COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1882

Cir. Ct. Nos. 2011CV3375
2011CV3800
2011CV5296
2011CV5307
2012CV899

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

FAMILY FARM DEFENDERS, INC., JOHN ROBERT CLARKE, HIROSHI KANNO AND ARLENE KANNO,

PETITIONERS,

V.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT,

RICHFIELD DAIRY, LLC,

INTERVENOR.

FAMILY FARM DEFENDERS, INC., JOHN ROBERT CLARKE, KIROSHI KANNO AND ARLENE KANNO,

PETITIONERS,

V.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT.

FAMILY FARM DEFENDERS, INC., FRIENDS OF THE CENTRAL SANDS, INC. AND JOHN ROBERT CLARKE,

PETITIONERS-CO-APPELLANTS,

V.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-RESPONDENT,

RICHFIELD DAIRY, LLC,

INTERVENOR-RESPONDENT.

PLEASANT LAKE MANAGEMENT DISTRICT AND JEAN MACCUBBIN,

PETITIONERS-APPELLANTS,

V.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-RESPONDENT,

RICHFIELD DAIRY, LLC,

INTERVENOR-RESPONDENT.

FAMILY FARM DEFENDERS, INC., FRIENDS OF THE CENTRAL SANDS, INC. AND JOHN ROBERT CLARKE,

PETITIONERS,

V.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Reversed and cause remanded with directions*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 HIGGINBOTHAM, J. On this appeal, we review a circuit court decision upholding the determination by the Wisconsin Department of Natural Resources (DNR) that an environmental impact statement was not required with regard to an application by Richfield Dairy, LLC to install two high capacity water wells on property owned by the dairy.

¶2 Family Farm Defenders, Inc., Friends of the Central Sands, and John Robert Clarke (collectively, Friends), and Pleasant Lake Management District and Jean MacCubbin (collectively, Pleasant Lake),[1] challenge the adequacy of an environmental assessment (EA) conducted by the DNR of the potential cumulative

[1] Family Farm Defenders is a Wisconsin nonprofit corporation with the stated mission to "support[] sustainable agriculture." Friends of the Central Sands is a Wisconsin nonprofit organization with the stated mission to "promot[e] and ensur[e] natural resource stewardship through monitoring, research, and education of Wisconsin's Central Sands region." John Robert Clarke owns property on the shore of Pleasant Lake in Waushara County, is on the board of Friends of the Central Sands, and is a member of Family Farm Defenders. Pleasant Lake Management District is a "public inland lake protection and rehabilitation district" with the stated mission "to protect and improve the water quality of Pleasant Lake." Jean MacCubbin is the president of Pleasant Lake Management District.

effects the two high capacity wells would have on the environment, including state waters. Specifically, Friends and Pleasant Lake contend that the DNR erred in stating in the EA that its duty to consider the potential cumulative effects high capacity wells may have on state waters is limited to the impact of the individual wells rather than the subject wells in conjunction with other high capacity wells within the pertinent region. Friends and Pleasant Lake also contend that the DNR failed to assess the potential cumulative effects of the high capacity wells, in violation of the Wisconsin Environmental Policy Act (WEPA), WIS. STAT. § 1.11 (2011-12)[2] and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (2005).[3]

¶3 We conclude that the EA prepared by the DNR was inadequate because there is no indication that the DNR considered the cumulative effects of the two high capacity wells on the environment, within the proper meaning of WIS. ADMIN. CODE § NR 150.22(2)(a)2. (2010). Accordingly, we reverse and remand to the circuit court to amend its remand directive to the DNR to consider the potential cumulative effects the two high capacity wells may have on the environment, consistent with this opinion.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[3] In a separate argument, Pleasant Lake contends that the circuit court erroneously exercised its discretion in denying its motion to supplement the DNR record with deposition testimony from a DNR limnologist, which purportedly established that the DNR never "determined what it meant for an impact to Pleasant Lake to be 'significant,'" and an email from a DNR attorney, which purportedly established that the DNR had no evidence to support its conclusion in the EA that the proposed wells would not cause a change in Pleasant Lake's water levels beyond normal seasonal fluctuations. We do not address this argument because the issue of whether the DNR conducted a sufficient factual investigation into cumulative effects is dispositive of this case. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

BACKGROUND

¶4 In 2011, Milk Source Holdings, Inc. and Richfield Dairy, LLC (collectively, Richfield Dairy) applied to the DNR for a number of permits to construct and operate a large dairy facility, which would house approximately 4,300 dairy cows and 250 steers. Richfield Dairy applied for a Wisconsin Pollutant Discharge Elimination System (WPDES) permit to construct the dairy facility, based on expectations that the cows and steers would produce a substantial amount of liquid and solid manure and related waste water. The dairy facility is located in Adams County, in the Central Sands region of Wisconsin, which already contains over 90 high capacity water pumping wells. Included in the construction plans for the dairy facility are two proposed high capacity wells. Richfield Dairy applied for a permit to construct the two wells, based on water usage at the proposed facility estimated to be approximately 52.5 million gallons per year (mgy), with a total capacity of approximately 525 mgy.

¶5 Before the DNR could grant Richfield Dairy's application for a WPDES permit, the DNR was required to conduct an EA under WEPA, WIS. STAT. § 1.11, and related administrative rules, WIS. ADMIN. CODE ch. NR 150.[4] Under WEPA, the purpose of an EA is to determine whether the agency must conduct an environmental impact statement for a particular activity. *See* WIS. STAT. § 1.11(2). One of the factors that must be considered in an EA is the

[4] The DNR is required to conduct an EA for Type II actions, which includes the issuance of a WPDES permit. WIS. ADMIN. CODE §§ NR 150.03(8)(i)2., 150.20(1)(c). Although an EA ordinarily would not be required for the approval of a high capacity well permit, an EA was required for the approval of a high capacity well permit in this case because when an EA is required for one type of agency action, such as the issuance of a WPDES permit, it is required for all related agency actions, such as the approval of a high capacity well permit. *See* WIS. ADMIN. CODE § NR 150.20(2)(a)-(b).

cumulative effects[5] of high capacity groundwater pumping on the environment within the region. *See* WIS. ADMIN. CODE § NR 150.22(2)(a)2.

¶6 An EA was conducted of the two proposed high capacity wells on Richfield Dairy's property. The DNR issued a preliminary EA ("draft EA") in May 2011, concluding that an environmental impact statement was not required for the construction of the two high capacity wells. The public then had an opportunity to comment on the draft EA. After the close of the comment period, the DNR certified the EA and finalized its decision that an environmental impact statement was not required. The DNR attached to the certified EA an addendum ("addendum EA") that made minor modifications to the draft EA and responded to comments from the public. The DNR subsequently issued permits for the proposed high capacity wells, with an approved annual pumping limit of 131.2 mgy.

¶7 Friends and Pleasant Lake petitioned for judicial review of the DNR's decision, pursuant to WIS. STAT. § 227.52. Relevant here, Friends and Pleasant Lake challenged the adequacy of the EA on the ground that it did not demonstrate that the DNR considered the cumulative effects of high capacity groundwater pumping in the region, as required under WIS. ADMIN. CODE § NR 150.22(2)(a)2.

¶8 In a written decision, the circuit court concluded that the DNR had sufficiently and properly considered the potential cumulative effects in the EA, as

[5] Although the terms "cumulative effects" and "cumulative impacts" are generally used interchangeably by case law and the parties, we will use the regulatory term "cumulative effects" in this opinion.

required by WEPA. However, the circuit court remanded the case to the DNR on the ground that the DNR failed to consider the environmental effects of operating the two proposed high capacity wells at the approved rate of 131.2 mgy, but rather considered only a 52.5 mgy annual pumping rate. Friends and Pleasant Lake appeal the court's conclusion that the DNR had properly considered the potential cumulative effects in the EA.

¶9 After the parties submitted briefs in this appeal, the DNR and Richfield Dairy filed a motion with this court to take judicial notice of a supplemental EA conducted in response to a request by Richfield Dairy to the DNR to modify the annual pumping limit of the two high capacity wells to 72.5 mgy. We granted the motion.

STANDARD OF REVIEW

¶10 In this case, Friends and Pleasant Lake appeal a circuit court decision upholding a determination by the DNR that an environmental impact statement was not required for Richfield Dairy's application to install two high capacity wells on its property. When reviewing a circuit court decision of an administrative agency decision pursuant to WIS. STAT. § 227.52, we review the agency's decision, not the circuit court's. ***Wisconsin Indus. Energy Grp., Inc. v. PSC***, 2012 WI 89, 342 Wis. 2d 576, ¶14, 819 N.W.2d 240.

¶11 An administrative agency's determination that an environmental impact assessment is not required is reviewed by courts under the reasonableness standard. *See* ***Wisconsin's Envtl. Decade, Inc. v. PSC (WED III)***, 79 Wis. 2d 409, 423, 256 N.W.2d 149 (1977). The reasonableness of an agency's decision that an environmental impact statement is not required is determined by the application of a two-step test:

> First, has the agency developed a reviewable record reflecting a preliminary factual investigation covering the relevant areas of environmental concern in sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences of the action proposed; second, giving due regard to the agency's expertise where it appears actually to have been applied, does the agency's determination that the action is not a major action significantly affecting the quality of the human environment follow from the results of the agency's investigation in a manner consistent with the exercise of reasonable judgment by an agency committed to compliance with WEPA's obligations?

Id. at 425.

¶12 The legal question presented in this case requires us to interpret and apply statutes and administrative regulations to undisputed facts, which ordinarily is a question of law subject to de novo review. *See* ***DOR v. Menasha Corp.***, 2008 WI 88, ¶44, 311 Wis. 2d 579, 754 N.W.2d 95. Judicial review of an administrative agency's interpretation and application of statutes and regulations it is charged with administrating is typically subject to varying levels of deference. *See* ***Wisconsin Indus. Energy Grp., Inc.***, 342 Wis. 2d 576, ¶19. The legal question at issue in this case, however, concerns the scope of the DNR's duty in considering the cumulative effects of the high capacity wells at issue here. This issue questions the scope of the agency's statutory duty, which this court "review[s] independently and without deference to the agency's determination." ***Andersen v. DNR***, 2011 WI 19, ¶25, 332 Wis. 2d 41, 796 N.W.2d 1.

ANALYSIS

¶13 We consider three issues on appeal: (1) what is the proper scope of the DNR's duty under WEPA and WIS. ADMIN. CODE § NR 150.22(2)(a)2., when considering the potential cumulative effects high capacity water wells may have on the environment; (2) does the agency record demonstrate that the DNR

properly considered the cumulative effects of the two high capacity wells at issue in this case; and (3) is this appeal moot. We begin our analysis with whether this appeal is moot.

¶14 Richfield Dairy and the DNR argue that Richfield Dairy's request to modify its pumping permit renders this appeal moot because the EA at issue in this appeal, which considered a lower pumping rate, is no longer relevant. We understand Richfield Dairy and the DNR to argue that, because the DNR's supplemental EA was based on a pumping rate that differs from the pumping rate assessed in the addendum EA, the supplemental EA supersedes the EA at issue here. Consequently, the DNR argues, resolving the instant controversy will have no practical effect on the question of whether the DNR properly considered cumulative effects at the pumping rate at issue in this case.

¶15 An issue is moot when a party seeks a determination that will have no practical effect on an existing legal controversy. ***City of Racine v. J-T Enters. of Am., Inc.,*** 64 Wis. 2d 691, 700, 221 N.W.2d 869 (1974). Appellate courts generally decline to decide moot issues. ***State ex rel. Wis. Envtl. Decade, Inc. v. Joint Comm. for Review of Admin. Rules,*** 73 Wis. 2d 234, 236, 243 N.W.2d 497 (1976). Nevertheless, we will decide an issue, even if moot, when the issue will likely reoccur and should be resolved to avoid uncertainty. ***State ex rel. La Crosse Tribune v. Circuit Court for La Crosse Cnty.,*** 115 Wis. 2d 220, 229, 340 N.W.2d 460 (1983).

¶16 Assuming without deciding that this appeal is moot,[6] there are certain exceptions under which a matter that is moot may still receive consideration. One of those exceptions applies here, namely, "where the issue is likely to arise again and should be resolved by the court to avoid uncertainty." ***Id.*** At the time the addendum EA was conducted in this case, over 90 high capacity water pumping wells had been constructed in the same area of the state where the wells at issue here are to be constructed. It is reasonable to assume that other EAs will be conducted in response to applications for construction of similar wells in Wisconsin. Thus, the DNR will be required to consider the cumulative effects of these proposed high capacity wells, thereby raising the issue presented in this case regarding the proper scope of the DNR's duty under WIS. ADMIN. CODE § NR 150.22(2)(a)2. to consider the cumulative effects of these wells. In short, "the issue is likely to arise again" and resolution of that issue by this court will avoid

[6] Richfield Dairy and the DNR argue that, even if we conclude that this case is not moot, the doctrine of exhaustion of administrative remedies prevents us from intervening in this case "until DNR first has the opportunity to fully evaluate potential environmental impacts at the proposed 72.5 mgy pumping limit, render a decision with respect to any new pumping limit for the high capacity well permits, and even render[] a final decision in the [p]ending [c]ontested [c]ases." *See* ***Metz v. Veterinary Examining Bd.***, 2007 WI App 220, ¶13, 305 Wis. 2d 788, 741 N.W.2d 244 (exhaustion doctrine provides that a party may not obtain judicial intervention before completing all steps in administrative process).

Alternatively, Richfield Dairy and the DNR argue that, even if we have jurisdiction to decide this case, we "should give priority to the agency's jurisdiction" under the doctrine of primary jurisdiction. *See* ***Butcher v. Ameritech Corp.***, 2007 WI App 5, ¶38, 298 Wis. 2d 468, 727 N.W.2d 546 (primary jurisdiction doctrine provides that a court may defer to an administrative agency to resolve an issue when both the agency and the court have jurisdiction).

We reject these arguments for the same reason that we reject the contention that this appeal is moot. As we explain more fully in this opinion, the DNR concedes that it must consider cumulative effects but the arguments made in support of that position reflect that the DNR misunderstands what it means to consider cumulative effects at any pumping rate.

future uncertainty regarding the scope of the DNR's duty. ***Id.*** We now turn to the merits of this appeal.

¶17 Friends and Pleasant Lake first argue that WIS. ADMIN. CODE § NR 150.22(2)(a)2., requires an EA to demonstrate that the DNR considered the incremental effects of the two high capacity wells at issue here in conjunction with other existing high capacity water pumping wells and other similar activity that can be reasonably anticipated in the foreseeable future.[7] In support, Friends and Pleasant Lake point to the meaning of "cumulative effects" provided in § NR 150.22(2)(a)2. Friends and Pleasant Lake also rely on a similar definition of "cumulative impacts" provided by NEPA and federal cases construing and explaining what is meant by cumulative impacts and what a proper cumulative impacts analysis under NEPA would entail.

[7] In a separate argument, Pleasant Lake contends that the DNR failed to evaluate the environmental effects of the proposed high capacity wells on Pleasant Lake and on other water resources. Specifically, Pleasant Lake contends that the DNR failed to conduct its own independent analysis of the environmental effects of the proposed wells in the draft EA, evaluate the environmental impacts of the wells at their total capacity of 525 mgy, and analyze the ecology of Pleasant Lake and the impact of a permanent drawdown on ecological resources. However, none of these contentions are fully developed and therefore we do not consider them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we will not consider arguments that are undeveloped or that are supported only by general statements and not by reference to legal authority).

For example, Pleasant Lake's contention that the DNR erred in failing to conduct its own analysis of the environmental effects of the proposed wells on Pleasant Lake is supported only by general statements of law and not by reference to legal authority that specifically stands for that proposition; its contention that the DNR erred in failing to evaluate the environmental effects of using the wells at their total capacity of 525 mgy is not supported by reference to any legal authority; and its contention that the DNR failed to consider the ecological effects of the proposed wells is not supported by reference to any part of the record on appeal. Although we agree with Pleasant Lake that the DNR must analyze the ecological effects of the proposed wells, we note that the supplemental EA suggests that the DNR has evaluated the ecological effects of a drawdown on Pleasant Lake.

¶18 The DNR conceded in the circuit court, and concedes on appeal, that WIS. ADMIN. CODE § NR 150.22(2)(a)2., requires the agency to consider the cumulative effects that the two high capacity wells may have on the environment. However, the DNR does not explain what a cumulative effects analysis would assess to comply with § NR 150.22(2)(a)2. Rather, the DNR merely states in broad strokes, without any analysis, that it must "consider cumulative impacts of the entire project, including those of the proposed high capacity wells, pursuant to Wis. Admin. Code NR § 150.22(2)(a)2." Although the DNR[8] does not present a fully developed argument on this topic, we address the legal issue because Friends and Pleasant Lake have fully argued the topic and because some clarity on the narrow issue we address will provide guidance to the DNR and to the courts on the scope of the DNR's responsibility in considering the cumulative effects of a proposed action under § NR 150.22(2)(a)2.

¶19 Under WEPA and its related administrative regulations, all state agencies are required to undertake an EA to determine whether an environmental impact statement is required for all projects that may affect the environment. *See* WIS. STAT. § 1.11; *see also* ***State ex rel. Boehm v. DNR***, 174 Wis. 2d 657, 665, 497 N.W.2d 445 (1993). WISCONSIN ADMIN. CODE § NR 150.22(2) governs the preparation and content of an EA. Pertinent here, § NR 150.22(2) states, among other things, that an EA must include "[t]he extent of cumulative effects of

[8] The DNR, in its brief on appeal, states that it "agrees with and joins in the standard of review and the argument as presented in the response brief filed by Richfield Dairy," and then states that it submits additional argument in support of the DNR's decision that an environmental impact statement is not required before the DNR acts on Richfield Dairy's permits. However, Richfield Dairy does not address the legal question at issue here, as we discuss that topic in this opinion. Therefore, we refer to the DNR only in reference to the legal question of the proper scope of the DNR's duty to consider the cumulative effects of the high capacity wells on the environment under Wisconsin regulations.

repeated actions of the same type, or related actions or other activities occurring locally that can be reasonably anticipated and that would compound impacts." § NR 150.22(2)(a)2. There are no Wisconsin cases construing this part of the regulation. However, as we have noted, Friends and Pleasant Lake look to federal case law as persuasive authority regarding the requirement that a federal agency consider the cumulative impacts under federal regulations.[9] Because WEPA is modeled after NEPA, we may look to federal case law interpreting NEPA and its related administrative regulations for guidance. *See* ***Wisconsin's Envtl. Decade, Inc. v. PSC (WED II)***, 79 Wis. 2d 161, 174, 255 N.W.2d 917 (1977) (federal law construing sections of NEPA after which WEPA regulations are patterned is persuasive authority).

¶20 Friends directs our attention to two federal cases as guidance on what constitutes a sufficient cumulative effects analysis under NEPA and applicable federal regulations. In ***Habitat Education Center v. United States Forest Service***, 603 F. Supp. 2d 1176, 1186 (E.D. Wis. 2009), the court purported to explain what a sufficient cumulative effects analysis would entail. The court explained that "a proper cumulative impacts analysis will assess the proposed action in light of other activity that has affected or will affect the same environmental resources. The goal is to highlight any environmental degradation that might occur if the minor effects of multiple actions accumulate over time." ***Id.*** at 1186. In ***Oregon Natural Resources Council Fund v. Brong***, 492 F.3d 1120 (9th Cir. 2007), the federal appeals court explained that the NEPA

[9] "Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions," and that, "[c]umulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7 (2013).

cumulative effects analysis must assess the "interaction of multiple activities," rather than focusing "exclusively on the environmental impacts of an individual project." ***Id.*** at 1133.

¶21 While neither case provides clear guidance on how to determine whether the DNR has conducted a sufficient inquiry into the cumulative effects of a proposed activity, we accept these cases as persuasive authority on the proper scope of the DNR's duty to assess cumulative effects. Based on the lessons we draw from these two cases and the language of WIS. ADMIN. CODE § NR 150.22(2)(a)2., we conclude that, reasonably read, § NR 150.22(2)(a)2., requires an EA to include an analysis of the cumulative environmental effects of past, present, and "reasonably anticipated" similar or related activities. Applying this reading of § NR 150.22(2)(a)2. to the proposed activities in this case, this regulation requires the EA to reflect consideration by the DNR of the cumulative environmental effects of the two high capacity wells in conjunction with other past, present, and reasonably anticipated high capacity water pumping wells, and other activities affecting surface and underground water resources in the relevant geographical area. In the words of two federal courts discussing the objectives of NEPA, the objective under WEPA and § NR 150.22(2)(a)2., is for the DNR to assess the "interaction of multiple activities," here multiple high capacity wells in the Central Sands region of Wisconsin, and to "highlight any environmental degradation that might occur if the minor effects of multiple actions accumulate over time." ***Habitat Educ. Ctr.***, 603 F. Supp. 2d at 1186 (construing "cumulative impacts" under NEPA and explaining the proper scope of review of cumulative

impacts under related federal regulations). ***Oregon Natural Res. Council Fund***, 492 F.3d at 1133.[10]

¶22 Applying a proper understanding of the DNR's duty to conduct an assessment of the cumulative effects of an action under WIS. ADMIN. CODE § NR 150.22(2)(a)2. to the EA in this case, we conclude that the record does not demonstrate that the DNR conducted a proper inquiry into the cumulative effects of the two high capacity wells at issue here. The record shows that the DNR's cumulative effects assessment focused exclusively on the effects of just the two wells, rather than the cumulative effects of the two wells in conjunction with other past and existing high capacity wells in the region.

¶23 In the following paragraphs, we examine the record and explain why we conclude that the DNR failed to conduct a sufficient cumulative effects inquiry in compliance with WEPA and WIS. ADMIN. CODE § NR 150.22(2)(a)2. We then consider and reject Richfield Dairy's and the DNR's arguments that the DNR's cumulative effects assessment was sufficient.

¶24 As we have explained, the DNR issued a draft EA. Friends and Pleasant Lake contend that the draft EA is inadequate because it does not consider

[10] The concurrence highlights the difficult "task of clarifying the meaning of the 'cumulative effects' requirement." Concurrence, ¶7. The concurrence states that it is "at a loss to explain in a concrete way what it means to conduct a sufficient 'cumulative effects' inquiry." ***Id.*** We agree with the concurrence that there is little guidance from legal authorities on the broader question of what a sufficient cumulative effects analysis entails. We also agree with the concurrence that the legal authority on this topic is abstract and difficult to apply. In this opinion, however, our focus is only on a part of the broader question. That is, we do not attempt to explain in precise detail all the aspects of what constitutes a sufficient cumulative effects inquiry. Aside from the difficulty in addressing the question, as the concurrence points out, this appeal involves a more narrow aspect of the broader question, concerning the scope of the DNR's duty to consider the incremental effects of the two wells, or these effects in addition to past, present, and reasonably anticipated activities or similar activities on the environment.

the cumulative effects of the two high capacity wells. Rather, in the section of the draft EA concerning the significance of cumulative effects, the DNR limits its discussion to the cumulative effects of manure spreading. We agree with Friends and Pleasant Lake that the draft EA was inadequate in this respect. The DNR does not address this contention and Richfield Dairy does not seriously argue that the draft EA reflects consideration by the DNR of the cumulative effects of the two high capacity wells. Ultimately, however, the absence of a cumulative effects analysis of the high capacity wells in the draft EA is of no consequence because the question before us is whether the record shows sufficient consideration of the cumulative effects prior to DNR's decision not to conduct an environmental impact statement.

¶25 Following a thirty-day public comment period of the draft EA, the DNR certified the EA and issued an addendum to the EA. The addendum EA made some modifications to the initial draft, including changes regarding the cumulative effects of the two high capacity wells. The addendum EA contained comments from the public to the draft EA and the DNR's responses to those comments. The addendum EA devotes two sections pertinent to the issues in this case, the first regarding the "Effects of Withdrawals on Surface Water Resources," and the second regarding the "Cumulative Impacts" of the two high capacity wells. Our review of the addendum EA reveals that the DNR's discussion of the effects of the two high capacity wells was limited to the effects of the two wells.

¶26 The record does show that the DNR acknowledged studies conducted by scientists in support of efforts opposing the approval of the high capacity water well permit. However, the addendum EA does not demonstrate that the DNR considered, analyzed the data and information from these studies, or drew conclusions from this information regarding whether the cumulative

environmental effects were significant. In other words, there is no indication in the addendum EA that demonstrates that the DNR conducted a sufficient inquiry into the possible cumulative effects of the two high capacity wells in conjunction with other high capacity pumping wells in the region. Rather, the addendum EA demonstrates that the DNR limited its consideration of the scientific evidence to the individual effects the two high capacity wells may have on the environment.[11]

¶27 Indeed, the DNR's response to several comments on this topic in the "Cumulative Impacts" section of the addendum EA best summed up the DNR's position with respect to its duty to consider the cumulative effects of the two high capacity wells and the scope of its inquiry in this case.

> These comments deal with the potential for cumulative impacts from high capacity wells on surface water bodies and groundwater in Adams and Waushara Counties. Even assuming that cumulative effects of pumping may have impacts on the amount of groundwater available to surface water resources in the Central Sands, as described in the Kraft and Mechenich report, the Department's review is limited to whether the proposed wells on the high capacity property will have potential significant adverse environmental impacts. In this case, that assessment shows no indication that such impacts will occur.

¶28 At the conclusion of the above statement, the reader is directed to the DNR's response to comments 67-73 of the addendum EA "for more details of this analysis." Comments 67-73 are in the section regarding the "Effects of

[11] By way of example, the addendum EA refers to a groundwater model submitted by Dr. George J. Kraft in 2011, which "indicates that additional water table drawdown in the area around Pleasant Lake due to the proposed wells would be about 2 inches." This reference to Dr. Kraft's model focuses exclusively on the potential effects the two wells may have on the water table and makes no reference to the potential cumulative effects the two wells may have on the water table drawdown in conjunction with other high capacity wells in the area. There are other examples of this type of analysis found in the addendum EA regarding the potential effects the two high capacity wells may have on state waters.

Withdrawals On Surface Water Resources," many of which criticize the DNR for not considering the cumulative effects of the high capacity wells on the state's water resources. The DNR's response to those comments focuses exclusively on the impacts of the two wells and do not discuss the potential cumulative effects of the wells in conjunction with other high capacity pumping wells. The DNR then reiterated its view that its review of the potential impacts of the high capacity wells on the environment "is limited to whether the proposed wells on the high capacity property will have potential significant adverse environmental impacts." The DNR's failure to demonstrate that it considered the cumulative effects of the high capacity wells in conjunction with other high capacity wells in the region renders the addendum EA inadequate.

¶29 The addendum EA is also inadequate because the report is devoid of any evidence that the DNR considered reasonably *anticipated* high capacity water pumping activity in the region. WISCONSIN ADMIN. CODE § NR 150.22(2)(a)2. requires the DNR to consider the cumulative effects of the action at issue "that can be reasonably anticipated and that would compound impacts." In its response brief on appeal, the DNR does not respond to contentions made by Friends and Pleasant Lake that the addendum EA contains no assessment of reasonably anticipated high capacity water pumping activity in the region. We view the DNR's failure to respond to these contentions as a concession. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (an argument to which no response is made may be deemed conceded for purposes of appeal). The record supports the Friends and Pleasant Lake's contentions.

¶30 In sum, we conclude that the EA does not demonstrate that the DNR conducted a sufficient inquiry of the potential cumulative effects of the proposed high capacity wells on the environment because the DNR failed to consider the

potential cumulative effects of the two wells in conjunction with other high capacity pumping wells in the region. We now consider and reject arguments made by Richfield Dairy and the DNR.

¶31 Richfield Dairy and the DNR contend that the DNR considered cumulative effects of the two high capacity wells. However, neither party supports these contentions with persuasive reasoning or cites to portions of the record that demonstrate sufficient consideration of cumulative effects. Four examples will suffice.

¶32 First, although Richfield Dairy asserts that the DNR properly considered cumulative effects based on drawdown modeling prepared by Richfield Dairy's consultant, NewFields, Inc., Richfield Dairy's discussion does not support the assertion. Richfield Dairy points to two statements from the consultant's report: that "Pleasant Lake *is* likely impacted by four high capacity wells located within one mile of Pleasant Lake" and "the net effect of groundwater withdrawal is expected to result in little change to existing flow conditions." We fail to understand how quoting two statements from the consultant's report demonstrates that the DNR actually did anything. Plainly the reports were before the DNR and we can assume the DNR personnel read them. But Richfield Dairy does not point to any evidence that the DNR analyzed the data or the methods used to reach the conclusions or otherwise actively analyzed the modeling.

¶33 Second, Richfield Dairy contends that the DNR properly considered cumulative effects based on drawdown modeling prepared by plaintiff's experts, Drs. George J. Kraft and David Mechenich in 2010, and subsequent modeling prepared by Dr. Kraft in 2011. It is true that the DNR acknowledged in the addendum EA that the groundwater modeling prepared by Drs. Kraft and

Mechenich established that there may be cumulative effects. However, the DNR expressly declined to consider the modeling for reasons that are not clear and, instead, stated that its analysis was limited to the effects of the two proposed wells.

¶34 Third, Richfield Dairy contends that the DNR properly considered cumulative effects based on a letter written by DNR Deputy Secretary Matt Moroney to state representatives, which provides that the DNR "has carefully considered potential effects to groundwater and area surface waters in light of George Kraft's modeling results" and that the modeling showed that the two proposed wells would not cause "significant adverse impacts on these surface water bodies." However, the comments made in this letter are conclusory. The Secretary merely asserts that that consideration occurred. He provides no meaningful detail showing what constituted the asserted consideration.

¶35 Fourth, and finally, the DNR supports its contention that it properly considered cumulative effects with excerpts from the circuit court's decision. Reliance on the circuit court's decision is misplaced. As the DNR acknowledges, we review the DNR's decision, and not the decision made by the circuit court. *See* ***Wisconsin Indus. Energy Grp., Inc.***, 342 Wis. 2d 576, ¶14 ("When an administrative agency's decision is challenged in the circuit court under [WIS. STAT.] § 227.52, an appellate court reviews the decision of the agency, not that of the circuit court."). Moreover, the circuit court's decision is not evidence or part of the DNR record. Judicial review of an administrative agency's decision under WIS. STAT. ch. 227 is limited to the record before the administrative agency. *See* § 227.57(1) (judicial review of an administrative agency decision "shall be confined to the record.").

¶36 Richfield Dairy next argues that the DNR's statement in the addendum EA concerning the limited scope of its review, when read in context, is simply an "acknowledgement that every [EA] is project-specific." We are not persuaded. Although EAs address the environmental effects of the specific project at issue, all EAs are required to consider cumulative effects. *See* WIS. ADMIN. CODE § NR 150.22(2)(a)2. The addendum EA provides a section purportedly discussing the cumulative effects of the project. However, the DNR stated explicitly in the addendum EA that it would limit its analysis to whether the two proposed wells would have significant adverse impacts on water resources and the analysis found in the addendum EA supports the view that DNR's consideration was limited to the effect of the two proposed wells.

¶37 Richfield Dairy maintains that Friends and Pleasant Lake "have the burden" to show that the DNR failed to consider reasonably foreseeable future high capacity groundwater pumping actions and that they have not met their burden here. However, as both Friends and Pleasant Lake explain, Richfield Dairy has it backwards. The DNR has the burden to show that it considered reasonably foreseeable future actions, not the challengers to the DNR's decision. *See* ***WED III***, 79 Wis. 2d at 430 (agency has burden to demonstrate that it conducted good faith factual investigation into environmental effects of proposed action).

CONCLUSION

¶38 In sum, we conclude that the record developed by the DNR does not demonstrate that the DNR conducted an adequate factual investigation of "cumulative effects" as that term is used in the administrative code. *See* ***id.*** at 425. We therefore reverse that part of the circuit court's order concluding that the DNR

properly considered cumulative effects. We remand to the circuit court with instructions to add to its remand directives to the DNR to consider the cumulative effects of the two high capacity wells, consistent with this opinion, for the purpose of determining whether an environmental impact statement is needed for the instant project under the applicable standards.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

¶39 LUNDSTEN, J. (*concurring*). I agree with the majority that we must reverse the circuit court, but my reasoning is more limited. Accordingly, I write separately.

¶40 In a case where little is clear, what is clear is that DNR did not consider "reasonably anticipated" future actions as required by WIS. ADMIN. CODE § NR 150.22(2)(a)2. This code provision requires that DNR's "evaluation" include consideration of "[t]he extent of cumulative effects of repeated actions of the same type, or related actions or other activities occurring locally that can be reasonably anticipated and that would compound impacts." ***Id.*** After reviewing the parties' briefs and the authority they rely on, I find no clarity regarding what such consideration must entail. However, it is plain that DNR did not make an anticipated-future-activities inquiry.

¶41 Neither DNR nor Richfield Dairy points to a place in the record showing that DNR considered anticipated future activities. As the majority explains, DNR does not respond to the plaintiffs' assertion that there was no such consideration. As to Richfield Dairy, its discussion is limited to the observation that Friends and Pleasant Lake have not identified information in the record indicating that DNR was aware of any "reasonably foreseeable future wells in close proximity to the Richfield Dairy project area." This response misses the mark.

¶42 Perhaps a proper inquiry by DNR regarding "reasonably anticipated" activities within the meaning of WIS. ADMIN. CODE § NR 150.22(2)(a)2. would

show that there are no such anticipated activities. But that possibility does not absolve DNR of its responsibility both to make the inquiry and to make a record of the inquiry. Like the majority, my review of the parties' arguments and the record supports the conclusion that there was no such inquiry. Accordingly, reversal is required.

¶43 With respect to mootness, I do not join the majority's discussion, but it is clear to me that, even if the particular DNR decision before us is moot, we have the authority to decide the appeal.

¶44 I could stop here, but I will attempt to explain briefly why I do not join the majority.

¶45 The parties and the majority have taken on the tough task of clarifying the meaning of the "cumulative effects" requirement. It does not seem to me that any of them succeed, and with good reason. After reading the briefs, the majority decision, and the authority they cite, I am at a loss to explain in a concrete way what it means to conduct a sufficient "cumulative effects" inquiry. Putting aside anticipated future activity (a puzzle all by itself), common sense suggests that the point of a "cumulative effects" inquiry and, indeed, the point of conducting an environmental assessment relating to a proposed activity is to make an assessment of the difference between expected relevant features of the environment *with and without* the proposed action. It seems to me that determining this difference necessarily takes into account the environmental effects of past and existing activities because such is the base line for determining the difference. However, I am unable to determine from the words of the code and the authority cited whether (again apart from the anticipated-future-activities

inquiry) a "cumulative effects" inquiry requires more. I understand the majority to be opining that more is required, but I do not understand what that "more" is.

¶46 I hasten to add that I have tried and failed to move the ball forward. In my view, the problem is the legal authority we have to work with. The code language and the interpretive statements in cases such as ***Wisconsin's Environmental Decade, Inc. v. PSC***, 79 Wis. 2d 409, 256 N.W.2d 149 (1977) (***WED III***), and ***Habitat Education Center, Inc. v. United States Forest Service***, 603 F. Supp. 2d 1176, 1186 (E.D. Wis. 2009), are, in my view, too abstract. I think the heart of the problem is that courts are asked to review a preliminary DNR inquiry (the environmental assessment inquiry) without an understanding of how that preliminary inquiry should trigger the decision to conduct the more extensive inquiry (an environmental impact statement). It is akin to deciding whether some particular contest rule is fair without an understanding of the contest itself.

¶47 As suggested by the supreme court in ***WED III***, at the ends of the spectrum it will often be apparent that an environmental assessment inquiry is or is not sufficient. *See* ***Wisconsin's Envtl. Decade***, 79 Wis. 2d at 424. But I do not view the current case as falling at either end of the spectrum. With the exception of anticipated activity, which I discuss above, the circuit court's thoughtful decision finding that the inquiry here was sufficient persuades me that it is not clear that DNR's inquiry was insufficient. At the same time, DNR and Richfield Dairy fail to persuade me that DNR's inquiry was sufficient. That is, DNR and Richfield Dairy fail to persuade me that the record "reveal[s] in a form susceptible of meaningful evaluation by a court the nature and results of the agency's investigation and the reasoning and basis of its conclusion." ***Id.*** at 425 n.15.

¶48 For the reasons stated, I concur.