledges that "there have been documented declines in stream flows and lake levels within the central sands."[1] 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."[2] In public comments on DNR's plan to prepare this strategic analysis, Wisconsin residents raised concerns that are representative of many CSWAC members. Commenters noted,

> 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.
> …

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

> 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.[3]

Water level data from the Unites 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%.[4]

The loss of our lakes and streams has real economic impacts for individuals, businesses, and local government in the Central Sands. 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.[5] That decline is in sharp contrast to the 11.6% increase in property values elsewhere in the Town of Oasis during that same period.[6] 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

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[3] DNR summary of public comments on scope of Central Sands strategic analysis (Exhibit A).
[4] 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* https://waterdata.usgs.gov/nwis/dv?cb_00065=on&format=gif_default&site_no=05401063&referred_module=sw&period=&begin_date=2012-01-01&end_date=2016-08-17.
[5] 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).
[6] Exhibit C.

tax district lost $28,152.45 in revenue. The local tax district has lost a total of $225,219.60 in revenue over the past 8 years.[7]

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,

> 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. Envtl. Decade v. DNR,* 85 Wis.2d at 526, 271 N.W.2d 69 at 72-3 (1978)) (citations omitted).

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

[7] Values determined based on county assessment rolls for the Town of Oasis.

> to the DNR. The duties of the DNR are comprehensive, and its role in protecting state waters is clearly dominant."

Id. ¶ 33 (quoting *Wis. Envt'l Dec.*, 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. CSWAC faces uncertain and limited legal options if DNR issues high capacity well approvals that do not protect public trust resources.

The eight challenged high capacity well approvals stand for much more than eight defective pumping permits. Should this Court uphold those permits as issued, our State shifts toward dangerous uncertainty as to which agency or regulatory body, if any, is charged with protecting Wisconsin's Public Trust waters. This result would have serious impacts on CSWAC members and member organizations such as lake districts and property owner associations.

Lake districts such as Pleasant Lake Management District have taxing authority to levy taxes in order to achieve their mission of protecting and improving water quality and quantity in their lakes. In order to manage their budget and plan for the future, lake districts and other local units of government must have predictability as to which regulatory powers the State will exercise, and which authorities remain at the local level. Abrupt changes in agency policy that are not consistent with existing law and that reduce state-level protection of Public Trust waters shifts a significant burden to lake districts, municipalities, citizens, and local groups to protect sensitive water resources such as those that exist in the Central Sands. Most significantly for CSWAC's members and member organizations, uncertainty as to how and whether water resources are protected from depletion will have a chilling impact for those who would otherwise be interested in investing in new or improved waterfront property.

It also endangers public health and flies in the face of logic to remove state-level permitting as a means by which to protect Public Trust waters from the impacts of high capacity wells. With insufficiently protective state permits, remedies remaining include local regulation and piecemeal legal actions between conflicting water users. Individual legal action, particularly

any nuisance actions against agricultural high capacity well users, will face legal hurdles such as Wisconsin's Right to Farm Law. *See* Wis. Stat. § 823.08(a)(1); s*ee also Racine Unified Sch. Dist. v. LIRC*, 164 Wis. 2d 567, 591, 476 N.W.2d 707 (Ct. App. 1991). Neighbor-versus-neighbor legal actions stemming from unchecked high capacity well use would also be an inefficient use of judicial resources and an inequitable assumption that citizens must step up to replace the authority of the DNR to protect Wisconsin's water resources.

CONCLUSION

For each of the reasons stated herein, CSWAC 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 DNR comprehensively fulfill its delegated responsibilities under the Public Trust Doctrine, including the consideration of cumulative impacts, when acting upon high capacity well applications.

Dated this 19th day of June, 2017.

Respectfully submitted,

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/s/

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