STATE OF WISCONSIN
SUPREME COURT

LAKE BEULAH MANAGEMENT DISTRICT,

Plaintiff-Appellant-Petitioner,

v. **Appeal No. 2009AP2021**

VILLAGE OF EAST TROY,

Defendant-Respondent.

PLAINTIFF-APPELLANT-PETITIONER'S BRIEF AND APPENDIX

APPEAL OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, DATED AUGUST 25, 2010, AFFIRMING A JUDGMENT OF THE WALWORTH COUNTY CIRCUIT COURT ENTERED ON MAY 7, 2009, THE HONORABLE ROBERT J. KENNEDY, PRESIDING, IN WALWORTH COUNTY CASE NO. 08-CV-915

Dean P. Laing
State Bar No. 1000032
O'Neil, Cannon, Hollman, DeJong & Laing S.C.
111 East Wisconsin Avenue, Suite 1400
Milwaukee, Wisconsin 53202-4870
(414) 276-5000
Attorneys for Plaintiff-Appellant-Petitioner

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A. ISSUE PRESENTED FOR REVIEW.

1. Does the Lake Beulah Management District (the "Lake District") have the authority to enact an ordinance regulating withdrawal of groundwater from the Lake Beulah groundwater basin in order to prevent adverse effects to the lake, which ordinance would potentially preclude the Village of East Troy (the "Village") from operating one of its high capacity wells ("Well No. 7"), if the Village is correct that "the Legislature specifically restricted the Department [of Natural Resources (the "DNR")] from considering effects of a proposed well of this capacity on public water rights in navigable waters, except when the water loss has exceeded 2,000,000 gallons per day," thus precluding the DNR from "consider[ing] the potentially adverse effects of Well No. 7 on 'the waters of Lake Beulah,'"[1] and "[t]he DNR has no authority much less an obligation to consider impacts to surface waters for wells in the category of Well #7?"[2]

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[1] *See* R.22:tab7:6-7 in Appeal No. 2008AP3170 (App.75-76).

[2] *See The Village of East Troy's Response Brief* in Walworth County Case Nos. 06-CV-673 and 07-CV-674 at 6 (App.87).

Answered by Trial Court: No, deciding issue on summary judgment.

Answered by Court of Appeals: Did not rule on issue because it held that the DNR has the authority, and the obligation, to consider potentially adverse effects of a high capacity well on a lake before issuing a permit for such a well, regardless of the well's capacity, and, accordingly, the ordinance conflicts with and is preempted by the legislature's delegation of that authority to the DNR.

B. STANDARD OF REVIEW.

1. "Whether the circuit court properly granted summary judgment is a question of law that this court reviews de novo." *Konneker v. Romano*, 2010 WI 65, ¶ 22, 326 Wis. 2d 268, 284, 785 N.W.2d 432 (citation omitted). *See also Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 14, 326 Wis. 2d 729, 738, 786 N.W.2d 78 ("We review a circuit court's grant of summary judgment de novo, using the same methodology employed by the circuit court under Wis. Stat. § 802.08.") (citation omitted).

2. "The question of whether a statute preempts a municipal ordinance raises a question of law which we review

independently, benefitting from the analyses of the circuit court and the court of appeals." *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 652, 547 N.W.2d 770 (1996). *See also Apartment Ass'n of S. Cent. Wis., Inc. v. City of Madison*, 2006 WI App 192, ¶ 12, 296 Wis. 2d 173, 183, 722 N.W.2d 614 ("The issue of whether a state statute pre-empts a city ordinance is a question of law. . . .") (citation omitted).

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

In 2005 the DNR issued a permit to the Village authorizing it to construct and operate a high capacity well, located within 1,400 feet of Lake Beulah, with a capacity to withdraw 1,440,000 gallons of water per day ("gpd") (more than a half billion gallons per year) from the groundwater which flows into Lake Beulah. R.1:4,5;R.5:6-8,10-11,18,39. When the DNR did that, it did not consider the potentially adverse effects of the well on Lake Beulah, as it was then of the opinion that it had no authority to do so. As the DNR told the Lake District at that time:

> The DNR shares your concern regarding the potential for negative impacts to nearby water resources when a high capacity well is constructed and operated and believes that those impacts should be considered when a request for a high capacity well approval is submitted to the Department. Unfortunately, the Legislature has only granted limited authority to the

> Department in that regard. For high capacity wells where the water loss will be greater than 2 million gallons per day, sec. 281.35(4)(b) and (5)(d), Wis. Stats., expressly requires the Department to consider environmental and public trust doctrine factors in determining whether or not to approve the application. However, for high capacity wells where the water loss will be 2 million gallons per day or less, sec. 281.17, Wis. Stats., only allows the Department to consider the impact on public utility wells (*i.e.*, existing public drinking water supplies) in determining whether or not to approve the application.[3]

The Village agrees with the position then held by the DNR. In the Village's words:

> [T]he Legislature specifically restricted the Department from considering effects of a proposed well of this capacity on public water rights in navigable waters, except when the water loss has exceeded 2,000,000 gallons per day. Wis. Stat. § 281.35(5)(d). It is undisputed that Well No. 7 does not meet this water loss threshold. Therefore, the Department would have to impermissibly stretch the authority granted to it by the Legislature if it were to consider the potentially adverse effects of Well No. 7 on "the waters of Lake Beulah."[4]

and

> Thus, under the statutory scheme, the DNR is only authorized and required to evaluate environmental impacts including impacts on surface waters for high capacity wells over 2,000,000 gallons per day and for wells in certain locations. Those standards do not apply to Well #7. The only standard applicable to Well #7 under this statutory scheme is Wis. Stat. § 281.34(5)(a).

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[3] *See* R.22:tab5:1 in Appeal No. 2008AP3170 (App.43). The DNR has since changed its position, and now acknowledges that it "may use its statutory 'public trust' authority when considering applications for well approvals," regardless of their capacity. *Response of the Wisconsin Department of Natural Resources to Petition for Review* in Appeal No. 2008AP3170 at 5 (App.53).

[4] *See* R.22:tab7:6-7 in Appeal No. 2008AP3170 (App.75-76).

> The DNR has no authority much less an obligation to consider impacts to surface waters for wells in the category of Well #7.[5]

In light of the position being taken at that time by the DNR and the Village, in 2006 the Lake District decided to enact an ordinance to regulate that otherwise-ignored subject, *i.e.*, high capacity wells withdrawing groundwater from the Lake Beulah groundwater basin which could potentially destroy the lake. R.5:63; App.36. The Lake District's thought was that, if the DNR and the Village were legally correct on their position, an ordinance enacted by the Lake District would not conflict with any authority of the DNR because, under their view, it had no authority.

The ordinance enacted by the Lake District requires parties seeking to operate high capacity wells which will withdraw groundwater from the Lake Beulah groundwater basin to comply with the permitting process set forth in the ordinance. In effect, the ordinance grants authority to the Lake District to do the work the DNR, at the time, believed it had no legal authority to do.

The Lake District acknowledges that it enacted the ordinance, at least in part, due to a serious concern that Well No. 7 will damage Lake

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[5] *See The Village of East Troy's Response Brief* in Walworth County Case Nos. 06-CV-673 and 07-CV-674 at 5-6 (App.86-87).

Beulah, which view is shared by the United States Geological Society, the Southeastern Wisconsin Regional Planning Commission, and private geologists:

- The United State Geological Society has concluded that "[t]here is no question that pumping from the test well has an effect on Lake Beulah."[6]

- The Southeastern Wisconsin Regional Planning Commission has concluded that it "agrees with the concerns . . . relating to the potential for negative impacts on the wetland complex and the Lake itself, due to the pumping from the well," and that "[t]he well construction being considered, as well as the subdivision construction itself, will have the effect of reducing the groundwater flow to the Lake."[7]

- Robert J. Nauta ("Nauta"), a Wisconsin licensed geologist with more than 18 years experience performing and interpreting hydrogeological studies, has concluded that "the existing data can only support the conclusion that pumping of proposed Well No. 7 would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah."[8]

On August 1, 2008, the Village, although fully aware of the Lake District's ordinance, began operating Well No. 7 without complying with the permitting process set forth therein. R.1:5;R.5:76;R.6:1. As a result, the Village is currently operating Well No. 7 without any regulatory

[6] *See* R.19:tab1:21 in Appeal No. 2008AP3170 (App.129).

[7] *See* R.19:tab1:24 in Appeal No. 2008AP3170 (App.132).

[8] *See* R.19:tab1:1,8 in Appeal No. 2008AP3170 (App.109,116).

review of the potentially adverse effects of the well on Lake Beulah.

In Appeal No. 2008AP3170, the Court of Appeals held, in a decision issued on June 16, 2010, that the DNR had the authority, and the obligation, to consider the potentially adverse effects of Well No. 7 on Lake Beulah before it issued its permit to the Village in 2005. 2010 WI App 85; App.11. Because the DNR failed to do that, the Court of Appeals remanded the case to the trial court, with directions that it remand the case to the DNR for it to reconsider the Village's permit application in light of the information it had in its possession at that time, including the opinions of the United States Geological Society, the Southeastern Wisconsin Regional Planning Commission, and Nauta. In that case, the Court of Appeals held that "[t]he permit process has to be, as a matter of common sense, more than a mechanical, rubber-stamp transaction," and "[t]he DNR's mission must be to protect waters of the state from potential threats caused by unsustainable levels of groundwater being withdrawn by a well, whatever type of well that may be." *Id.* at ¶¶ 27, 28.

In light of that decision, the Court of Appeals, in this case, held, in a decision issued on August 25, 2010, that "[s]tate law explicitly delegated the authority over high-capacity well permits to the DNR, and the

Ordinance is clearly in direct conflict with that authority." 2010 WI App 127, ¶ 19; App.1. Accordingly, the court held, "[t]he state legislature's explicit grant of authority to the [DNR] preempts the District's ordinance." *Id.* at ¶ 1.

On November 5, 2010, this Court granted review in both of these cases. It is the Lake District's position that the Court of Appeals' decision in Appeal No. 2008AP3170 is legally correct and should be affirmed, in which case so too should its decision in this case, as the Lake District's ordinance will admittedly be in conflict with and thus be preempted by the legislative authority granted to the DNR to consider the potentially adverse effects of Well No. 7 on Lake Beulah as part of the DNR permitting process. It is the Lake District's position that the opposite is likewise true. If the Court of Appeals' decision in Appeal No. 2008AP3170 is reversed, so too should the Court of Appeals' decision in this case, as the Lake District's ordinance will then not conflict with any legislative authority granted to the DNR, and surely some governmental entity must have the authority to regulate high capacity wells that will potentially destroy lakes in this State. It cannot be, as the Village would have it, that no governmental agency has the authority to regulate that

situation, and that permits for high capacity wells of the capacity of Well No. 7 must be issued by the DNR as a mechanical, rubber-stamp transaction, without any analysis, even if the DNR and the applicant are certain that the well will destroy a lake.

In its brief in Appeal No. 2008AP3170, the Lake District will explain why the DNR has the authority, and the obligation, as the Court of Appeals held, to consider the potentially adverse effects of a high capacity well, regardless of its capacity, on a lake as part of the DNR permitting process. In this brief, the Lake District will explain why, if the Court of Appeals' ruling in Case No. 2008AP3170 is reversed, the Lake District then must have that authority, by way of its ordinance.

II. STATEMENT OF FACTS.

A. THE LAKE DISTRICT.

In 1968 the Town of East Troy formed the Lake Beulah Sanitary District, pursuant to section 60.77, Wis. Stats., "to deal with sanitary and water quality issues around Lake Beulah." R.10:tabA. As a sanitary district, the Lake Beulah Sanitary District was empowered as a "body corporate with the powers of a municipal corporation," including the power to "[i]ssue rules or orders" and to "enact and enforce ordinances to

implement those powers." Wis. Stat. §§ 60.77(2), (5)(c), (5m).

In 1995, the Town of East Troy converted the Lake Beulah Sanitary District to a lake district pursuant to section 33.235(1m), Wis. Stats. R.10:tabA. The resolution effectuating that conversion provides that "[t]he Town Board does hereby expressly grant to the new Lake Management District all the powers of the Lake Beulah Sanitary District and the sanitary district powers that can be granted to it by § 30.22(4), Wis. Stats." *Id.* As a converted sanitary district, the Lake District has all the "powers of a town sanitary district under ss. 60.77 and 60.78," *see* Wis. Stat. § 33.22(3)(b)1., as well as all the powers of a Lake Protection and Rehabilitation District under section 33.22(1), Wis. Stats. That section provides as follows:

> Any district organized under this chapter may select a name for the district, sue and be sued, make contracts, accept gifts, purchase, lease, devise or otherwise acquire, hold, maintain or dispose of property, disburse money, contract debt and do any other acts necessary to carry out a program of lake protection and rehabilitation. . . .

Wis. Stat. § 33.22(1).

B. <u>ENACTMENT OF ORDINANCE.</u>

On December 11, 2006, the Lake District adopted Ordinance No. 2006-03, entitled An Ordinance Prohibiting the Net Transfer of

Groundwater and Surface Water from Lake District Hydrologic Basin. R.5:63; App.36.[9] The preamble to the ordinance explains the reasons for its enactment:

> **WHEREAS**, the District finds it necessary to protect the entire local water resource, both groundwater and surface water, both water quality and water quantity, to achieve its purposes of protecting and rehabilitating Lake Beulah and promoting the public health, comfort, convenience, and welfare of the District; and
>
> **WHEREAS**, the District finds that waters vital to the existence, well being and quality of Lake Beulah are limited to those that fall naturally to the land surface within the Lake Beulah Surface Water Drainage Basin[10] or flow into Lake Beulah from the Lake Beulah Groundwater Basin;[11] and
>
> **WHEREAS**, the District finds that Lake Beulah is a complex ecosystem, in which the biological and physical components and constituents are interrelated such that whatever effects one will affect the others, the sustainability of which depends on adequate supplies of groundwater and surface water; and

[9] The Lake District's ordinance is not unique; numerous other municipalities, such as the Towns of Plymouth, Rhine, Richfield and Waukesha, have enacted similar ordinances.

[10] The ordinance defines the "Lake Beulah Surface Water Drainage Basin" as "[t]he geographic region or territory whose boundaries include all those lands and waters on which water deposited at the ground surface would, if prevented from infiltrating into the soil, flow by gravity to a point where it would enter into Lake Beulah." R.5:64; App.37.

[11] The ordinance defines the "Lake Beulah Groundwater Basin" as "[t]he three dimensional region whose boundaries encompass that portion of the aquifer known variously as the shallow, unconsolidated, or sand and gravel aquifer, within which the groundwater, if it were unaffected by pumping or other artificial inducement, would flow into, beneath or within the Lake Beulah Surface Water Drainage Basin." R.5:64; App.37.

> **WHEREAS**, the District finds that it is harmful to Lake Beulah and contrary to the purposes of the District to allow the surface or groundwater within the Lake Beulah drainage basin or groundwater basin to be despoiled, depleted or diverted or transferred out of said regions. . . .

The ordinance provides that, absent a permit issued by the Lake District, no party shall:

> A. Divert or transfer surface water out of the Lake Beulah Surface Water Drainage Basin.
>
> B. Divert, transfer, or induce the diversion or transfer of groundwater out of the Lake Beulah Groundwater Basin.
>
> [C.] Withdraw groundwater from within the Lake Beulah Groundwater Basin and then divert or transfer said water out of the Lake Beulah Groundwater Basin.

The ordinance describes the process a party must follow in order to obtain a permit from the Lake District:

> A request for a permit for such use or action must be submitted to the Board of Commissioners for approval. The petition, together with any documents or records that support the petition, must clearly state the grounds upon which the petitioner requests the permit including, at minimum, a concise statement of the purpose of the request, the annual volume of water to which the request applies and the number of years the petitioner seeks for the approval or permit to remain in effect. In addition, said petition must include a thorough environmental study of the proposed use or action with emphasis on the potential impacts of such use or action on the following: Lake Beulah; groundwater and surface water contributing to Lake Beulah; wetlands adjacent to Lake Beulah or any surface water tributary to Lake Beulah; private wells in the District; and groundwater supplying any private well in the District.

The Village learned of the enactment of the ordinance on December 19, 2006, at the latest. R.5:76.

C. WELL NO. 7.

Well No. 7 has the capacity to withdraw 1,440,000 gpd (more than a half billion gallons per year) from the groundwater flowing into Lake Beulah. R.1:4,5;R.5:6-8,10-11,18,39. The Village refused to comply with the permitting process set forth in the ordinance, and on August 1, 2008 began operating Well No. 7 without any regulatory review of the potentially adverse effects of the well on Lake Beulah. R.1:5;R.5:76;R.6:1.

Well No. 7 is situated on property known as the Lake Bluff Subdivision, which is located outside the physical boundaries of the Lake District. R.5:50;R.6:1. The well is located in an area where it will directly intercept and remove groundwater that would otherwise flow into Lake Beulah. R.1:5. Operation of Well No. 7 will result in up to a 40% decrease in groundwater flow to Lake Beulah (R.5:91), and will cause the following adverse effects on the lake:

> [A] reduction of groundwater flow to Lake Beulah will adversely affect its water quality. Reducing groundwater flow will result in a softening of the lake water and a change in water temperature, causing a reduction in its natural defense against eutrophication. The native aquatic life in Lake Beulah is present because

> of the water quality and temperature regime that has been established in the lake. Impact to surface water quality will combine to make the lake less hospitable to native species. It will also provide a foothold for invasive species. Additionally, by removing groundwater from an aquifer, damage to wetlands will occur, which will correspondingly reduce the community's ability to store and filter the pollutants that typically degrade water quality.

R.5:90.

D. PROCEDURAL STATUS OF CASE AND DISPOSITION IN CIRCUIT COURT.

On July 22, 2008 the Lake District commenced this lawsuit against the Village in the Walworth County Circuit Court. R.1. Because the lawsuit was filed before the Village began operating Well No. 7, the complaint sought "a declaratory judgment pursuant to section 806.04, Wis. Stats., that Ordinance No. 2006-3 is valid and that the Village is required to comply with it." R.1:5. The case was assigned to the Honorable Robert J. Kennedy.

On August 11, 2008 the Village answered the complaint, alleging that it has no legal duty to comply with the ordinance because the Lake District had "no statutory authority to enact" an ordinance regulating activities outside of its boundaries, the ordinance "is preempted by state law," and the Lake District "lacks statutory authority to enforce ordinances within the Village" without the Village's consent. R.2:3.

On February 25, 2009 the Village filed a motion for summary judgment seeking dismissal of the case. R.8. Following briefing by the parties (R.7,10,11), on April 29, 2009, the trial court issued an oral decision, granting the Village's motion. R.18; App.134. The trial court held that the Lake District had no authority to enact an ordinance governing conduct outside its boundaries, and that the ordinance preempts the DNR's authority to regulate high capacity wells:

> [T]he Court rules that the District's ordinance has no effect outside its boundaries; and even if the District had the power to enact the ordinance, the District cannot require the Village to submit to it.
>
> . . .
>
> Here the ordinance itself . . . conflicts and interferes with the DNR powers under Chapter 281 and 280, as well as various NR regulations. . . .
>
> A lake district action of this type is pre-empted, in the opinion of this Court, and also is void, even if not pre-empted, because it conflicts with the DNR regulation of the public water supply and well regulation. . . .
>
> And therefore, I declare that the ordinance is void and unenforceable in this particular case, certainly as to the Village of East Troy but I think it's void and enforceable, period, even within its own boundaries under the circumstances; and that is the way the Court rules.

R.18:18,39,43; App.151,172,176.

On May 7, 2009, a Final Judgment and Order was entered by the trial court, declaring that "the District's Ordinance is void and

unenforceable in that it conflicts with state law, and it is invalid as applied to the Village." R.12.

On August 4, 2009 the Lake District filed a Notice of Appeal, appealing "from the whole of the final Judgment entered on May 7, 2009." R.13.

E. DISPOSITION IN THE COURT OF APPEALS.

On August 25, 2010, the Court of Appeals issued a decision affirming the judgment entered in the trial court, holding that:

> This case represents the latest chapter in ongoing litigation stemming from Well #7. We cite a recently released companion case, *Lake Beulah Management District v. DNR*, 2010 WI App 85, ¶14, No. 2008AP3170, for relevant background information. . . .
>
> In *Lake Beulah* we held that the DNR had the authority to review the public trust implications of Well #7, and we remanded to the DNR to reconsider its approval of Well #7 in light of evidence suggesting a more adverse environmental impact than previously believed.
>
> . . .
>
> The District operates "with the powers of a municipal corporation" under Wis. Stat. § 60.77(2), and "municipality" in this context is explicitly inclusive of lake protection and rehabilitation districts. Wis. Stat. § 281.01(6). Therefore, the District "may pass ordinances which, while addressed to local issues, concomitantly regulate matters of statewide concern." *See DeRosso*, 200 Wis. 2d at 650. This is to say that the District's ordinances are not presumed invalid simply because they invoke a matter of statewide concern, such as the drilling of high-capacity drinking water wells. However, the long-standing rule is that a municipal ordinance may not

> conflict with state legislation; otherwise, the ordinance is preempted. *See Fox v. City of Racine*, 225 Wis. 542, 546, 275 N.W. 513 (1937). . . .
>
> . . .
>
> The circuit court reasoned that, while the legislature had not expressly withdrawn the District's ability to act, the Ordinance logically conflicted with, defeated the purpose of, and violated the spirit of the state's delegation of authority in this sphere to the DNR. In essence, the court determined that the Ordinance violated the second, third, and fourth tests articulated in *DeRosso*. *See DeRosso*, 200 Wis. 2d at 651-52.
>
> We agree with the circuit court's conclusion. The legislature has explicitly delegated to the DNR the authority to permit the construction of certain wells, and has directed that such authority be construed liberally. *See* Wis. Stat. §§ 280.11(1), 281.11. . . .
>
> . . .
>
> State law explicitly delegated the authority over high-capacity well permits to the DNR, and the Ordinance is clearly in direct conflict with that authority. Therefore, we hold that the Ordinance is preempted under the *DeRosso* tests and rendered unenforceable. Accordingly, we affirm. . . .

2010 WI App 127, ¶¶ 2, 3, 11, 15, 16, 19; App.1.

LEGAL ARGUMENT

I. ORDINANCES ARE PRESUMED VALID.

In attacking the Lake District's ordinance, the Village bears a heavy burden. As this Court has held:

> An ordinance is presumed valid and must be liberally construed in favor of the municipality. The party challenging the constitutionality of an ordinance bears a

> heavy burden. In Wisconsin, an ordinance will be held constitutional unless the contrary is shown beyond a reasonable doubt, and the ordinance is entitled to every presumption in favor of its validity.

Town of Rhine v. Bizzell, 2008 WI 76, ¶ 26, 311 Wis. 2d 1, 20, 751 N.W.2d 780 (citations omitted). *See also Town of Clearfield v. Cushman*, 150 Wis. 2d 10, 20, 440 N.W.2d 777 (1989) ("An ordinance is presumed valid and the burden is on the challenger to prove otherwise.").

II. IF THE DNR DOES NOT HAVE THE AUTHORITY TO CONSIDER POTENTIALLY ADVERSE EFFECTS OF WELL NO. 7 ON LAKE BEULAH, THE LAKE DISTRICT'S ORDINANCE CANNOT CONFLICT WITH THAT NON-EXISTENT AUTHORITY.

This Court "has frequently stated that a municipality may pass ordinances which, while addressed to local issues, concomitantly regulate matters of statewide concern." *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 650, 547 N.W.2d 770 (1996) (citations omitted). Such ordinances are valid unless one of the following exceptions apply: "(1) the legislature has expressly withdrawn the power of municipalities to act; (2) it logically conflicts with state legislation; (3) it defeats the purpose of state legislation; or (4) it violates the spirit of state legislation." *Id.* at 651-52. "Should any one of these tests be met, the municipal ordinance is void." *Id.* at 652.

None of these exceptions apply in this case if the Village is correct that the DNR does not have the authority to consider potentially adverse effects of Well No. 7 on Lake Beulah in the DNR permitting process. As to the second, third and fourth exceptions, the Lake District's ordinance would not, under those circumstances, conflict with state legislation, defeat the purpose of state legislation, or violate the spirit of state legislation. As this Court has held:

> As a general rule, additional regulation to that of the state law does not constitute a conflict therewith. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescriptions.

Fox v. City of Racine, 225 Wis. 542, 546, 275 N.W. 513 (1937) (citation omitted).

Sections 281.34 and 281.35, Wis. Stats. -- the statutes which regulate high capacity wells -- do no such thing. As the Court of Appeals held in Appeal No. 2008AP3170:

> For the remaining wells [those high capacity wells with capacities of less than 2,000,000 gpd], Wis. Stat. §§ 281.34 and 281.35 are silent as to whether the DNR may review or consider the well's potential environmental effects. The only guidance given to the DNR is the mandate in § 281.34(2) that "[a]n owner shall apply to the department for approval before construction" of a well over 10,000 gpd (a high capacity well). The statute gives no specifics on what the application entails (except for a $500 fee) or what

standards, if any, the DNR may or must use when deciding whether to approve or deny permits for wells between 100,000 and 2,000,000, such as the well here.

As we eluded to earlier, the Village interprets this silence in the presence of a comprehensive scheme to regulate high capacity wells as tacitly revoking any other authority the DNR might have over other wells, including its general authority to protect waters of the state. Well #7 is one of the "other wells." The Village's position goes so far as to argue that Wis. Stat. §§ 281.34 and 281.35 limit the DNR's authority to consider *anything* not specifically listed in that scheme before approving a high capacity well permit. It interprets the statutes to prohibit the DNR from enacting any regulations that would constrict wells, including Wis. Admin. Code ch. NR 812. As we interpret the Village's argument, if taken to its logical conclusion, the DNR would be prevented from, for example, requiring permit seekers to use certain construction methods when building a well, *see, e.g.*, Wis. Admin. Code § NR 812.11, and preventing permit seekers from placing waste in a well, *see* Wis. Admin. Code § NR 812.05.

The public trust doctrine is such an important and integral part of this state's constitution that, before we can accept the Village's argument, there should be some evidence that the legislature intended by these statutes to render nugatory the more general statutes bestowing the DNR with the general duty to manage the public trust doctrine. Outside of what the Village considers to be the plain intent of the statutes, the only evidence of legislative intent is that, *in 2007*, the legislature rejected an advisory committee's recommendation to amend Wis. Stat. § 281.34 by adding to the list of enumerated circumstances always requiring the DNR to conduct a formal environmental review. The immediate response to the Village's argument is that the legislature's actions after this permit was issued do not affect our analysis of the statutes and legislative history that existed at that time. And we have not found any legislative history suggesting that 2003 Wis. Act 310 was meant to *revoke* the DNR's general authority. But the more measured response is that the rejection of the advisory committee's suggesting proves nothing.

> The action of rejecting the idea of requiring formal environmental review in every instance gives us no guidance as to whether the DNR could investigate a middling well at its discretion. We conclude that there is no evidence that the legislature intended to revoke the general grant of authority to the DNR regarding these other wells.

2010 WI App. 85, ¶¶ 23-25; App.24-26 (emphasis in original). Accordingly, the fact that the Lake District's ordinance enlarges upon the provisions of sections 281.34 and 281.35, Wis. Stats., which are silent as to whether the DNR may consider potentially adverse effects of a well with a capacity of less than 2 million gpd on navigable waters, creates no conflict therewith, as those statutes do not limit the requirement for all cases to their own prescriptions.

As to the first exception, that the legislature has expressly withdrawn the power of municipalities to act, that has not occurred either. Section 59.70(6)(e), Wis. Stats., upon which the Village relies, provides as follows:

> No municipality may enact or enforce an ordinance regulating matters covered by ch. 280 or by department rules under ch. 280.

High capacity wells and, more particularly, their potentially adverse effects on navigable waters, are not regulated by chapter 280.

These wells, as the Village concedes, are regulated by sections 281.34 and 281.35, Wis. Stats. In the Village's words:

> The legislature granted DNR authority to regulate high capacity wells through a comprehensive and graduated statutory framework in Wis. Stat. §§ 281.34 and 281.35.[12]

In fact, not only has the legislature not expressly withdrawn the power of the DNR to consider the potentially adverse effects of a high capacity well within a capacity of less than 2 million gpd on navigable waters, it has expressly empowered lake districts to regulate this subject. Section 281.11, Wis. Stats., provides, in part, as follows:

> 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. . . . In order to achieve the policy objectives of this subchapter, it is the express policy of the state to mobilize governmental effort and resources at ***all levels***, state, federal ***and local***, allocating such effort and resources to accomplish the greatest result for the people of the state as a whole. . . . (emphasis added).

Section 33.001, Wis. Stats., provides, in part, as follows:

> (1) The legislature finds environmental values, wildlife, public rights in navigable waters, and the public welfare are threatened by the deterioration of public lakes; that the protection and rehabilitation of the public inland lakes of this state are in the best interest of the citizens of this state; . . . that lakes form an important basis of the state's recreational industry; that the

[12] *Petition for Review and Appendix of the Village of East Troy* in Appeal No. 2008AP3170 at 12.

> increasing recreational usage of the waters of this state justifies state action to enhance and restore the potential of our inland lakes to satisfy the needs of the citizenry; and that the positive public duty of this state as trustee of waters requires affirmative steps to protect and enhance this resource and protect environmental values.
>
> (2) In accordance with sub. (1), the legislature declares all the following:
>
> (a) It is necessary to embark upon a program of lake protection and rehabilitation, to authorize ***a conjunctive state and local program*** of lake protection and rehabilitation to fulfill the positive duty of the state as trustee of navigable waters, and protect environmental values. . . . (emphasis added).

Section 33.21, Wis. Stats., provides that lake districts "may be created for the purpose of undertaking a program of lake protection and rehabilitation of a lake or parts thereof within the district." Section 33.22(1), Wis. Stats., sets forth the virtually unlimited powers of a lake district:

> Any district organized under this chapter may select a name for the district, sue and be sued, make contracts, accept gifts, purchase, lease, devise or otherwise acquire, hold, maintain or dispose of property, disburse money, contract debt and do ***any other acts necessary to carry out a program of lake protection and rehabilitation***. . . . (emphasis added).

As this Court has stated, "the word any means any." *Tempelis v. Aetna Cas. & Surety Co.*, 169 Wis. 2d 1, 11, 485 N.W.2d 217 (1992).

Lake districts "are a significant component of Chapter 33's manifold approach to addressing legislature's inland lakes objectives."

Donaldson v. Board of Comm'rs of Rock-Koshkonong Lake Dist., 2004 WI 67, ¶ 22, 272 Wis. 2d 146, 161, 680 N.W.2d 762. The above cited "provisions governing the creation and activities of lake districts are designed to enable these special purpose districts to coexist among more traditional local governmental units." *Id.*

Additionally, section 33.15(4), expressly grants lake districts the power to perform "work in the lake ***or its watershed*** which will protect or enhance the opportunities for public enjoyment of the lake." (emphasis added). A lake's watershed generally "extends well beyond the established boundary of the Lake District," *see Donaldson*, 2004 WI 67, ¶ 10, 272 Wis. 2d at 156, which is true of the Lake Beulah watershed. R.5:74.

Accordingly, if the Village is correct that the DNR does not have the authority to consider potentially adverse effects of Well No. 7 on Lake Beulah, the Lake District's ordinance does not conflict with, nor is it preempted by, state legislation. The Village cannot have it both ways.

III. THE VILLAGE'S ARGUMENT ON EXTRATERRITORIAL POWERS IS WITHOUT MERIT.

The Village argues that the Lake District's ordinance is invalid for an additional reason beyond preemption, and that is that it attempts to regulate extraterritorial conduct. In support of its argument, the

Village relies upon *Safe Way Motor Coach Co. v. City of Two Rivers*, 256 Wis. 35, 39 N.W.2d 847 (1949), which holds that a municipality's "jurisdiction and authority is limited to the territory within its boundaries." *Id.* at 43.

In *Safe Way* and other cases similarly holding, the municipalities were not seeking to regulate ***conduct*** occurring outside their boundaries where that conduct was causing ***harm*** within their boundaries, like in this case. Those cases are far different factually than this case. Here, the ***conduct***, *i.e.*, the operation of Well No. 7, is physically located outside of the boundaries of the Lake District, but the ***harm*** caused by that conduct, *i.e.*, the damage to Lake Beulah, is located within the boundaries of the Lake District.

It would border on the ridiculous if a municipality could not regulate conduct occurring outside its boundaries where that conduct is causing harm within its boundaries. Consider the following examples:

- A municipality has a "no deer hunting" ordinance in effect. Can a person stand on the border of the municipality and shoot bullets into the municipality, striking a deer located within the municipality's boundaries? Is a municipality prohibited from regulating that conduct?

- A municipality has an "anti-pollution" ordinance in effect. Can a business located on the border

> of the municipality dump waste into a river flowing into a lake located within the municipality, thereby polluting the lake? Is a municipality prohibited from regulating that conduct?

Unless a lake district can regulate conduct occurring outside its boundaries, where the conduct causes harm to navigable waters located within its boundaries, the legislative goal of protecting public inland lakes will be thwarted. That is why the legislature expressly granted such power to lake districts. Section 33.15(4), Wis. Stats., expressly authorizes lake districts to implement a program of lake protection and rehabilitation "consist[ing] of any work in the lake ***or its watershed*** which will protect or enhance the opportunities for public enjoyment of the lake." (emphasis added)

IV. THE VILLAGE'S ARGUMENT THAT THE LAKE DISTRICT NEEDED THE VILLAGE'S CONSENT TO ENACT THE ORDINANCE IS SIMILARLY WITHOUT MERIT.

Finally, the Village argues that a lake district has no power to enact an ordinance without the consent of an affected incorporated municipality, citing section 33.22(4), Wis. Stats., which provides as follows:

> Districts shall not exercise the town sanitary district powers authorized under sub. (3) within the boundaries of an incorporated municipality unless the governing body of the municipality consents. . . .

The obvious response to the Village's argument is that the Lake District did not enact the ordinance under its powers as a town sanitary district, but did so under its powers as a lake district. As such, section 33.22(4), Wis. Stats., has no relevance to the facts of this case. Had the legislature wanted the provisions of section 33.22(4), Wis. Stats., to apply equally to lake districts, it would have said so.

CONCLUSION

The Village talks out of both sides of its mouth. In Appeal No. 2008AP3170, it argues that the DNR has no authority to consider the potentially adverse effects of Well No. 7 on Lake Beulah, because the legislature has not granted it that authority. Conversely, in this case, the Village argues that the Lake District has no authority to consider the potentially adverse effects of Well No. 7 on Lake Beulah, because its authority to do so, if it had such authority in the first instance, has been preempted by state legislation.

If the DNR does not have the authority to consider the potentially adverse effects of Well No. 7 on Lake Beulah, as the Village argues, then the Lake District's ordinance does not, by definition, conflict with the DNR's authority, as that authority is non-existent. In that case, the

ordinance is valid, does not conflict with state legislation, is not preempted, and appropriately regulates conduct occurring outside the Lake District's boundaries because that conduct is causing harm to a lake within its boundaries.

Accordingly, if this Court reverses the Court of Appeals' decision in 2008AP3170, it should likewise reverse the Court of Appeals' decision in this case.

Dated this 6th day of December, 2010.

O'NEIL, CANNON, HOLLMAN, DEJONG & LAING S.C.
Attorneys for Plaintiff-Appellant-Petitioner

By: _____
Dean P. Laing
State Bar No. 1000032

Post Office Address:

111 East Wisconsin Avenue, Suite 1400
Milwaukee, Wisconsin 53202-4870
(414) 276-5000

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8)(b), (c)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6,291 words.

Dated this 6th day of December, 2010.

Dean P. Laing
State Bar No. 1000032

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, including the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of the brief filed with the court and served on all opposing parties.

Dated this 6th day of December, 2010.

Dean P. Laing
State Bar No. 1000032

APPENDIX - TABLE OF CONTENTS

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(2)(a)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) a copy of any unpublished opinion cited under s. 809.23(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further hereby certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 6th day of December, 2010.

Dean P. Laing
State Bar No. 1000032

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 6th day of December, 2010.

Dean P. Laing
State Bar No. 1000032

APPENDIX - TABLE OF CONTENTS

COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2021 Cir. Ct. No. 2008CV915

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

LAKE BEULAH MANAGEMENT DISTRICT,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF EAST TROY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 ANDERSON, J. The Lake Beulah Management District (the District) appeals from an order granting summary judgment to the Village of East Troy (the Village) invalidating the District's 2006 ordinance regulating the withdrawal of groundwater. The state legislature's explicit grant of authority to

the Wisconsin Department of Natural Resources (DNR) preempts the District's ordinance. We affirm the circuit court on this ground.

¶2 This case represents the latest chapter in ongoing litigation stemming from Well #7. We cite a recently released companion case, ***Lake Beulah Management District v. DNR***, 2010 WI App 85, ¶14, No. 2008AP3170, for relevant background information. In 2000, the Village began searching for a new well site in order to provide an adequate water supply to its citizens. The site chosen was approximately 1400 feet from Lake Beulah, an 834-acre lake in Walworth county. ***Id.***, ¶3. This site was subsequently annexed into the Village in August 2003.

¶3 In June 2003, the DNR approved a permit for the construction of the well, dubbed Well #7. Based on the opinion of a consultant hired by the Village, the DNR concluded the well "would avoid any serious disruption of groundwater discharge to Lake Beulah." ***Id.*** After a swarm of litigation delayed construction, an "extension" of the DNR's permit was granted in September 2005. In the companion case we held that this extension operated as a new permit, thus avoiding any conflict with the expiration date of the 2003 permit. *See* ***id.***, ¶14. Construction ultimately began in 2006 and the well was operational by August 1, 2008. It is estimated that Well #7 has a pumping capacity of up to 1,440,000 gallons per day. *See* ***id.***, ¶3. In ***Lake Beulah*** we held that the DNR had the authority to review the public trust implications of Well #7, and we remanded to the DNR to reconsider its approval of Well #7 in light of evidence suggesting a more adverse environmental impact than previously believed. ***Id.***, ¶39.

¶4 The instant case concerns the District's attempt to circumvent the DNR's approval of Well #7 by passing an ordinance preventing operation of the

well. In 1968, the town of East Troy[1] formed the Lake Beulah Sanitary District pursuant to WIS. STAT. §§ 60.77 and 60.78 (2007-08).[2] The sanitary district was empowered as a "body corporate with the powers of a municipal corporation." Sec. 60.77(2). In 1995, the town of East Troy converted the sanitary district into the Lake Beulah Lake Management District under WIS. STAT. § 33.235(1m). The converted District retained its previous responsibilities while also obtaining the powers of a lake district under WIS. STAT. § 33.22(1). *See* § 33.22(3)(b)1. This empowered the District to "select a name for the district, sue and be sued, make contracts, accept gifts, purchase, lease, devise or otherwise acquire, hold, maintain or dispose of property, disburse money, contract debt and do any other acts necessary to carry out a program of lake protection and rehabilitation." Sec. 33.22(1).

¶5 On December 11, 2006, the District adopted Ordinance No. 2006-03 (the Ordinance), entitled An Ordinance Prohibiting the Net Transfer of Groundwater and Surface Water from Lake District Hydrologic Basin. The Ordinance prohibited the transfer or diversion of surface water or groundwater out of the District's jurisdiction without a permit:

> Section 2. PROHIBITED ACTS. It shall be unlawful and prohibited by this Ordinance for any person or entity to do any of the following unless such acts are authorized in advance by and performed in conformance with a valid permit issued by the District pursuant to this Ordinance:
>
> A. Divert or transfer surface water out of the Lake Beulah Surface Water Drainage Basin.

[1] The town of East Troy is not to be confused with the *Village* of East Troy, the respondent in the instant case.

[2] All references to the Wisconsin Statutes are to the 2007-08 version, unless otherwise noted.

> B. Divert, transfer, or induce the diversion or transfer of groundwater out of the Lake Beulah Groundwater Basin.
>
> E. Withdraw groundwater from within the Lake Beulah Groundwater Basin and then divert or transfer said water out of the Lake Beulah Groundwater Basin.

¶6 Notably, the Ordinance applies regardless of whether acts causing water withdrawal occur inside or outside the District's boundaries. Moreover, the Ordinance states that no permit will be issued "unless a volume of water equal to at least 95% of the water actually diverted or transferred is returned to the Hydrologic Basin at the location(s) where the adverse effects of the proposed use, action, diversion or transfer will be mitigated."

¶7 This Ordinance clearly implicates the proposed use of Well #7, which the District alleges would "intercept and remove groundwater that would otherwise sustain Lake Beulah." While the well is not located within the District's physical boundaries, the District has included the well site within the Lake's "groundwater basin." Under a separate DNR permit, the water used by the Village is ultimately discharged into a different body of water, so ninety-five percent of the water removed by the well would not be returned to the basin as the Ordinance purports to require.

¶8 It quickly became clear that the Village had no intention to comply with the Ordinance. Soon after the Ordinance was adopted, the Village wrote a letter to the District asserting that the District had no legal authority to pass it. In May 2007, the District requested records describing how the Village intended to "physically transport[] water back into the Lake Beulah Hydrologic Basin after water from Well #7 has been transported outside of said Basin," presumably in enforcement of the Ordinance. In response, the Village asked for "the District's purported basis of authority to enact and enforce" the Ordinance. When the

District insisted upon "a 'yes' or 'no' answer," the Village relayed its belief that its legal obligations did not include the Ordinance.

¶9 On July 22, 2008, the District brought an action for declaratory judgment upholding the Ordinance. The Village moved for summary judgment, arguing, inter alia, that the Ordinance was preempted by and conflicted with state law.[3] The circuit court granted summary judgment and found the Ordinance "void and unenforceable in that it conflicts with state law, and ... invalid as applied to the Village." The District appeals.[4]

¶10 We review a grant of summary judgment de novo. *See* ***Umansky v. ABC Ins. Co.***, 2009 WI 82, ¶8, 319 Wis. 2d 622, 769 N.W.2d 1. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. 802.08(2). Whether the Ordinance is preempted as a matter of law is a question we review independently, while benefiting from the analysis of the circuit court. *See* ***DeRosso Landfill Co. v. City of Oak Creek***, 200 Wis. 2d 642, 652, 547 N.W.2d 770 (1996).

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[3] The parties also sparred over whether the District had any general regulatory authority to enact the Ordinance and whether the District had "extraterritorial" authority to enforce the Ordinance on the Village. However, our analysis is limited to the preemption issue, which is dispositive. Therefore, while these arguments were made again on appeal, we do not address them here. *See* ***Walgreen Co. v. City of Madison***, 2008 WI 80, ¶2, 311 Wis. 2d 158, 752 N.W.2d 687 (noting that when resolution of one issue is dispositive, we need not reach other issues raised by the parties).

[4] The Village also moves to strike a portion of the District's reply brief on appeal, arguing that a portion of that brief raised a new issue for the first time on appeal. In January, we issued an order holding the motion in abeyance. We deny the motion. The disputed portion of the brief concerned the District's extraterritorial authority, and the wholly separate issue of preemption is dispositive. *See* ***Walgreen Co.***, 311 Wis. 2d, ¶2 (noting that when resolution of one issue is dispositive, we need not reach other issues raised by the parties).

¶11 The District operates "with the powers of a municipal corporation" under WIS. STAT. § 60.77(2), and "municipality" in this context is explicitly inclusive of lake protection and rehabilitation districts. WIS. STAT. § 281.01(6). Therefore, the District "may pass ordinances which, while addressed to local issues, concomitantly regulate matters of statewide concern." *See* ***DeRosso***, 200 Wis. 2d at 650. This is to say that the District's ordinances are not presumed invalid simply because they invoke a matter of statewide concern, such as the drilling of high-capacity drinking water wells. However, the long-standing rule is that a municipal ordinance may not conflict with state legislation; otherwise, the ordinance is preempted. *See* ***Fox v. City of Racine***, 225 Wis. 542, 546, 275 N.W. 513 (1937). Generally, a municipal ordinance is preempted if "(1) the legislature has expressly withdrawn the power of municipalities to act; (2) it logically conflicts with state legislation; (3) it defeats the purpose of state legislation; or (4) it violates the spirit of state legislation." ***DeRosso***, 200 Wis. 2d at 651-52. If any one of these tests is met, the municipal ordinance is void. *See* ***id.*** at 652.

¶12 The DNR's authority is found in WIS. STAT. chs. 280 and 281. Section 280.11(1) provides:

> The department shall, after a public hearing, prescribe, publish and enforce minimum reasonable standards and rules and regulations for *methods to be pursued in the obtaining of pure drinking water for human consumption* and the establishing of all safeguards deemed necessary in protecting the public health against the hazards of polluted sources of impure water supplies intended or used for human consumption, *including minimum reasonable standards for the construction of well pits*. It shall have *general supervision and control of all methods of obtaining groundwater for human consumption* including sanitary conditions surrounding the same, *the construction or reconstruction of wells* and generally to prescribe, amend, modify or repeal any rule or regulation theretofore prescribed and shall do and perform any act deemed

> necessary for the safeguarding of public health. (Emphasis added.)

¶13 These statutes expressly seek to create a "comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private." WIS. STAT. § 281.11. Further, the legislature explicitly states that the DNR's powers "shall be liberally construed." ***Id.***; *see also* ***Wisconsin's Envtl. Decade, Inc. v. DNR***, 85 Wis. 2d 518, 528-29, 271 N.W.2d 69 (1978). WISCONSIN STAT. § 281.34 specifically deals with "groundwater withdrawals," and provides that any proposed well with a capacity of greater than 100,000 gallons per day—this then includes Well #7—must obtain approval from the DNR before construction can take place. *See* § 281.34(2). The Village twice obtained approval from the DNR to construct Well #7.

¶14 Conversely, the District's authority stems from aforementioned WIS. STAT. § 33.22(1), which authorizes the District to, inter alia, "do any other acts necessary to carry out a program of lake protection and rehabilitation." The District argues that such language is an express grant of "extremely broad powers to protect the quality of public inland lakes," and allows for the District to pass Ordinances setting standards for the construction of wells. Moreover, the District contends that the DNR's mandate only speaks to "how" groundwater may be withdrawn, while the Ordinance regulates "whether and how much" of the groundwater may be taken. In support, the District relies heavily upon a thirty-nine-page memorandum sent within the office of former Wisconsin Attorney General Peggy A. Lautenschlager, which addressed an ordinance passed by the

town of Richfield in 2005.[5] As the memorandum's conclusion endorsed Richfield's ordinance, the District urges us to afford it great weight. However, "while attorney general opinions may be considered persuasive authority, they are not precedent for any court." ***FAS, LLC v. Town of Bass Lake***, 2007 WI 73, ¶18, 301 Wis. 2d 321, 733 N.W.2d 287. Therefore, it is up to us to decide how much persuasive power we will accord this memorandum.

¶15 The circuit court reasoned that, while the legislature had not expressly withdrawn the District's ability to act, the Ordinance logically conflicted with, defeated the purpose of, and violated the spirit of the state's delegation of authority in this sphere to the DNR. In essence, the court determined that the Ordinance violated the second, third, and fourth tests articulated in ***DeRosso***. *See* ***DeRosso***, 200 Wis. 2d at 651-52.

¶16 We agree with the circuit court's conclusion. The legislature has explicitly delegated to the DNR the authority to permit the construction of certain wells, and has directed that such authority be construed liberally. *See* WIS. STAT. §§ 280.11(1), 281.11. The Ordinance creates a loophole whereby a DNR-approved well, like Well #7, is prevented from operating in lieu of another localized permit. In essence, the Ordinance casts the District and the DNR as "locomotives on a collision course," in direct conflict with one another. *See* ***State ex rel. Michalek v. LeGrand***, 77 Wis. 2d 520, 530, 253 N.W.2d 505 (1977).

¶17 We hold that the Ordinance logically conflicts with, defeats the purpose of, and violates the spirit of the legislature's delegation of authority to the

[5] This is not a "formal opinion" from the Attorney General, as the District claims. The first page of the document makes clear that it is a memorandum from the then-assistant attorney general to the then-attorney general. It is not among the attorney general's published opinions.

DNR.[6] The state intended to create a "comprehensive program" for well construction supervision through the DNR. *See* WIS. STAT. § 281.11. Under a liberal construction of its powers, the DNR cannot be limited simply to regulating "how" groundwater is obtained, as the District claims. If a municipal body could make well construction contingent upon its own permit, based on its own standards, a DNR permit would be wholly insignificant, and the legislature's stated goal of creating a uniform scheme to supervise the extraction of groundwater would be eviscerated. Therefore, the Ordinance conflicts with the general laws of the state and is preempted by the state's delegation of authority to the DNR. *See* ***City of Fond du Lac v. Town of Empire***, 273 Wis. 333, 341, 77 N.W.2d 699 (1956). This reflects the view that, ultimately, "the state must maintain pre-eminence in the control of navigable waters in this state." ***DNR v. City of Clintonville***, 53 Wis. 2d 1, 4, 191 N.W.2d 866 (1971) (*citing* ***Muench v. Public Serv. Comm'n***, 261 Wis. 492, 53 N.W.2d 514, 55 N.W.2d 40 (1952)).

¶18 Furthermore, even if given great deference, the assistant attorney general's memorandum does not advance the District's arguments. It not only refers to a factually distinct situation involving a different ordinance, but it reaches a limited conclusion—that ordinances directed at the preservation of groundwater are not *presumptively* invalid. If anything, the memorandum serves to weaken the District's position given its suggestion that "under conflict-preemption analysis, a

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[6] The Village has moved for attorney fees and costs on grounds that this appeal is frivolous pursuant to WIS. STAT. § 809.25(3)(c)2. We deny the motion. To be frivolous, the appeal must be without any basis in law. ***Black v. Metro Title, Inc.***, 2006 WI App 52, ¶15 n.3, 290 Wis. 2d 213, 712 N.W.2d 395. Given the presumption of validity with respect to municipal ordinances and the fact that the legislature has not explicitly withdrawn the District's power to pass the Ordinance, we find that the District's appeal, though unsuccessful, is not frivolous. *See* ***State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee***, 105 Wis. 2d 203, 208, 313 N.W.2d 805 (1982) ("It is a basic maxim of statutory construction that ordinances, like statutes, enjoy a presumption of validity.").

local regulation that would interfere with a DNR groundwater protection measure taken under Chapter 280 would be invalid." That is precisely what has occurred in the instant case.

¶19 State law explicitly delegated the authority over high-capacity well permits to the DNR, and the Ordinance is clearly in direct conflict with that authority. Therefore, we hold that the Ordinance is preempted under the ***DeRosso*** tests and rendered unenforceable. Accordingly, we affirm the circuit court's order granting summary judgment to the Village of East Troy.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.

COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2010

David R. Schanker
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. 2008AP3170 Cir. Ct. No. 2006CV172

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

LAKE BEULAH MANAGEMENT DISTRICT,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

CO-PETITIONER-CO-APPELLANT-CROSS-RESPONDENT,

V.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-RESPONDENT,

VILLAGE OF EAST TROY,

INTERVENING-RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 BROWN, C.J. This decision explores the interplay between the public trust doctrine and the regulation of high capacity wells, especially when citizens or conservancy organizations such as lake management districts perceive that a proposed well may adversely affect nearby navigable waters. We will go through our analysis in some detail, but for purposes of this introductory statement, it is enough to say the following: The statutes identify three types of water wells, differentiated by the quantity of water they consume—wells consuming 100,000 gallons per day (gpd) or less, wells consuming over 2,000,000 gpd and wells in-between. This case has to do with wells in-between. The parties dispute the role that the public trust doctrine plays with regard to the middling wells. The Village of East Troy says that, with certain statutorily defined exceptions, there is no role. Lake Beulah Management District and Lake Beulah Protective and Improvement Association claim that there is always a role such that the DNR is mandated to thoroughly investigate each proposed middling well for possible public trust doctrine implications. The DNR agrees with the District and the Association that the doctrine always plays a role but asserts that the comprehensiveness of the investigation is solely at its discretion. We agree with the DNR, but we also hold that the DNR misused its discretion here. We therefore reverse and remand with directions that the circuit court remand this case to the DNR for further proceedings. We also affirm a side issue and a cross-appeal.

BACKGROUND

¶2 The procedural and factual history of the high capacity well at issue here—Well #7—goes back to 2003 when the Village first applied for and received a now-expired permit from the DNR. We relate this history in detail.

¶3 In 2003, the Village wanted to add a fourth well to its municipal water supply "to eliminate current deficiencies and supplement for future growth." The Village chose a site for the well which was approximately 1400 feet from the shores of Lake Beulah, an 834-acre lake located in Walworth county, and determined that Well #7 would have a 1,440,000 gpd capacity. As part of its application to the DNR, the Village submitted an April 2003 report that its consultant prepared. Based upon analysis of pump test data, the report "estimated that a well producing [1,440,000 gpd] would avoid any serious disruption of groundwater discharge to Lake Beulah."

¶4 The DNR then issued the permit via a letter dated September 4, 2003. The letter stated the DNR's conclusion: "It is not believed that the proposed well will have an adverse effect on any nearby wells owned by another water utility." And it included an excerpt from the Village's consultant which contained the consultant's opinion that Well #7 "would avoid any serious disruption of groundwater discharged to Lake Beulah." The 2003 permit was valid for two years and required the Village to submit a new application if it did not commence construction or installation of the improvements within those two years.

¶5 On October 3, 2003, just short of one month after the DNR issued the 2003 permit, the Lake Beulah Management District petitioned for a contested case before the DNR, alleging that the DNR "failed to comply with ... [its] responsibility to protect navigable waters, groundwater and the environment as a whole" in issuing the permit to the Village. The District wanted the DNR to independently consider the environmental effects before approving the permit. The DNR denied the petition later that month on the basis that it lacked the authority to consider the environmental concerns which the District presented.

¶6 But about three months later, on January 13, 2004, the DNR changed its mind and granted a contested case hearing on the issue of whether the DNR "should have considered any potentially adverse effects to the waters ... when the [DNR] granted a conditional approval of the plans and specifications for proposed Municipal Well No. 7 in the Village of East Troy." The Village responded on March 26, 2004, by filing a motion for summary disposition with the administrative law judge (ALJ). The Village argued that the DNR lacked the statutory authority to consider the environmental effects because Well #7 is not located in a place where the Wisconsin statutes specifically mandate environmental review prior to permit approval. At this point in the procedural history, even though the DNR had reversed course and granted a contested case hearing, it still held the same view as the Village on the scope of the DNR's authority over wells. The Lake Beulah Protective and Improvement Association then successfully intervened and has been allied with the District ever since. We will hereafter refer to the two entities as one—the conservancies.

¶7 On June 11, 2004, the ALJ presiding over the contested case granted the Village's motion and agreed with the Village that "because the statute requires that the [DNR] consider certain impacts ... the statute should be construed to exclude consideration of other factors." The ALJ also commented that even if what the conservancies contended was true (that in some cases the DNR may have a "basis other than the express statutory standards for reconsidering the preliminary approval in a contested case proceeding"), Well #7 was not such a case because the conservancies failed to present any "scientific evidence" that the well would have an adverse effect.

¶8 On July 16, 2004, the conservancies filed a petition for judicial review of the 2003 permit. During the briefing for that petition, the DNR reversed

its prior position and concluded that "it has authority under certain circumstances to consider the Public Trust Doctrine in its analysis of high capacity well approvals" and that it can "condition or limit a high capacity well approval where operation of the well has negative impacts on public rights in navigable waters."[1] The DNR also stated, however, that it had no duty to consider environmental impacts in the instant matter because no one presented it with any evidence that the "operation of the Village's high capacity well approval would adversely impact Lake Beulah." On June 24, 2005, the circuit court, the Honorable James L. Carlson presiding, dismissed the petition and affirmed the ALJ's decision and reasoning.

¶9 On August 4, 2005, the conservancies moved for reconsideration and filed the affidavit of Robert Nauta, a Wisconsin licensed geologist. The conservancies also served the motion and affidavit on the attorneys for the DNR and the Village. The affidavit stated, inter alia, that Nauta had reviewed the Village consultant's 2003 report and other reports concerning the Lake Beulah area, and had installed his own test wells and conducted surface water studies relating to the hydrology of Lake Beulah. Though he had a limited amount of time to review and conduct those studies, he concluded that the Village's consultant

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[1] The public trust doctrine is rooted in our state constitution and provides that the state holds title to navigable waters in trust for public purposes. WISCONSIN CONST. art. IX, § 1, states in pertinent part:

> [T]he river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

reached erroneous findings about the water table and the aquifer's condition and the consultant's tests were "inadequately designed and improperly conducted." He also opined that the consultant's brief test did confirm a lowering of groundwater and wetland water levels, and thus, given the specific hydrology of Lake Beulah and its surrounding environs, the tests results "clearly demonstrate potential for adverse impacts to Lake Beulah." He therefore reasoned that Well #7 "would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah."

¶10 The circuit court denied the conservancies' motion for reconsideration. The conservancies then appealed to this court. We dismissed the appeal in an order dated June 28, 2006, because the 2003 permit had expired and, as we explain next, the DNR had issued another permit in 2005 for Well #7. Therefore, the appeal was moot. *See* ***Lake Beulah Lake Mgmt. Dist. v. DNR***, Nos. 2005AP2230 & 2005AP2231, unpublished slip op. (WI App June 28, 2006).

¶11 The record shows that, while litigation over the 2003 permit ensued, the Village applied to "extend" its 2003 permit for two additional years because it had not yet started building and the 2003 permit would expire on September 4, 2005. With its application, the Village submitted the $500 application fee and information demonstrating that the physical circumstances were unchanged from the 2003 application. On September 6, 2005, the DNR granted the Village a two-year "extension" of the 2003 permit, concluding that Well #7 complied with the

groundwater protection law.[2] The DNR mailed to the conservancies a copy of the 2005 permit (still addressed to the Village), which included the thirty-day appeal deadline.

¶12 On March 3, 2006, nearly six months after the 2005 permit was issued and while the appeal concerning the 2003 permit was still pending, the conservancies filed a petition for review of the 2005 permit. The petition restated many of the concerns it expressed in the litigation over the 2003 permit, namely that Well #7 would adversely affect the quantity of water available to maintain the water level of Lake Beulah and that the DNR failed to consider Well #7's effect on Lake Beulah. The conservancies requested that the circuit court "remand[] the matter to the DNR for reconsideration of the [2005] approval to include consideration of its Public Trust Doctrine obligations to protect the navigable waters of Lake Beulah and its connecti[ng] waterways."

¶13 On September 23, 2008, the circuit court, the Honorable Robert J. Kennedy presiding, denied the petition and held that (1) the 2005 permit was a "new" permit (not an extension); (2) the DNR had a right to consider the public trust doctrine to determine whether a high capacity well, regardless of its size, will negatively impact the waters of the State; (3) if the DNR had a "solid, affirmative

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[2] After the 2003 approval but before the Village requested the 2005 approval, the Wisconsin legislature enacted a new groundwater protection law. *See* 2003 Wis. Act 310, §§ 5-12. The new law became effective on May 7, 2004, and mandated that the DNR conduct environmental review of additional wells near specified water resources. ***Id.***; *see* WIS. STAT. § 281.34(4) (2007-08). The Village's proposed well was not located such that the new law specifically included it in the category of wells for which it mandated environmental review. We will explain the relevant details of the new law in our discussion.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

indication" that waters of the state would be "significantly harmed" or "adverse[ly] affect[ed]," then the DNR should consider the information and possibly conduct further studies; and (4) there was "an absolute dearth of any proof," so the DNR did not fail its obligation to protect the waters of the state. The circuit court also assumed, without deciding, that the conservancies' petition for judicial review was timely. The conservancies then brought this appeal.

DISCUSSION

¶14 We start our discussion by briefly addressing a side issue.[3] The conservancies argue that the 2005 permit was a "nullity" because the DNR: (1) had nothing to extend since the DNR's approval came two days after the 2003 permit expired and (2) could not grant a "new" permit since the Village applied for an *extension* of the 2003 permit, not a *new* permit. But the facts are to the

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[3] There is also an issue brought by the Village via a cross-appeal. The Village argues that the conservancies had only thirty days to file their petition for review and yet they waited nearly six months, making the conservancies' petition untimely. But in ***Habermehl Electric, Inc. v. DOT***, 2003 WI App 39, ¶18, 260 Wis. 2d 466, 659 N.W.2d 463, we held that the thirty-day rule found in WIS. STAT. § 227.53(1)(a)2. does not apply to noncontested cases and, instead, the six-month "default limitation" applies. The petition for review on appeal is not based on a decision in a contested case. So the six-month time limit applies. The petition was timely.

In so concluding, we decline the Village's request to distinguish or criticize ***Habermehl Electric*** and the two other cases reaching the same conclusion, ***Collins v. Policano***, 231 Wis. 2d 420, 605 N.W.2d 260 (Ct. App. 1999), and ***Hedrich v. Board of Regents of University of Wisconsin System***, 2001 WI App 228, 248 Wis. 2d 204, 635 N.W.2d 650. Unless or until ***Habermehl*** is reversed or modified by our supreme court, it remains the law and we will follow it. *See* ***City of Sheboygan v. Nytsch***, 2008 WI 64, ¶5, 310 Wis. 2d 337, 750 N.W.2d 475 ("It is well settled that the court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals."). Further, no supreme court case, including ***Waste Management of Wisconsin, Inc. v. DNR***, 149 Wis. 2d 817, 440 N.W.2d 337 (1989), reaches a conflicting conclusion about the time limit in WIS. STAT. § 227.53(1)(a)2. *See* ***Cuene v. Hilliard***, 2008 WI App 85, ¶15, 312 Wis. 2d 506, 754 N.W.2d 509 ("To the extent that a supreme court holding conflicts with a court of appeals holding, we follow the supreme court's pronouncement.").

contrary. In 2005 the DNR received an application from the Village for a new approval of Well #7. The application included information demonstrating that the physical circumstances were unchanged from the 2003 application. And the Village paid an application fee of $500—the same as it would if applying for a new permit. *See* WIS. STAT. § 281.34(2). Regardless of how the Village labeled its application, and regardless of how the DNR labeled its approval, the fact is that the DNR received the application with the required fee for a "new" permit, determined that the circumstances remained unchanged since the original 2003 approval and that the proposed well complied with the new groundwater law promulgated between the 2003 permit and the 2005 permit, and based on that determination, granted a new permit. Inasmuch as the DNR had a new fee and had to review the application in consort with new legislation, the DNR issued a new permit and its conduct comported with it being a new permit. The 2005 permit is not a nullity.

¶15 With that side issue disposed of, we can now concentrate on setting the table to discuss the major issues at hand. Central to the DNR's grant of the 2005 permit was its conclusion that the facts had not changed since the 2003 permit.[4] But that is not altogether true. The record shows that, before the DNR granted the 2005 permit, its attorney of record in the 2003 permit proceedings had

[4] The Village sent the DNR a letter from its engineer stating that the conditions were unchanged. And the DNR accepted that in its review for compliance with the groundwater protection act that came into effect after it issued the 2003 permit.

new information: the affidavit from the conservancies' expert, Robert Nauta.[5] During oral argument, we asked the DNR's attorney of record in this case, who was also the same attorney of record in the 2003 case, whether the Nauta affidavit had come to the attention of the DNR permit decision makers. She replied that it had not. We asked whether she thought she had a duty to convey this information to the decision makers and she said she did not. She contended that it was the conservancies' obligation to bring this affidavit to the attention of the permit decision makers and that the conservancies had failed to do so. So, in her view, the DNR did not have any new information and the DNR therefore was not specifically alerted to a possible public trust doctrine problem such that it should have investigated the permit claim more fully before issuing it.

¶16 The facts and circumstances provided in our rendition of the background, along with the information gained by way of oral argument, raise several questions: Does the DNR have a duty to investigate public trust doctrine concerns with regard to middling wells? If so, what is that duty? If there is a duty, does that duty arise on a case-by-case basis or is it present in every case involving a high capacity well? If the duty exists only case by case, how is this

[5] During oral argument, the conservancies also pointed to three other pieces of information they claim the DNR had before the 2005 approval but did not consider. These include: (1) an April 2003 report from the Village's engineering firm, which we referenced early during our recitation of the facts surrounding the 2003 approval; (2) a June 3, 2003 e-mail from the United States Geological Services' Daniel Feinstein stating that his interpretation of the Village engineer's 2003 report was that the test well had an effect of drawing down the water levels; and (3) a June 28, 2003 letter from Philip Evenson of the Southeastern Wisconsin Regional Planning Commission, which states that the commission staff agree with the District's concern regarding the potential for negative impacts on the wetlands and Lake Beulah itself from the proposed well, but that the current information is insufficient to estimate whether the negative impacts would be significant. It is unclear whether the DNR had this information, however, with the exception of the 2003 report from the Village's expert. So when we refer to the Nauta affidavit, we refer to the information that the DNR had but did not consider.

duty triggered and what information is necessary? What process must citizens and conservancy groups employ to bring the triggering information to the DNR's attention? Regardless of the normal process, since this information came to the DNR attorney's attention in the 2003 case, does the attorney-client imputation rule apply such that if an attorney for the DNR had new facts in a legal file, the DNR should be held to have had such knowledge in its agency record when the agency record concerns the same underlying matter as the legal file? Those are the issues we now address.

High Capacity Wells and the Duty to Consider the Public Trust Doctrine

¶17 The Village claims that the DNR is precluded by statute from considering the public trust implications of Well #7. In other words, the Village claims that the DNR has no duty. This requires us to examine the relevant statutes in detail. There are four statutes at issue here: two statutes provide a broad, general grant of authority to the DNR—WIS. STAT. §§ 281.11 and 281.12—and two statutes create specific rules for high capacity wells—WIS. STAT. §§ 281.34 and 281.35.[6] Since we are construing statutes involving the scope of an agency's power, we give no deference to the agency's opinion. ***Grafft v. DNR***, 2000 WI App 187, ¶4, 238 Wis. 2d 750, 618 N.W.2d 897. Nor do we defer to the circuit court. *See* ***Moonlight v. Boyce***, 125 Wis. 2d 298, 303, 372 N.W.2d 479 (Ct. App. 1985). Instead, we interpret these statutes de novo. ***Grafft***, 238 Wis. 2d 750, ¶4.

[6] These are the statutes that the legislature created or updated in 2003 Wis. Act 310, §§ 5-12, which comprise the new groundwater protection law that became effective in 2004.

¶18 The general statutes explain, inter alia, that the DNR "shall have general supervision and control over the waters of the state"[7] and "shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of [WIS. STAT. ch. 281]." WIS. STAT. § 281.12(1). The policy and purpose section states that the DNR

> *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....* The purpose of this subchapter is to *grant necessary powers* and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, this subchapter ... shall be *liberally construed in favor of the policy objectives set forth* in this subchapter.

WIS. STAT. § 281.11 (emphasis added).

¶19 We interpret these general statutes as expressly delegating regulatory authority to the DNR necessary to fulfill its mandatory duty "to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private." *See* ***id***; *see also* ***Karow v. Milwaukee County Civil Serv. Comm'n***, 82 Wis. 2d 565, 570, 263 N.W.2d 214 (1978) (the word "shall" is

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[7] "Waters of the state" means

> those portions of Lake Michigan and Lake Superior within the boundaries of this state, all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems *and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction.*

WIS. STAT. § 281.01(18) (emphasis added).

generally construed as imposing a mandatory duty). That these general statutes do not mention wells in particular does not mean that the statutes do not grant the DNR the authority to control or regulate wells by considering environmental factors relevant to protecting, maintaining and improving waters of the state. After all, wells have everything to do with waters of the state—they withdraw groundwater, one type of water which comprises the definition of waters of the state—therefore, the DNR necessarily has authority over them. *See* WIS. STAT. § 281.01(18) (defining waters of the state).

¶20 But we must construe statutes in the context in which they are used, considering surrounding and closely related statutes. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. The Village argues that the specific statutes relating to wells create a comprehensive statutory framework within which the DNR can protect waters of the state, and thus, the Village contends that WIS. STAT. §§ 281.11 and 281.12 are general grants of authority which are superseded by specific statutes regulating wells. The essence of the Village's assertions is that the specific statutes, WIS. STAT. §§ 281.34 and 281.35, represent the legislature's policy decision that the protections provided in §§ 281.34 and 281.35 are sufficient to satisfy the DNR's duties to protect the waters of the state, and so any authority the DNR might previously have had from §§ 281.11 and 281.12 to regulate wells was overridden by the legislature's enactment of §§ 281.34 and 281.35. We now consider §§ 281.34 and 281.35.

¶21 These specific statutes classify wells into three categories: (1) wells with a capacity of less than or equal to 100,000 gpd, (2) wells with a capacity of more than 100,000 gpd and less than or equal to 2,000,000 gpd in any thirty-day period, and (3) wells with a capacity of more than 2,000,000 gpd in any thirty-day

period. *See* WIS. STAT. § 281.34(1)(b) (defining a high capacity well as one with a capacity of more than 100,000 gpd); WIS. STAT. § 281.35(4)(b) (providing a second threshold level at more than 2,000,000 gpd in any thirty-day period and, therefore, creating three categories of wells).

¶22 WISCONSIN STAT. §§ 281.34 and 281.35 also provide the DNR with guidance about when environmental review[8] is required for certain wells within the second category and all wells within the third category. In the second category, which we have referred to above as the "middling wells," § 281.34(4) requires that the DNR conduct environmental review in only three instances. Those instances are if the proposed well will: (1) be located in a groundwater protection area, (2) result in a water loss of more than ninety-five percent of the amount of water withdrawn, or (3) potentially have a significant environmental impact on a spring. ***Id.*** For the third category, § 281.35(4)(b) and (5)(d) require the DNR to determine that the proposed well will not adversely affect public water rights in navigable waters and will not conflict with any applicable plan for future uses of the waters of the state.

¶23 For the remaining wells, WIS. STAT. §§ 281.34 and 281.35 are silent as to whether the DNR may review or consider the well's potential environmental effects. The only guidance given to the DNR is the mandate in § 281.34(2) that "[a]n owner shall apply to the department for approval before construction" of a

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[8] WISCONSIN STAT. §§ 281.34 and 281.35 require the DNR to use the environmental review process found in the Wisconsin Environmental Policy Act (WEPA), WIS. STAT. § 1.11. *See also* WIS. ADMIN. CODE ch. NR 150 (the DNR's procedures for implementing WEPA). These statutes also authorize the DNR to require an applicant for approval of a high capacity well to submit an environmental impact report. Secs. 281.34(5) and 281.35(4)(b).

well over 100,000 gpd (a high capacity well). The statute gives no specifics on what the application entails (except for a $500 fee) or what standards, if any, the DNR may or must use when deciding whether to approve or deny permits for wells between 100,000 and 2,000,000 gpd, such as the well here.[9] *See* ***id.***

¶24 As we alluded to earlier, the Village interprets this silence in the presence of a comprehensive scheme to regulate high capacity wells as tacitly revoking any other authority the DNR might have over other wells, including its general authority to protect waters of the state. Well #7 is one of those "other wells." The Village's position goes so far as to argue that WIS. STAT. §§ 281.34 and 281.35 limit the DNR's authority to consider *anything* not specifically listed in that scheme before approving a high capacity well permit. It interprets the statutes to prohibit the DNR from enacting any regulations that would constrict wells, including WIS. ADMIN. CODE ch. NR 812. As we interpret the Village's argument, if taken to its logical conclusion, the DNR would be prevented from, for example, requiring permit seekers to use certain construction methods when building a well, *see, e.g.*, WIS. ADMIN. CODE § NR 812.11, and preventing permit seekers from placing waste in a well, *see* WIS. ADMIN. CODE § NR 812.05.

¶25 The public trust doctrine is such an important and integral part of this state's constitution that, before we can accept the Village's argument, there should be some evidence that the legislature intended by these statutes to render nugatory the more general statutes bestowing the DNR with the general duty to

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[9] We also note that the statutes provide no guidance on whether the DNR has the authority to regulate wells under 100,000 gpd when necessary to protect, maintain or improve waters of the state. Though that exact issue is not before us, the conclusion we reach today is relevant to that issue.

manage the public trust doctrine. *See* ***Columbia Hosp. Ass'n v. City of Milwaukee***, 35 Wis. 2d 660, 668-69, 151 N.W.2d 750 (1967). Outside of what the Village considers to be the plain intent of the statutes, the only evidence of legislative intent is that, *in 2007*, the legislature rejected an advisory committee's recommendation to amend WIS. STAT. § 281.34 by adding to the list of enumerated circumstances always requiring the DNR to conduct a formal environmental review.[10] The immediate response to the Village's argument is that the legislature's actions after this permit was issued do not affect our analysis of the statutes and legislative history that existed at the time. *See* ***Schaul v. Kordell***, 2009 WI App 135, ¶23 n.12, 321 Wis. 2d 105, 773 N.W.2d 454. And we have not found any legislative history suggesting that 2003 Wis. Act 310 was meant to *revoke* the DNR's general authority. But the more measured response is that the rejection of the advisory committee's suggestion proves nothing. The action of rejecting the idea of requiring formal environmental review in every instance gives us no guidance as to whether the DNR could investigate a middling well at its discretion. We conclude that there is no evidence that the legislature intended to revoke the general grant of authority to the DNR regarding these other wells.

¶26 Moreover, we underscore the legislature's *explicit* command that the DNR's authority be "liberally construed" in favor of protecting, maintaining and improving waters of the state. WIS. STAT. § 281.11; *see also* ***Wisconsin's Envtl. Decade, Inc. v. DNR***, 85 Wis. 2d 518, 528-29, 271 N.W.2d 69 (1978)

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[10] *See* Wisconsin Groundwater Advisory Committee, *2007 Report to the Legislature*, § 2.2.4, available at http://dnr.wi.gov/org/water/dwg/gac/GACFinalReport1207.pdf (last visited June 1, 2010).

(interpreting the predecessor of § 281.11[11] and concluding that "in keeping with the broad authority conferred on the DNR and explicit legislative intent," the DNR's statutory authority should be broadly construed).

¶27 We therefore conclude that, just because the legislature was silent about the DNR's role with regard to some of the middling wells, this does not mean that the legislature meant to abrogate the DNR's authority to intercede where the public trust doctrine is affected. We are even more confident in our conclusion when we consider that the DNR must grant a permit for construction of all middling wells. Why would an agency have to grant a permit if it did not have any reviewing authority over a well? The permit process has to be, as a matter of common sense, more than a mechanical, rubber-stamp transaction. It must mean that the DNR has authority to become involved whenever it sees a public trust doctrine problem. In fact, the Village's own well application included its engineer's well pump test data and conclusion that the well "would avoid any serious disruption to the groundwater discharge at Lake Beulah." We question why the Village thought it necessary to provide this data if it did not think the DNR could consider the public trust doctrine.

¶28 We are convinced that we have harmonized the statutes to avoid conflict and ensured that no statute is surplusage. *See* ***Jones v. State***, 226 Wis. 2d 565, 575-76, 594 N.W.2d 738 (1999) (holding that specific statutes control general ones only when there is truly a conflict and courts are to harmonize statutes to avoid conflicts when a reasonable construction of the statutes permits that). We

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[11] The legislature renumbered WIS. STAT. § 144.025 (1975-76) to WIS. STAT. § 281.11 in 1995 Wis. Act 227.

agree with the conservancies and the DNR and hold that the legislature's mandate that the DNR complete a formal environmental review for only certain wells does not prohibit or rescind the DNR's authority to review other middling wells under WIS. STAT. §§ 281.11 and 281.12. The DNR's mission must be to protect waters of the state from potential threats caused by unsustainable levels of groundwater being withdrawn by a well, whatever type of well that may be.[12]

Whether the DNR's Duty is Absolute

¶29 We have rejected the Village's contention that the DNR has no authority to act in this case. We likewise now reject the conservancies' completely opposite contention that the DNR was *required* to conduct a full and thorough environmental review. As our foregoing discussion makes plain, the fact that the DNR had the authority to consider environmental factors with regard to Well #7 does not mean that it was required to do so. We disagree with the conservancies' contention that the DNR *always* has a sua sponte *affirmative obligation* to consider a well's effect on the waters of the state regardless of whether the DNR is presented with any information suggesting that the well might have a negative effect. We agree with the DNR that this would present it with an impossible and costly burden were we to adopt the conservancies' reasoning. We

[12] We can envision, however, circumstances where the DNR could exercise its authority under WIS. STAT. §§ 281.11 and 281.12 in a way that would conflict with the high capacity well statutes. For example, if the DNR were to ban all wells or require the same kind of environmental review for all wells, that action would seem to conflict with the high capacity well statutes for the same reason that we held the DNR's ban of sulfide mineral mining conflicted with the Mining Act. *See* ***Rusk County Citizen Action Group, Inc. v. DNR***, 203 Wis. 2d 1, 552 N.W.2d 110 (Ct. App. 1996). But, for the reasons already stated, we conclude that there is no conflict between the statutes in interpreting the general statutes to provide the DNR the flexibility to consider the environmental effect of a well on waters of the state when deciding whether to approve or deny a well permit.

further agree with the DNR that its public trust duty arises only when it has evidence suggesting that waters of the state may be affected by a well. If the law were that the DNR always has a duty to conduct environmental review for every well application, even if it had no information that the waters of this state would possibly be adversely affected by a well, then the legislature would have had little reason to have enacted the specific high capacity well statutes. Such a duty would render WIS. STAT. §§ 281.34 and 281.35 largely surplusage, and we are to avoid interpreting statutes in such a way. *See* ***Randy A.J. v. Norma I.J.***, 2004 WI 41, ¶22, 270 Wis. 2d 384, 677 N.W.2d 630.

¶30 The conservancies contend that, in spite of what the statutes say about high capacity wells, there is common law authority mandating that the DNR, as the trustee of our state's waterways, has an absolute sua sponte duty to investigate every high capacity well proposal to see whether it will harm waters of the state. This is incorrect. The DNR is not an independent arm or a fourth branch of government; it is a legislatively created agency. ***Kegonsa Joint Sanitary Dist. v. City of Stoughton***, 87 Wis. 2d 131, 143-44, 274 N.W.2d 598 (1979). As such, the DNR has only those powers which are expressly conferred by or which are necessarily implied from the *statutes* under which it operates. *See* ***Oneida County v. Converse***, 180 Wis. 2d 120, 125, 508 N.W.2d 416 (1993). The public trust doctrine found in our state constitution does not have any self-executing language authorizing the DNR to do anything—the statutes do that. So the authority and duty that the conservancies claim the DNR has ("to investigate and determine whether the operation of [Well # 7] will have a significant negative

20:1.4(1). One of the benefits of having people with different expertise in an agency is that they can *communicate* and *pool information* and thus be more efficient and responsive to the general public for whom they ultimately work. The DNR provides no reason why the decision makers did not have that Nauta affidavit in the formal "agency record" when its attorney had it in a legal file on the same underlying matter.[16]

¶39 Since we have concluded that the DNR had a duty to consider the information from a scientist that the proposed well "would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah," we reverse and remand to the circuit court with directions to, in turn, remand this case to the DNR so that it may consider the Nauta affidavit and any other information the agency had pertinent to Well #7 before it issued the 2005 approval.

¶40 No costs to either party on appeal.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Recommended for publication in the official reports.

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[16] As a practical matter, the situation whereby the DNR's own attorney represents the agency in a case such as this is unique. Normally, the Department of Justice has the duty to represent the DNR pursuant to WIS. STAT. § 165.25. However, the DOJ refused to represent the DNR in the instant case because it disagreed with the DNR's grant of both the 2003 and 2005 permits. Thus, the agency's own attorney was the attorney of record for the DNR. The attorney-client discussion here, therefore, may be limited to the facts of this case. This is not to say that it cannot be applied in future cases. It is only to say that courts will have to look closely at the facts and circumstances in each case.

the client; the fact that the attorney has not actually communicated his or her knowledge to the client is immaterial. 7 AM. JUR. 2D *Attorneys at Law* § 153 (2010); ***Wauwatosa Realty Co.***, 6 Wis. 2d at 236-37.

¶37 For the purposes of the imputation rule, the DNR attorney's clients were the DNR employees making the permit decisions. The attorney was an "in-house" attorney employed by the state and assigned to handle legal matters for the litigation over the 2003 and 2005 Well #7 permits. At oral argument, the attorney stated that everything in the 2003 application file would also be in the 2005 file; she had to have known that the 2003 case was linked to the 2005 permit decision and that any information submitted during litigation over the 2003 permit was relevant to the decision makers' consideration of the 2005 permit application. We thus rule that anything in the DNR's attorney file for the litigation concerning Well #7 is imputed to the DNR employees making the decisions regarding the permit for Well #7. It follows, therefore, that the attorney file is part of the agency record for the 2005 permit approval, regardless of whether the DNR's attorney actually gave the Nauta affidavit to the decision makers, because it concerns the same parties and the same precise contested issue.

¶38 And frankly, we are a bit perplexed as to why the DNR attorney did not show the affidavit to the decision makers when she presumably consulted with them after the conservancies filed their motion for reconsideration. The conservancies gave *her* the affidavit a mere day after the Village applied to *her* to extend its permit. And the affidavit directly contradicted the previous evidence before the DNR about Well #7's environmental impacts. It should have occurred to her that the Nauta affidavit was relevant to the Village's request and that the affidavit was a factual change requiring the consideration of the DNR's decision makers. Attorneys are supposed to share information with their clients. *See* SCR

How the Attorney-Client Relationship Applies to this Case

¶35 But all things are not equal here. The facts show that the DNR did have the conservancies' information, albeit not presented in the way described above. The conservancies presented the Nauta affidavit to the DNR's attorney on August 4, 2005, as part of the litigation on the 2003 permit. This was little more than one month before the DNR issued the 2005 approval. The affidavit directly challenged the Village consultant's conclusion and the DNR's resultant decision that Well #7 would not seriously disrupt groundwater flow to Lake Beulah. However, the DNR argues that since the evidence was presented to its attorney during litigation on a prior permit and was not provided to its decision makers regarding the instant permit, the Nauta affidavit was not part of the "agency record" and therefore did not require its consideration. Thus, even though the attorney represented the decision makers on both the 2003 and 2005 permit challenges and therefore knew there was an affidavit calling into question the efficacy of Well #7, the attorney contends that the decision makers did not have the information since it was not in the right file. Because the decision makers did not consider the affidavit, they were able to conclude when issuing the 2005 permit that there had been no change since 2003.

¶36 As a general rule, however, the knowledge of an attorney acquired while acting within the scope of the client's authority is imputed to the client. *See* ***Suburban Motors of Grafton, Inc. v. Forester***, 134 Wis. 2d 183, 192-93, 396 N.W.2d 351 (Ct. App. 1986). "In the context of an enduring attorney-client relationship, knowledge acquired by the attorney is imputed to the client as a matter of law." 7 AM. JUR. 2D *Attorneys at Law* § 153 (2010) (footnote omitted); *see also* ***Wauwatosa Realty Co. v. Bishop***, 6 Wis. 2d 230, 236, 94 N.W.2d 562 (1959). The presumption is that the attorney will communicate the information to

hearing examiner may then decide whether there is sufficient evidence of a potential adverse impact and, if so, may issue specific orders to the DNR.

¶33 The DNR is further of the view that, if the permit is not challenged under any of the three foregoing options, then a concerned citizen's only remaining option, if he or she has information that a well is adversely impacting the public trust, is to bring a nuisance action against the permit holder under ***State v. Deetz***, 66 Wis. 2d 1, 13, 224 N.W.2d 407 (1974). *See also* WIS. STAT. § 30.294. Or, once the permit has been granted, if the agency itself decides that the well is adversely affecting waters of the state, then it can bring a WIS. STAT. § 30.03 action to alter the permit approval.

¶34 We generally agree with the DNR and hold that these are the procedures commonly used to give information to the DNR decision makers and to challenge the ultimate decision. We also agree with the DNR that the conservancies did not use these procedures to submit their information. The conservancies did not present information *to* the permit decision makers that would have flagged Well #7 as possibly affecting a navigable waterway, either before issuance of the 2005 permit, at a contested case hearing on the 2005 permit, or by using WIS. STAT. § 227.56 to supplement the record during the 2005 petition for judicial review, as we described in the footnote. So, all things being equal, the conservancies would be out of court.

How Citizens Can Present Evidence to the DNR Regarding the Environmental Impact of a Well

¶32 The DNR posits that concerned citizens who want to affect the decisions of DNR permit decision makers have three options. Two options allow citizens to submit information in a way that requires consideration of the new information: (1) presenting the information to the permit decision makers while the permit process is ongoing or (2) if the permit has already been granted, requesting a contested case hearing and, at this hearing, present the information. The third option is to petition for judicial review after the DNR has issued the permit. However, under this option, the concerned citizen may not be able to submit new information.[14] The DNR suggests that a contested case is the proper way to present information after it has issued a permit because a contested case hearing provides an opportunity for every party, including concerned citizens, to rebut or offer countervailing evidence.[15] At the conclusion of the testimony, the

[14] A concerned citizen may be able to use WIS. STAT. § 227.56 during a petition for judicial review to present evidence that the court would use to determine whether to remand to the agency for further fact-finding. *See* ***State Public Intervenor v. DNR***, 171 Wis. 2d 243, 245-46, 490 N.W.2d 770 (Ct. App. 1992). Under this statute, a citizen can apply "to the circuit court for leave to present additional evidence on the issues in the case," and the circuit court has the discretion to admit the additional evidence upon such terms as it may deem proper if the person presenting the evidence shows to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceedings before the agency. Sec. 227.56(1). The conservancies, however, did not use § 227.56 to get their information to the DNR.

[15] The DNR did not explain or cite any authority at oral argument about how exactly concerned citizens would go about submitting information at a contested case hearing which was not before the permit decision makers at the time the permit decision was made. We note that WIS. STAT. § 227.45 discusses evidence in contested cases and mandates that the "agency or hearing examiner shall admit all testimony having reasonable probative value" and is specifically required to exclude only evidence that is "immaterial, irrelevant or unduly repetitious testimony" or evidence that is inadmissible under a statute relating to HIV testing. ***Rutherford v. LIRC***, 2008 WI App 66, ¶¶21-22, 309 Wis. 2d 498, 752 N.W.2d 897. WISCONSIN STAT. § 227.44(3) also mandates that all parties shall be afforded the opportunity "to present evidence and to rebut or offer countervailing evidence."

impact on Lake Beulah") must come from state statutes.[13] We conclude that there is no requirement mandating the DNR to do a full examination of every well to see if the public trust doctrine is affected.

How this Duty is Triggered

¶31 The DNR asserts that the type of evidence necessary to trigger the DNR's duty to investigate public trust concerns with regard to wells like Well #7 is what the ALJ presiding over the June 2004 contested case termed as "scientific evidence" of a likely adverse impact to Lake Beulah from the Village's well. We do not have the expertise to say exactly what kind of evidence will prompt the DNR to further investigate a well's adverse environmental impacts or to condition or deny a well permit. There is no standard set by statute or case law. But we do have case law which recognizes that the DNR has particular expertise when it comes to water quality and management issues. *See* ***Wisconsin's Envtl. Decade, Inc.***, 85 Wis. 2d at 529-30. The DNR is the central unit of state government in charge of water quality and management matters. ***Id.*** We will leave it to the DNR to determine the type and quantum that it deems enough to investigate. But, certainly, "scientific evidence" suggesting an adverse affect to waters of the state should be enough to warrant further, independent investigation.

[13] We are not suggesting that the DNR can ignore common law interpreting the agency's authority, nor that the public trust doctrine has no bearing on the interpretation of its statutory authority.

ORDINANCE NO. 2006-03

AN ORDINANCE PROHIBITING THE NET TRANSFER OF GROUNDWATER AND SURFACE WATER FROM LAKE DISTRICT HYDROLOGIC BASIN

WHEREAS, Lake Beulah Management District (the "District") is a municipal entity existing pursuant to Wisconsin Statutes, Section 33.235 with powers of a town sanitary district as provided therein, and the powers of an inland lake protection and rehabilitation district as provided in Wisconsin Statutes, Section 33.22; and

WHEREAS, the District exists for the purposes of undertaking a program of lake protection and rehabilitation and promoting the public health, comfort, convenience and welfare of the District, and also serves as a local unit of government as described in Wisconsin Statutes, Section 281.11 to further state policy to mobilize resources to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private, and accomplish the greatest result for the people of the state as a whole; and

WHEREAS, the District finds it necessary to protect the entire local water resource, both groundwater and surface water, both water quality and water quantity, to achieve its purposes of protecting and rehabilitating Lake Beulah and promoting the public health, comfort, convenience, and welfare of the District; and

WHEREAS, the District finds that waters vital to the existence, well being and quality of Lake Beulah are limited to those that fall naturally to the land surface within the Lake Beulah Surface Water Drainage Basin or flow into Lake Beulah from the Lake Beulah Groundwater Basin; and

WHEREAS, the District finds that Lake Beulah is a complex ecosystem, in which the biological and physical components and constituents are interrelated such that whatever effects one will affect the others, the sustainability of which depends on adequate supplies of groundwater and surface water; and

WHEREAS, the District finds that it is harmful to Lake Beulah and contrary to the purposes of the District to allow the surface or groundwater within the Lake Beulah drainage basin or groundwater basin to be despoiled, depleted or diverted or transferred out of said regions; and

WHEREAS, the District seeks to assure that Lake Beulah is protected, that the public health, comfort, convenience and welfare of the District are promoted, and that until such time that the District installs a single enterprise water distribution and sewerage system, the electors of the District will be able to produce from their own lands adequate supplies of clean groundwater for drinking, while still utilizing customary private septic systems for disposal of septic waste; and

WHEREAS, the District finds it necessary to encourage conservation of groundwater and surface water resources within the District and protect those resources from despoliation and over consumption in order to protect Lake Beulah and promote the public health, comfort, convenience or welfare of the District; and

WHEREAS, the District finds that the state legislature has empowered the District to undertake any act necessary to carryout a program of lake protection and rehabilitation and undertake specific and general acts for the promotion of public health, comfort, convenience or welfare of the District; and

WHEREAS, the District finds that it is consistent with its legislatively prescribed duties to prohibit the net transfer of waters out of the region upon which Lake Beulah, this District and its electors depend for a source of water necessary to maintain and improve the quality of Lake Beulah and provide potable supply to the electors.

NOW THEREFORE, the Commissioners of the Lake Beulah Management District do ordain as follows:

Section 1. DEFINTIONS.

A. **Lake Beulah Hydrologic Basin.** The term "Lake Beulah Hydrologic Basin" or "Hydrologic Basin" shall mean: the geographic region or territory whose boundaries include all of the Lake Beulah Surface Water Drainage Basin and all of the Lake Beulah Groundwater Basin.

B. **Lake Beulah Surface Water Drainage Basin.** The term "Lake Beulah Surface Water Drainage Basin" or "Drainage Basin" shall mean: The geographic region or territory whose boundaries include all those lands and waters on which water deposited at the ground surface would, if prevented from infiltrating into the soil, flow by gravity to a point where it would enter into Lake Beulah.

C. **Lake Beulah Groundwater Basin.** The term "Lake Beulah Groundwater Basin" or "Groundwater Basin" shall mean: The three dimensional region whose boundaries encompass that portion of the aquifer known variously as the shallow, unconsolidated, or sand and gravel aquifer, within which the groundwater, if it were unaffected by pumping or other artificial inducement, would flow into, beneath or within the Lake Beulah Surface Water Drainage Basin.

D. **De Minimis.** The term "de minimis" as applied to use. diversion or transfer of water shall mean: Any use, diversion or transfer ("UDT") that is of such character or quantity that its effect upon Lake Beulah or the Lake Beulah ecosystem, when considered singly or in the aggregate along with all other UDTs in or from the Hydrologic Basin, including UTDs declared exempt under this Ordinance, cannot to a reasonable degree of

scientific certainty be found to cause, result in or bring about an adverse effect or impact on Lake Beulah, the Lake Beulah ecosystem, the shallow, unconsolidated aquifer within the Groundwater Basin, potable water supplies within the District or the public health, comfort, convenience or welfare of the District.

NOTE: As demand for water increases or available water decreases, the application of this definition of "*de minimis*" will result in a lowering of the upper threshold of the quantity of water found to be *de minimis*. The District intends to protect Lake Beulah and sustain the Lake Beulah ecosystem by allowing previously granted *de minimis* determinations to remain in effect, while subjecting new determinations to those limitations established by environmental conditions existing at the time of the new determination.

Section 2. PROHIBITED ACTS. It shall be unlawful and prohibited by this Ordinance for any person or entity to do any of the following unless such acts are authorized in advance by and performed in conformance with a valid permit issued by the District pursuant to this Ordinance:

A. Divert or transfer surface water out of the Lake Beulah Surface Water Drainage Basin.

B. Divert, transfer, or induce the diversion or transfer of groundwater out of the Lake Beulah Groundwater Basin.

E. Withdraw groundwater from within the Lake Beulah Groundwater Basin and then divert or transfer said water out of the Lake Beulah Groundwater Basin.

Section 3. LIABILITY AND PENALTY. Any person or entity found in violation may be assessed a penalty in accordance with this section. Any person that violates this Ordinance, except as provided for in Section 5, shall be liable to the Lake Beulah Management District for the cost of enforcing this Ordinance and the cost of replacing, to the District's satisfaction, any water that is diverted away from or transferred out of the Lake Beulah Hydrologic Basin in violation of this Ordinance, said replacement to consist of bringing into and discharging within the District, in a manner approved by the District, water in equal quantity and quality as that water which was diverted or transferred out of the Lake Beulah Hydrologic Basin, the Lake Beulah Surface Water Drainage Basin, or the Lake Beulah Groundwater Basin in violation of this Ordinance. For the purposes of this Ordinance the "cost of enforcement" shall include, without limitation, the following:

- administrative costs
- expert and consultant fees
- attorney's fees
- court costs

Section 4. PERMIT PROCESS. No use or action may be initiated, undertaken or continued that would be in violation of this Ordinance except in accordance with a permit issued by the District. A request for a permit for such use or action must be submitted to the Board of Commissioners for approval. The petition, together with any documents or records that support the petition, must clearly state the grounds upon which the petitioner requests the permit including, at minimum, a concise statement of the purpose of the request, the annual volume of water to which the request applies and the number of years the petitioner seeks for the approval or permit to remain in effect. In addition, said petition must include a thorough environmental study of the proposed use or action with emphasis on the potential impacts of such use or action on the following: Lake Beulah; groundwater and surface water contributing to Lake Beulah; wetlands adjacent to Lake Beulah or any surface water tributary to Lake Beulah; private wells in the District; and groundwater supplying any private well in the District. Petitioner may request an opportunity to testify and present evidence at a hearing conducted by the Board of Commissioners. The permit shall be granted only upon the majority decision of the Board of Commissioners based upon the following procedure:

A. *Review.* The Board of Commissioners shall review the petition, proposed site drainage, sewerage and water systems, the proposed water diversion or transfer operation and any study commissioned or required by the District with respect to any potential impact upon Lake Beulah, the Lake Beulah ecosystem, the surface water resources of the Lake Beulah Surface Water Drainage Basin or the groundwater resources of the Lake Beulah Groundwater Basin.

B. *Determination.* After study and review of the necessary data, the Board of Commissioners shall hold a public hearing on the petition. The Board of Commissioners shall render its decision in writing no later than 90 days from the date of the public hearing. Any further consideration of the petition beyond the 90 day period shall be preceded by another public hearing on the petition.

C. *Factors and Standards to be Considered.* The Board of Commissioners shall apply each of the following factors and standards in making its determination and shall not grant any permit or approval that if the net effect would be adverse to Lake Beulah or the public health, comfort, convenience, and welfare of the District:

1. Health, safety and welfare of the District;

2. Water supply, sanitation, and utilities in the District;

3. Impact on property values within the District;

4. The amount of water that will be diverted or transferred from the Hydrologic Basin and not returned to and discharged within the Hydrologic Basin;

5. Impact on Lake Beulah, the Lake Beulah ecosystem, or the water supply necessary or advisable for protecting, maintaining or improving the quality of Lake Beulah;

6. Impact on any well, water supply or septic system of any elector of the District, and

7. That such grant is not contrary to the public interest where, owing to special conditions, a literal enforcement of the terms of this ordinance will result in practical difficulty or unnecessary hardship, so that the spirit of the ordinance will be observed, public safety and welfare secured, and substantial justice done.

8. In considering the preceding factors, the Board of Commissioners shall apply each of the following standards in making its determination:

   a. No proposed use, diversion or transfer shall be permitted unless a volume of water equal to at least 95% of the water actually diverted or transferred is returned to the Hydrologic Basin at the location(s) where the adverse effects of the proposed use, action, diversion or transfer will be mitigated.

   b. Any return flows allowed as part of a permit granted pursuant to this Ordinance must be discharged so as to mitigate the adverse effects of the proposed use, action, diversion or transfer to the satisfaction of the District.

   c. Any return flows allowed as part of a permit granted pursuant to this Ordinance must be of water quality equal or superior to the water diverted or transferred from the Hydrologic Basin.

D. *Fees*. Such petitioner shall be liable for, and one or more processing fees shall be charged to reimburse, the District's reasonable costs of reviewing, processing and hearing such petition, including any of the District's costs of any studies reasonably necessary to determine the impact of the proposed action and the costs of any appeals that petitioner may choose to

bring of any decision of the District regarding the petition. Additionally, a one time or annual fee shall be charged for granting any approval or permit, such fee being sufficient to cover on-going environmental monitoring, water replacement, water treatment and permit administration as the District may deem appropriate. The petitioner will be provided an itemized invoice for the fees, and said fees are due within 30 days. Non-payment of any fee charged shall be cause for revocation of any permit or approval granted under this Ordinance and any amount of non-payment may be assessed as a special assessment or special charge and shall lienable against any property of the petitioner.

E. *Review and Appeal of Determinations.* The procedures set forth in Wisconsin Statute Chapter 68 shall apply to any request for review, administrative appeal or judicial review of any District determination, action or inaction pursuant to this Ordinance.

Section 5. EXCEPTIONS.

A. The penalty provisions of this Ordinance shall not apply to any uses, diversions or transfers of water that occur in accordance with a permit issued by the District.

B. The permit and penalty provisions of this Ordinance shall not apply to any uses, diversions or transfers of water that are declared by the District to be exempt, provided such use, diversion or transfer is first registered with the District upon forms provided by the District, the estimated quantity of such use, diversion or transfer, and the points of water acquisition and discharge, are annually reported to the District, and the use, diversion or transfer does not change such that the District finds it is no longer exempt. The following shall be exempt from the penalty provisions of this Ordinance as provided above:

1. *De Minimis* Use, Diversion or Transfer.

2. Single-Family Residential Use, Diversion or Transfer for Customary Residential Purposes.

3. Existing Small Volume Use, Diversion or Transfer. This category shall apply only to those uses, diversions or transfers that do not exceed 1000 gallons per day and that actually exist on the effective date of this Ordinance.

Section 6. ADMINISTRATIVE CONVENIENCE. The District may develop, adopt and require the use of forms and other materials consistent with and useful for the administration of this Ordinance. The boundaries of the Hydrologic Basin, Drainage

Basin and Groundwater Basin shall be portrayed on one or more maps approved by the District in accordance with available data, and said maps may be revised from time to time in accordance with newly available data.

Section 7. SEVERABILITY. If any part of this ordinance is held void, such part shall be deemed severable and the invalidity thereof shall not affect any remaining part of this ordinance.

Section 8. EFFECTIVE DATE. This Ordinance shall become effective on the first day after the Ordinance has been adopted by the Board of Commissioners and duly published.

Dated this 11 day of December 2006.

LAKE BEULAH MANAGEMENT DISTRICT

_____, Commissioner

ATTEST:

_____, Clerk-Treasurer

Date Adopted 12-11-06
Date Published _____
Effective Date _____

SUE 10/24/03

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY 608-267-6897

October 24, 2003

Patrick J. Hudec
Hudec Law Offices, S.C.
2100 Church St.
P.O. Box 167
East Troy, WI 53120-0167

Subject: Request for a Contested Case Hearing by Lake Beulah Management District Regarding DNR Issuance of an Approval for Proposed Municipal Well No. 7 Applied for by the Village of East Troy

Dear Mr. Hudec:

On October 6, 2003, the Department of Natural Resources ("DNR") received the Petition for Contested Case Hearing which you have submitted on behalf of the Lake Beulah Management District. The Petition objects to DNR issuance of an approval for proposed municipal well No. 7, applied for by the Village of East Troy, which was issued on September 4, 2003. Your hearing request states that the "proposed Water Systems Facilities Plan involves a proposal to draw substantial amounts of groundwater that will affect the waters of Lake Beulah, including subsurface water sources feeding the lake, the groundwater aquifer in amounts affecting the lake and sensitive environmental areas and the overall ecosystem, and also will adversely impact nearby private wells."

The DNR shares your concern regarding the potential for negative impacts to nearby water resources when a high capacity well is constructed and operated and believes that those impacts should be considered when a request for a high capacity well approval is submitted to the Department. Unfortunately, the Legislature has only granted limited authority to the Department in that regard. For high capacity wells where the water loss will be greater than 2 million gallons per day, sec. 281.35(4)(b) and (5)(d), Wis. Stats., expressly requires the Department to consider environmental and public trust doctrine factors in determining whether or not to approve the application. However, for high capacity wells where the water loss will be 2 million gallons per day or less, sec. 281.17, Wis. Stats., only allows the Department to consider the impact on public utility wells (*i.e.*, existing public drinking water supplies) in determining whether or not to approve the application.

Accordingly, your petition for a contested case hearing is DENIED for the following reasons:

1. Section 227.42(1)(b), Wis. Stats., requires that there must be no evidence of legislative intent that the interest is not to be protected, in order for a petitioner to be granted a contested case hearing. In this instance, there is clear legislative intent that the petitioner's interests as identified above are not protected.

Section 281.17(1), Stats., allows the Department to deny approval or grant conditional approval of a high capacity well only in two situations: if the proposed withdrawal will impair the water supply of any public utility furnishing water to or for the public or if the proposed withdrawal

does not meet the grounds for approval specified under sec. 281.35, Wis. Stats. In this instance, the proposed withdrawal will not impair the water supply of any public water utility, nor is sec. 281.35 applicable (because the well will not result in a water loss averaging more than 2,000,000 gallons per day in any 30-day period). The legislature has expressly limited the interests to be protected, and petitioners' interests as identified above are not protected.

2. Section 227.42(1)(d), Wis. Stats., requires that there must be a dispute of material fact in order for the petitioner to be granted a contested case hearing. The petition states that "there is a dispute of material fact" and petitioner "contests the findings, conclusions, approval and conditions contained in the approval." However, the petition does not identify the dispute of material fact. Therefore, the petitioner has failed to meet the requirement that there must be a dispute of material fact.

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that the Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed. For judicial review of a decision pursuant to sections 227.52 and 227.53, Wis. Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review must name the Department of Natural Resources as the respondent.

Sincerely,

William H. Smith
Deputy Secretary

C: Village of East Troy, c/o Judy Weter
Paul Kent, Attorney for Village of East Troy
James Baxter, Attorney for Village of East Troy
Francis Fuja—SER
Jill Jonas—DG/2
Lee Boushon—DG/2
Judy Ohm—LS/5

STATE OF WISCONSIN
SUPREME COURT
Appeal No.: 2008 AP 3170

LAKE BEULAH MANAGEMENT DISTRICT,

Petitioner-Appellant-Cross-Respondent-Respondent,

LAKE BEULAH PROTECTIVE AND IMPROVEMENT DISTRICT,

Co-Petitioner-Co-Appellant-Cross-Respondent,

vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent.

VILLAGE OF EAST TROY,

Intervening Respondent-Respondent-Cross-Appellant-Petitioner.

RESPONSE OF THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES TO PETITION FOR REVIEW

On Appeal from the Decision of the Court of Appeals, District II
Dated June 16, 2010

AXLEY BRYNELSON, LLP

Carl A. Sinderbrand
State Bar No. 1018593
Sara K. Beachy
State Bar No. 1068648

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Judith M. Ohm
State Bar No. 1006612

Attorneys for Respondent-Respondent,
Wisconsin Department of Natural Resources

July 30, 2010

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INTRODUCTION

The Village of East Troy ("Village") has requested review of the Court of Appeals decision in *Lake Beulah Management District v. DNR*, No. 08-AP-3170, unpublished slip. op., 2010 WL 2383903 (Wis. Ct. App., June 16, 2010), App-1[1]. The Petition for Review asks the Court to address two broad issues: 1) the scope of Wis. Stat. §§ 281.11 and 281.12, and their relationship with Wis. Stat. §§ 281.34 and 281.35; and 2) the administrative procedures and requirements for submitting information for agency consideration and into the agency record in a proceeding under Chapter 227 that does not become a "contested case."

The Wisconsin Department of Natural Resources ("DNR") opposes the Petition and asks the Supreme Court to deny review. The Court of Appeals correctly decided the issues relating to DNR's statutory authority, applying the pertinent statutes to the underlying facts based on basic rules of statutory construction. Contrary to the argument in the Petition for Review, the court did not make new law.

The Court of Appeals' decision regarding the content of the agency record, as framed by the decision, likely has limited application. However, it is wrongly decided, and it has the potential to alter and undermine important principles of

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[1] "App" refers to Petitioner's Appendix.

administrative law. Accordingly, should the Court grant the Petition as to the substantive issue, it should also grant the Petition as to this procedural issue.

CRITERIA FOR GRANTING REVIEW

A. The Court of Appeals' Decision Does Not Require Further Clarification. It Correctly Harmonizes and Applies DNR's Statutory Responsibilities for Water Resources Protection and High-Capacity Well Regulation.

The Village argues that the Legislature has enacted a specific and comprehensive system for administering the high-capacity well approval program under Wis. Stat. §§ 281.34 and 281.35; and that this statutory program supersedes and precludes application of DNR's more general public trust responsibilities embodied in Wis. Stat. §§ 281.11 and 281.12. The Village argues that the Court should accept its Petition in the interest of developing and clarifying the law, pursuant to Wis. Stat. § 809.62(1r)(c).

The Village is wrong, and its reliance on Wis. Stat. § 809.62(1r)(c) is misplaced. The Court of Appeals did not create new law or apply existing law in a manner that is either novel or incompatible with existing case law. Rather, it applied conventional rules of statutory construction and correctly harmonized the pertinent statutes. Nothing in Wis. Stat. § 281.34 or § 281.35 precludes DNR from considering its statutory public trust responsibilities in an appropriate case that does not fit the statutory criteria under Wis. Stat. § 281.34 or § 381.35; nor is there an inherent conflict between DNR's general statutory authority and its more specific statutory authority. Indeed, the Court of Appeals observed that DNR has

promulgated regulations under its general authority, establishing standards for well location, construction and operation that may become conditions of well approvals. *See* Petition for Review, App-1 at ¶¶ 24-27, discussing Wis. Admin. Code ch. NR 812.

B. The Court of Appeals Decision is Inconsistent with Existing Administrative Law by Requiring that Documents Not Properly Submitted Must Be Considered by the Agency, but It Likely Has Limited Effect.

The Village also seeks review of the Court of Appeals' decision that a document sent to a DNR attorney in a different case should have been considered and made part of the record, asserting that the decision conflicts with existing precedent under Wis. Stat. § 809.62(1r)(d). DNR agrees that the decision conflicts with existing law, but questions whether its potential impact warrants review unless the Court otherwise grants review.

STATEMENT OF ISSUES

1. Whether DNR can consider adverse impacts to waters of the state when evaluating applications for high-capacity well approval, pursuant to its authority under Wis. Stat. §§ 281.11 and 281.12.

The Court of Appeals correctly decided "yes." The court concluded that the authority granted in § 281.12 can be applied in harmony with and compatibly with the process outlined in § 281.34, *i.e.*, there is no conflict between the two statutes.

2. Whether a party to an administrative proceeding must follow Chapter 227 of the statutes and the agency's rules for submitting information in order for that information to be considered by the agency.

The Court of Appeals incorrectly decided "no." The court ruled that DNR erred by not considering information that was sent to a DNR attorney in a different but related judicial proceeding, but which was not properly submitted through applicable and available administrative and judicial procedures.

STATEMENT OF THE CASE

DNR generally agrees with the statement of facts and procedural history in the Village's Petition at 8-10, for purposes of this Response. However, DNR disagrees with the Village's assertion that the Court of Appeals determined that Wis. Stat. §§ 281.34 and 281.35 could be disregarded when considering high capacity well approval applications. The Court of Appeals stated that DNR's authority under Wis. Stat. §§ 281.11 and 281.12 to protect the waters of the state was in harmony with and not in conflict with DNR's statutory authority under Wis. Stat. §§ 281.34 and 281.35.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT DNR MAY USE ITS STATUTORY "PUBLIC TRUST" AUTHORITY WHEN CONSIDERING APPLICATIONS FOR WELL APPROVALS.

A. The Legislature Has Granted DNR Authority to Manage Waters of the State, Consistent with the Public Trust Doctrine.

The "Public Trust Doctrine" is a foundation of Wisconsin's long and noble stewardship of the environment. It is embodied in Article IX, Section 1 of the Wisconsin Constitution, which reads in pertinent part:

> [T]he river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

During the past one hundred years, the Court has issued numerous decisions evaluating, defining, and refining the scope of the Public Trust Doctrine. This Court and the courts of appeals have applied this doctrine to protect public rights in navigation, recreation, and commerce, and generally for protection of surface water resources. *See, e.g.*, *Diana Shooting Club v Husting*, 156 Wis. 261, 145 N.W. 816 (1914); *Muench v. PSC*, 261 Wis. 492, 53 N.W.2d 514 (1952); *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983); *Hilton v. DNR*, 2006 WI 84, 293 Wis. 2d 1, 717 N.W.2d 166; *State v. Town of Linn*, 205 Wis. 2d 426, 556 N.W.2d 394 (Ct. App. 1996), *rev den'd* 207 Wis. 2d 287, 560 N.W.2d 275 (1996).

Wisconsin courts have also repeatedly discussed the extent to which the Public Trust Doctrine conveys rights or responsibilities, which is an underlying

issue in the Village's Petition for Review. The courts have held that the Public Trust Doctrine is not an independent, self-executing basis for regulation or management of water resources. It is a constitutional duty placed upon the State and administered by the Legislature, and does not itself delegate regulatory authority to DNR absent legislative authorization. *See, e.g., Bleck*, 114 Wis. 2d at 465; *Hilton*, 2006 WI 84 at ¶ 19. Nor does the Public Trust Doctrine create a cause of action for violation of the public trust. *Borsellino v. DNR*, 2000 WI App 27, ¶ 18, 232 Wis. 2d 430, 443-44, 605 N.W.2d 255.

The Village suggests that the Court of Appeals concluded that DNR had independent authority to regulate pursuant to the Wisconsin Constitution, irrespective of legislative delegation. (Petition at 25-28.) That is a mischaracterization of the decision, and is inconsistent with the balance of the Village's argument.

The Court of Appeals relied upon Wis. Stat. §§ 281.11 and 281.12, which are legislative delegations of public trust authority. The court correctly concluded that those statutes establish the policy and delegate the power to ensure that DNR protects public water resources when administering its water programs under Chapter 281. *See* Petition for Review, App-1 at ¶ 19.

Section 281.11 establishes the purpose and policy of Chapter 281:

> 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.... **The purpose of this subchapter is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private.**

> To the end that these vital purposes may be accomplished, this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed in favor of the policy objectives set forth in this subchapter....

Wis. Stat. § 281.11 (emphasis added).

Section 281.12(1) constitutes a specific grant of power to DNR to accomplish the policy and purpose set forth in § 281.11:

> The department shall have general supervision and control over the waters of the state. **It shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter.** The department also shall formulate plans and programs for the prevention and abatement of water pollution and for the maintenance and improvement of water quality.

Wis. Stat. § 281.12(1) (emphasis added).

The Village argues that the Court of Appeals interpreted these statutes as containing implied delegations, and that under pertinent case law, the court should have construed the statutes narrowly against the grant of implied powers. (*See* Petition at 11-12.) The Village is wrong for at least two reasons. First, § 281.11 specifically states that this subchapter (*i.e.*, including § 281.12) and associated rules and orders "shall be liberally construed in favor of the policy objectives ...." That express legislative directive would trump any generic rule of statutory construction.

More importantly, there can be no doubt that § 281.12(1) is an *express* legislative delegation of power; therefore, the generic rule of construction for implied powers has no application. In § 281.34, the well approval statute cited by the Village, the Legislature expressly directed DNR to promulgate groundwater management rules "using its authority under ss. 281.12(1) and 281.35 ...." Wis.

Stat. § 281.34(9)(c).[2] In *Rusk County Citizen Action Group, Inc. v. DNR*, the court acknowledged that DNR has regulatory authority under § 281.12 (formerly § 144.025) 203 Wis. 2d 1, 9-10, 552 N.W.2d 110 (Ct. App. 1996).[3] DNR has promulgated regulations under its general authority provided under § 281.12, including safe drinking water regulations, and those rules have undergone required legislative review before being finalized. *See* Wis. Admin. Code § NR 809.01.[4]

The Court of Appeals did not break new ground here. Both the Legislature and courts have recognized that § 281.12 is an express delegation of regulatory authority to DNR.

B. Consideration of Impacts to Waters of the State Is Consistent with DNR's Well Approval Authority.

The core of the Village's argument is that Wis. Stat. §§ 281.34 and 281.35 created a comprehensive, all-inclusive well program that leaves no room for application of other statutory authority. The Village has cited no statutory or case law authority for this proposition. The Village has cited no canon of statutory

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[2] DNR was to promulgate such rules if a special groundwater advisory committee did not timely issue a groundwater management report.

[3] In *Rusk* the court found that DNR could not exercise that regulatory authority to entirely ban facilities that are allowed by another statute. 203 Wis. 2d at 10-11. In the case at bar, the Court of Appeals specifically found that there was no conflict between DNR's general authority under §§ 281.11 and 281.12 and its specific authority under §§ 281.34 and 281.35, in the context of regulation of high-capacity wells.

[4] The well construction code was promulgated generally under Wis. Stat. chs. 280 and 281. Wis. Admin. Code § NR 812.01(1). The well statute relied upon by the Village, however, is not the source of this authority. *See* Wis. Stat. § 281.34.

construction to reach this conclusion. Indeed, its only rationale for this unusual proposition is that the statute creates different mandatory review requirements for wells whose capacities and potential impacts are small (<100,000 gallons per day water loss), medium (100,000-2,000,000 gpd) and large (>2,000,000 gpd); and that the Legislature has modified (or not) the statute over time.

Several canons of statutory construction or interpretation are relevant here. First, the purpose of statutory interpretation is to give a statute its full, proper, and intended effect, in accordance with the legislative purpose. *See, e.g., Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶ 27, 303 Wis. 2d 258, 276-77, 735 N.W.2d 93. Even when the statute is unambiguous, the courts will consider language within the statutes that reflects the legislative purpose. *See id.* Furthermore, courts should construe statutes in context and in conjunction with related statutes. *See, e.g., Sands v. Whitnall School Dist.*, 2008 WI 89, ¶ 15, 312 Wis. 2d 1, 13-14, 754 N.W. 2d 439; *Kolupar* 2007 WI 98, ¶ 27.

Significantly, the canon that gives preference to specific statutes over general statutes only applies when the statutes are in conflict. *Wisconsin Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶ 32, 270 Wis. 2d 318, 346, 677 N.W.2d 612, citing *State v. Maxey*, 2003 WI App 94, ¶ 22, 264 Wis. 2d 878, 890, 663 N.W.2d 811. However, statutes are not presumed to be in conflict; on the contrary, courts must make every effort to harmonize them. *See, e.g., State v. Fischer*, 2010 WI 6, ¶ 24, 322 Wis. 2d 265, 284, 778 N.W.2d 629; *State Dept.*

of Corrections v. Schwarz, 2005 WI 34, ¶ 28, 279 Wis. 2d 223, 240.,693 N.W.2d 703.

When "confronted with an apparent conflict between statutes," courts must "construe sections on the same subject matter to harmonize the provisions and to give each full force and effect." *Fischer,* 2010 WI 6 ¶ 24; *see also Bingenheimer v. Wis. Dep't of Health & Soc. Servs.*, 129 Wis. 2d 100, 107-08, 383 N.W.2d 898 (1986). It is a "cardinal rule that conflicts between different statutes, by implication or otherwise, are not favored and will not be held to exist if they may otherwise be reasonably construed in a manner that serves each statute's purpose." *Town of Clayton v. Cardinal Const. Co., Inc.*, 2009 WI App 54, ¶ 14, 317 Wis. 2d 424, 435, 767 N.W. 2d 605, citing *Jones v. State*, 226 Wis. 2d 565, 576, 594 N.W.2d 738 (1999) (internal citations omitted). Unless "legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of mere lack of uniformity in detail." *Fox v. City of Racine*, 225 Wis. 542, 547, 275 N.W. 513 (1937).

The Court of Appeals' decision here satisfies these basic principles of statutory interpretation. First, the Court of Appeals' decision is consistent with the legislative purpose underlying ch. 281. The purpose of that chapter is manifest in § 281.11: "to grant necessary powers ... for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private...." The Village's argument that DNR may not regulate medium capacity wells when state waters are jeopardized ignores that express purpose.

Second, the Court of Appeals reasonably construed the applicable statutes to "harmonize the provisions," thereby giving "each full force and effect." *See Fischer*, 2010 WI 6, ¶ 24. The Court of Appeals concluded that the disputed statutes can coexist, and therefore there is no conflict. *Fox*, 225 Wis. at 547.

Sections 281.34 and 281.35 establish minimum required evaluations by DNR. Small wells are exempt from review. For medium capacity wells, the required evaluations are modest; for the largest wells, they are more significant. There is nothing in the language of § 281.34 or § 281.35 that designates those two statutes as being the sole basis for regulating wells, or as establishing the maximum level of permissible evaluation.

If the Legislature had intended to limit DNR's authority to the criteria listed in those statutes, the Legislature would have provided that DNR shall issue approvals when the referenced standards have been met. Instead, the Legislature identified certain conditions for which DNR cannot approve a well, and certain resources for which DNR must conduct more intensive evaluation. *See* Wis. Stat. § 281.34(5)(a) and (b).

The Court of Appeals also correctly noted that the well construction code was not adopted pursuant to § 281.34, and that § 281.34 does not specifically authorize DNR to establish a well construction code. The Village's Petition ignores that fact. The Village does not dispute either that the well construction code is essential and lawful, or that the authority to promulgate that code lies outside §§ 281.34 and 281.35.

The statutes can be read harmoniously, and the Court of Appeals did just that. Under most circumstances, DNR will limit its review of applications for high capacity well approvals to the criteria in §281.34 or § 281.35. If DNR has reason to believe that construction and use of a well will adversely affect state waters, however, § 281.12 provides authority for DNR to augment its minimally required evaluation. Because the statutes do not conflict, the general/specific rule is inapplicable.

The Village's argument that the Court of Appeals' decision raises separation of powers issues is a red herring. (*See* Petition at 23-24.) The court did not add words to any statute. It did not create a fourth criterion among the minimum requirements of the well statutes. As discussed above, it harmonized and gave full force and effect to each of the statutes in Chapter 281, in a manner that fulfills the Legislature's clearly articulated purpose.

The decision also creates no risk of over-use in other water programs. (*See* Petition at 21-22.) The Village has acknowledged that § 281.12(1) applies to "this chapter." The Village's fear of using this statute to create additional layers of regulation under Wis. Stat. ch. 30 or 283 is unwarranted.

More importantly, programs established under Chapters 30 and 283 already incorporate public trust review among the minimum review requirements. DNR is specifically required to consider public interests in navigation, the core of the Public Trust Doctrine, for various structures and other activities affecting navigable waters. *See, e.g.*, § 30.025(3)(b) (utility facilities); § 30.12(3m)(c)

(deposits); § 30.123(6m)(a) (bridges and culverts); § 30.13(1) (wharves and piers); and § 30.18(5)(a) (water withdrawal). Under Chapter 283, these same public trust policies are incorporated into pollution discharge planning and approvals through the areawide waste treatment or water quality management plans. *See* Wis. Stat. §§ 283.31(3)(e) and 281.83; Wis. Admin. Code § NR 121.01. And as the Village concedes, public trust evaluations are specifically required for certain activities under Chapter 281, including the minimum required evaluation for high capacity wells with a water loss of greater than 2 million gallons per day. *See* Wis. Stat. § 281.35(5)(d)1.

C. There are Well-Established Standards for DNR to Conduct a Public Trust Evaluation.

Lastly, the Village expresses concern that the Court of Appeals did not establish specific standards for consideration or evaluation of public trust factors, but rather deferred to DNR on those technical evaluations. (Petition at 20-21.) The court's deference to DNR is appropriate for several reasons.

First, evaluation of public interests in navigable waters, and the balancing of public interests with other public policies (such as a municipality's requirements to provide a potable water supply), are not new to DNR. As discussed immediately above, many other statutes require DNR to evaluate and balance competing public interests involving water resources. DNR has a long history of performing those analyses.

Second, deference to the technical expertise of administrative agencies in administering their programs is a hallmark of administrative law. Under Wis. Stat. § 227.57(8), a court may not substitute its judgment for that of the agency on a matter within the agency's discretion. In a contested case, a court may not substitute its judgment for that of the agency as to the weight of evidence. Wis. Stat. § 227.57(6). The court also must accord due weight to "the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it...." Wis. Stat. § 227.57(10). Where, as here, the agency has a long history of performing such analyses, the court applies "great weight;" standard; *i.e.*, the court will uphold an agency's interpretation or application of a statute if it is reasonable and consistent with the meaning or purpose of the statute. *See, e.g., DaimlerChrysler c/o ESIS v. LIRC*, 2007 WI 15, ¶¶ 15-16, 299 Wis. 2d 1, 16-17, 727 N.W.2d 311, *recon. den'd.* 2007 WI 40.

The Court of Appeals recognized that the type and quantum of evidence that DNR requires in order to determine whether to conduct a discretionary public trust review will vary from case to case. It correctly determined that it must defer to DNR to make that threshold decision whether the evidence warrants additional review, as well as the ultimate decision on how to apply that evidence to the application at hand. The court's conclusion in that regard is unremarkable and wholly consistent with the long line of applicable administrative law cases. It does not require further clarification by this Court.

II. THE COURT OF APPEALS DECISION REQUIRING DNR TO CONSIDER INFORMATION NOT PROPERLY SUBMITTED TO THE AGENCY IS INCORRECT BUT MAY HAVE LIMITED APPLICATION.

A. The Court's Application of the Principle of Imputed Knowledge Is Inconsistent with Administrative Law.

The facts pertinent to this issue are unusual. An attorney for the Lake Beulah Management District ("LBMD") had submitted an affidavit (the "Nauta affidavit") as an attachment to a motion for reconsideration of a circuit court decision upholding the 2003 approval for the same well at issue in this case. *See* App-1, ¶ 9. The motion was summarily denied by the circuit court before DNR issued the 2005 Approval. (*See* App-1, ¶ 10.) In the case regarding the 2003 Approval, DNR was represented by its in-house attorney, a rare situation because DNR is typically represented by the Department of Justice. Therefore, DNR's in-house counsel was provided with a copy of the motion, with the affidavit attached, albeit as part of a different proceeding than the matter at bar.

For unexplained reasons, the LBMD attorney who submitted the Nauta affidavit in the related court proceeding did not submit the affidavit or substantive information to DNR'S drinking water and groundwater staff in support of the 2005 permit application. Therefore, DNR's decisionmakers for well approvals did not have or consider that affidavit in conjunction with the 2005 Approval. Additionally, LBMD did not request a contested case hearing to address potential impacts of the well on the waters of the state after the DNR approved the 2005 permit. In the subsequent judicial review of the 2005 Approval, the circuit court

likewise refused to consider the Nauta affidavit, finding that it was not part of the agency record in the 2005 Approval. *See* September 23, 2008, Decision of Judge Robert J. Kennedy; R. 40 at 11-12. Despite multiple opportunities for LBMD to make the affidavit a part of the record through the prescribed methods, and despite its failure to take advantage of those opportunities, the Court of Appeals reversed and remanded the case, holding that any information in the possession of the agency's attorney is imputed to the agency and must be considered.

The Court of Appeals erred in several respects. First, it inappropriately relied upon a general principle of agency in the private corporate setting – that knowledge of a corporate agent or employee is imputed to the principal – to conclude that any information in the possession of DNR attorneys is imputed to the agency decisionmakers.

The court relied in part upon *Wauwatosa Realty Co. v. Bishop*, 6 Wis. 2d 230, 236, 94 N.W.2d 562 (1959). That case arose in the context of information that an attorney acquired while representing a client. The underlying proposition, however, is not unique to attorneys. The other case cited by the Court of Appeals involved the knowledge of a corporate director in his fiduciary capacity. *See Suburban Motors of Grafton, Inc. v. Forester*, 134 Wis. 2d 183, 185-86,192-93, 396 N.W.2d 351 (1996). *Suburban* and other cases make clear that the underlying premise of imputed knowledge of an agent to the principal applies to the corporate setting. *See, e.g., Tele-Port v. Ameritech Mobile Communications*, 2001 WI App

261, ¶ 7, 248 Wis. 2d 846, 637 N.W.2d 782, *rev den'd* 2002 WI 23. There is no law supporting the court's application of this concerpt to an administrative agency.

The Court of Appeals' extension of the principle of imputed knowledge to an administrative agency also undermines the established rule that parties must comply with administrative procedures and deadlines outlined in Chapter 227.

The Legislature intended the procedures in Chapter 227 to be exclusive and mandatory. *See*, e.g., *Wisconsin's Environmental Decade, Inc. v. PSC*, 79 Wis. 2d 161, 170, 225 N.W.2d 917 (1977); *Charter Manufacturing Co. v. Milwaukee River Restoration Council, Inc.*, 102 Wis. 2d 521, 525-26, 307 N.W.2d 322 (Ct .App. 1981). The right to appeal under Chapter 227 is dependent on "strict compliance" with its provisions. *Cudahy v. Dep't. of Revenue*, 66 Wis. 2d 253, 257-62, 224 N.W.2d 570 (1974). Failure by any party to comply deprives the circuit court, and likewise the court of appeals, of subject matter jurisdiction. *Id.*

Petitioner points out, and DNR agrees, that Chapter 227 sets forth procedures that a party must follow to ensure that a document becomes part of the agency record. (*See* Petition at 30-32.) The Court of Appeals concurred. *See* Petition for Review, App-1 at ¶¶ 32-34. The court acknowledged that a party may create or supplement the record during the approval process, after approval has been granted, and during the judicial review process. *Id.* The court also agreed with DNR that LBMD did not comply with those procedures. However, the court erred by failing to conclude that these are the exclusive procedures for creating or supplementing the agency record.

A citizen cannot simply hand a document to any individual at DNR and expect that it will make its way into the record for a particular proceeding. Nor can a citizen submit a document to a DNR attorney in one proceeding and expect that the document will be part of the record in a different proceeding.

B. Application of the Court of Appeals Decision Would Undermine the Orderly Administration of the Law and Unduly Burden Both Administrative Agencies and Parties.

In a footnote, the Court of Appeals indicated that its ruling on this issue may only apply in the narrow circumstance in which the agency's lawyer represents the agency both in court and in a companion administrative or judicial proceeding. App-1, at ¶ 38, n.16. If this principle of imputed knowledge is limited to the facts of this case, as suggested in the footnote, its impact on administrative agencies may be minimal. However, the court also stated in the footnote that future courts will have to look closely at the facts and circumstances of each case. *Id.*

Imputed knowledge only applies when the information received is "something pertinent to the subject matter of that employment ...." *Tele-Port*, 2001 WI App 261, ¶ 7. *See also, Suburban Motors*, 134 Wis. 2d at 192, quoting 3 Fletcher, Cyclopedia of the Law of Private Corporations § 790 (rev. perm. ed. 1975) ("all material facts which its officer or agent received notice or acquires knowledge *while acting in the course of his employment within the scope of his authority* ....") (emphasis added). Given the limits of the case law and the unusual

fact situation, it is anticipated that the decision will have limited prospective impact.

The court's rationale is troubling, however. It relies upon and extends a more general rule of law that does not uniquely apply to attorneys and has no application to administrative agencies. If applied to a broader range of employees in future cases, it may well wreak havoc on administrative agencies, undermining their ability to effectively and timely administer their regulatory programs.

It is not unusual for interested parties to submit information to the wrong person within the agency, to the wrong office, or to an official with no direct knowledge of the proceeding. In an agency with over two thousand employees, numerous programs, and multiple offices throughout the state, there is no assurance that incorrectly submitted information will ever reach the actual decisionmakers.

If the agency's decision is defective for not considering incorrectly submitted information, it may actually behoove an opposing party to submit information incorrectly. Here, it is noteworthy that LBMD was represented by attorneys who should have known how and where to submit information, and they were given multiple opportunities to correctly submit the information before the agency or circuit court.

Parties and agencies alike reasonably rely upon administrative rules and practices established in Chapter 227, as well as agency rules. These rules and practices lend predictability to the administrative process, lead to equitable

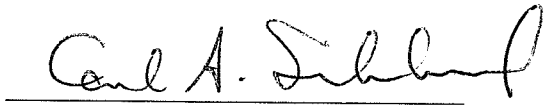
outcomes, and ensure timeliness of agency decisions. That need for consistency and predictability is reflected in both statutes and administrative rules, which provide instructions on how to apply for or contest an approval, submit information, seek judicial review, and request a court, on review, to supplement the record. *See, e.g.,* Wis. Stat. §§ 227.42; 227.55; 227.56; 227.57; *see also* Wis. Admin. Code ch. NR 2; § NR 812.09. As the Court of Appeals acknowledged, LBMD used none of the available alternatives to create or supplement the record with respect to the 2005 Approval. *See* App-1, ¶ 8.

CONCLUSION

For the reasons stated herein, the Wisconsin Department of Natural Resources respectfully requests that the Court deny the Village's Petition for Review. If the Court grants review, it should grant review with respect to whether improperly submitted information properly becomes part of the agency record.

Dated this 30th day of July, 2010.

AXLEY BRYNELSON, LLP



Carl A. Sinderbrand
State Bar No. 1018593
Sara K. Beachy
State Bar No. 1068648
Attorneys for Wisconsin
Department of Natural Resources

ADDRESS
2 E. Mifflin St., Suite 200
Madison, WI 53703
(608) 257-5661
(608) 257-5444 (fax)
csinderbrand@axley.com
skbeachy@axley.com

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES

Judith M. Ohm
State Bar No. 1006612
Attorney for Wisconsin
Department of Natural Resources

ADDRESS
101 S. Webster St.
P.O. Box 7921
Madison, Wisconsin 53707-7921
(608) 266-9972
Judith.Ohm@Wisconsin.gov

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STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Issuance of a Conditional Approval of the Plans and Specifications for Proposed Municipal Well No. 7 Applied for by the Village of East Troy, Wisconsin

Case No. IH-04-02

BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

Respondent, the Village of East Troy, by its attorneys Anderson & Kent, S.C., hereby submits this brief in support of its motion for summary disposition.

INTRODUCTION

When the Department of Natural Resources issued the high capacity well approval to the Village of East Troy, there was only one factor that the Department of Natural Resources could consider in conditioning or denying this approval: assurance that the water supply of a public utility would not be impaired. This limited scope of authority is clearly set forth in Wis. Stat. § 281.17 and is consistent with the longstanding and current interpretation of this chapter by the Department.

The facts in this case are also straightforward. Petitioner has not alleged that the well at issue might impair the water supply of a public utility. Instead, Petitioner has relied on claims that the Village's well would impact the water levels of Lake Beulah and of private wells. The Village maintains that these claims have no basis in fact, but regardless they cannot serve as a basis for conditioning or denying a high capacity well approval.

Recent legislation has begun to broaden these considerations. That legislation is not applicable to the current permit, but it does serve to underscore the limited scope of the

Department's authority in this area. Even under the new law, there is no authority for the Department to consider alleged impacts to lake levels and private wells.

FACTS

On June 20, 2003, the Village of East Troy (Village) applied for a high capacity well approval for a 312-foot well with the capacity to pump 1,000 gallons per minute, to be constructed in the SW¼ of the SW¼ of Section 17, currently in the Town of East Troy. (Well No. 7). Well No. 7 will be used to provide a potable water source for residents of the Village of East Troy, including service to a possible future expansion of the Village in the area surrounding Well No. 7. The DNR reviewed the plans and specifications for this project, concluded that the project should not have an adverse effect on any well supplying water to a public utility, and approved the plan on September 4, 2003. (Approval)

On October 6, 2003, the Lake Beulah Management District (District) petitioned the Department for a contested case hearing regarding the approval of the Well No. 7 plan. In that petition, the District claimed that the Approval should be rescinded based on the following allegations:

> [T]he proposed Water System Facilities Plan involves a proposal to draw substantial amounts of groundwater that will affect the waters of Lake Beulah, including subsurface water sources feeding the lake, the groundwater aquifer in amounts affecting the lake and sensitive environmental areas and the overall ecosystem , and also will adversely impact nearby private wells.

The Department denied the District's petition on October 24, 2003. In that letter, the Department explained, among other things, that the agency has no authority to deny the Well No. 7 plan unless it will impact public drinking water supplies.

Based on consultations with the Governor and the Wisconsin Department of Justice

(DOJ), the Department retracted their denial of this petition and subsequently granted the District's petition to allow the Division of Hearings and Appeals to rule on the threshold issue. In the new letter, DNR stated that the subject of this contested case hearing is as follows:

> **Whether the Department should have considered** any potentially adverse effects to the waters of Lake Beulah, including subsurface water sources feeding the lake, the groundwater aquifer in amounts affecting the lake and sensitive environmental areas and the overall ecosystem, and nearby private wells, when the Department granted a conditional approval of the plans and specifications for proposed Municipal Well No. 7 in the Village of East Troy. [Emphasis Added]

This is a question of law. For the reasons set forth below, the Department properly interpreted state law when it chose not to consider these factors beyond its statutory mandate. The Approval should be summarily affirmed.

LAW AND ARGUMENT

I. THE DNR PROPERLY CONCLUDED THAT ITS HIGH CAPACITY WELL AUTHORITY IS LIMITED TO THE CONSIDERATION OF IMPACTS ON PUBLIC WATER UTILITIES.

A. The Specific Language of Wis. Stat. § 281.17 Limits DNR's Authority.

An analysis of the scope of a statute begins with the language of the statute and its plain meaning. *See, VanCleve v. City of Manitowoc*, 2003 WI 2, 258 Wis. 2d 80, 655 N.W.2d 113. "If the language of a statute is clear on its face, we need not look any further than the statutory text to determine the statute's meaning." *State v. Peters*, 2003 WI 88, ¶ 14, 263 Wis. 2d 475, 665 N.W.2d 171.

Wis. Stat. § 281.17(1)(a) establishes the trigger for when an approval is required from the DNR for the construction, installation or operation of a high capacity well.[1] Wis.

[1] A high capacity well is a well with the capacity to pump 70 or more gallons per minute or 100,000 gallons per day. Wis. Stat. § 281.17(1)(a) and Wis. Admin. Code § NR 812.07(53). There is no dispute that the East Troy well requires a high capacity well permit.

Stat. § 281.17(1)(b) establishes standards for such approvals and provides as follows:

> (b) The Department shall withhold its approval or grant a limited approval under which it imposes such conditions as to location, depth, pumping capacity, rate of flow, and ultimate use that will ensure all of the following:
> 1. That the water supply of any public utility engaged in furnishing water to or for the public will not be impaired.
> 2. That the well meets the grounds for approval under s. 281.35, if applicable.

Wis. Stat. § 281.17(1)(b) requires the Department to withhold or limit a permit for two reasons. First, under Wis. Stat. § 281.17(1)(b)1, the Department is required to condition or deny an approval for a high capacity well to ensure "that the water supply of any public utility engaged in furnishing water to or for the public will not be impaired." The Department considered this factor during the approval process for Well No. 7. Petitioner makes no allegation that this approval will have any effect on a public water utility.

Second, under Wis. Stat. § 281.17(1)(b)2, the Department is required to condition or deny an approval for a high capacity well to ensure that the well "meets the grounds for approval under s. 281.35, **if applicable**." (emphasis added). A well must average over 2,000,000 gallons of water loss per day over a 30-day period to be subject to the grounds for approval under this section. Wis. Stat. § 281.35(4)(b)1. The maximum pumping capacity of Well No. 7 is only 1,440,000 gallons per day. Therefore, Wis. Stat. § 281.17(1)(b)2. does not apply.

However, § 281.17(1)(b)2 is still instructive. Wis. Stat. § 281.35(5)(d) provides that when the water loss exceeds 2,000,000 gallons per day, the Department is required to determine that no public rights in navigable waters will be adversely affected, there will not be a significant adverse impact on the environment or ecosystem, and the project will not have a significant detrimental effect on the quantity and quality of the waters of the state or

the public interest, among other grounds for approval. However, the Department may **only** consider these factors when permitting wells **over** the 2,000,000 gallons-per-day water loss threshold of Wis. Stat. § 281.35. The Legislature specifically chose not to include these factors for a well such as Well No. 7 that does not meet this water loss threshold. Thus, Petitioner's allegations about impacts to Lake Beulah and its ecosystem are not relevant to issuance of an approval for Well No. 7.

Because Petitioner has not alleged that Well No. 7 will have an adverse effect on a public utility water supply, Petitioner has not stated a claim upon which relief may be granted. This should be the end of the inquiry.

B. BASIC CANONS OF STATUTORY CONSTRUCTION UNDERSCORE THE LIMITED SCOPE OF WIS. STAT. § 281.17.

As noted above, a statutory analysis begins with the language of the statute and that is where the inquiry should end unless there is some statutory ambiguity. A statute is not ambiguous just because the parties disagree on its meaning. *State v. Orlik*, 226 Wis. 2d 527, 534, 595 N.W.2d 468 (Ct. App. 1999). Here, there is nothing ambiguous about the statutory language of § 281.17. However, if § 281.17 is found to be ambiguous, basic principles of statutory construction further support the Department's position on its authority.

1. The Requirement That The Department Consider Certain Impacts Of High Capacity Wells Implies That The Department Is Not Authorized To Consider Other Impacts.

The maxim '*inclusio* (or *expressio*) *unius est exclusio alterius*,' otherwise known as the 'exclusio rule', is a rule of statutory construction that means "to include one thing implies the exclusion of the other." *Keip v. Wisconsin Dept. of Health and Family Services*,

2000 WI App 13, ¶ 18, 232 Wis. 2d 380, 606 N.W.2d 543. The exclusio rule also leads to the conclusion that the Department's authority to condition or deny a high capacity well under Wis. Stat. § 281.17 is limited.

Section 281.17(1)(b)1. states that the Department "shall" condition or deny an approval for a high capacity well to ensure "that the water supply of a public water utility will not be impaired." No other factors are listed. This specifically enumerated requirement under Wis. Stat. § 281.17(1)(b)1 shows that the Legislature intended to exclude any consideration of factors not expressly authorized. Similarly, the only place where other factors may be considered is where there is a withdrawal of 2,000,000 gallons per day under § 281.17(1)(b)2. The failure to include those factors under § 281.17(1)(b)1 shows an intent to exclude them. *C.A.K. v. State*, 154 Wis. 2d 612, 623, 453 N.W.2d 897 (1990).

2. The DNR's Construction Of § 281.17 Is Consistent With The Principal That Administrative Agencies Only Have the Authority Granted To Them By The Legislature.

Every administrative agency must conform precisely to the statute which grants the power." *State ex rel. Wisconsin Inspection Bureau v. Whitman,* 196 Wis. 472, 220 N.W. 929, 942 (1928). A state agency only has the express or implied authority granted to it by statute. *Peterson v. Natural Resources Board*, 94 Wis. 2d 587, 592, 288 N.W.2d 845 (1980).

As noted above, the Legislature specifically restricted the Department from considering effects of a proposed well of this capacity on public water rights in navigable waters, except when the water loss has exceeded 2,000,000 gallons per day. Wis. Stat. § 281.35(5)(d). It is undisputed that Well No. 7 does not meet this water loss threshold.

Therefore, the Department would have to impermissibly stretch the authority granted to it by the Legislature if it were to consider the potentially adverse effects of Well No. 7 on "the waters of Lake Beulah."

II. THE DNR'S DECISION SHOULD BE UPHELD AND GIVEN GREAT WEIGHT BECAUSE IT IS CONSISTENT WITH ITS LONGSTANDING INTERPRETATION OF WIS. STAT. § 281.17.

The Department has consistently and repeatedly taken the position that § 281.17 means what it says: The Department's authority to regulate high capacity wells is limited to impacts on municipal wells. This is seen from the following public documents, copies of which are attached to this Brief for reference.

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There have been several attempts in the 1950's to amend the high capacity well law, and as recently as the mid-70's, **it was suggested by the Public Intervenor that the Department's authority to review high cap well applications should be expanded to private wells and watercourses or lakes.** However, the law was not changed, and as cited in a memo from the DNR Secretary to the Natural Resources Board. . . . the legislative development, early on and consistently, pointed away from changing the law. In essence, **the legislature limited the discretion of the Department to conduct a broader analysis by expressly limiting what it may analyze via the narrow language of the statute.** Nor has the legislature chose to pass legislation to expand it.

DNR Brief in Docket No. IH-03-07, p. 3, September 24, 2003., Ex. A [Emphasis Added].

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State law says the DNR can regulate high capacity wells only if they affect a municipal water supply.

Todd Ambs, DNR Water Division Administrator, quoted in November 24, 2003 Milwaukee Journal Sentinel, Ex. B.

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The specific language and legislative history of the high capacity well law reflects that the legislature is well aware that **the statute only protects nearby municipal wells.**

Department Secretary George Meyer, in letter to the Attorney General regarding the Perrier bottling plant, October 5, 2000, Ex. C.

***

The issue is very simple. Under sections 281.17, Wis. Stats., (the high capacity well statute), a high capacity well must be approved by the Department of Natural Resources. unless it adversely effects or reduces the availability of water to a public utility. **The law does not authorize the Department to deny the well approval even if the well will adversely impact one of Wisconsin's valuable lakes and streams.**

Department Secretary George Meyer, in letter to legislative leaders, February 14, 2000, Ex. D.

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The department may limit pumping capacity or deny an approval for a high capacity well(s) if the department believes that the operation of the high capacity well(s) would have an adverse impact on water availability to a public utility well.

Application for a High Capacity Well System, School Wells and Wastewater Treatment Plant Wells, WDNR – Bureau of Drinking Water and Groundwater, Rev. January 9, 2002, Ex. E.

***

The Bureau of Drinking Water and Groundwater would deny or limit the pumping capacity of a high capacity dewatering well only if the operation would likely have an adverse impact on water availability to a public utility well....

WDNR Drinking Water and Groundwater website, Ex. F.

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Generally, the Private Water program denies or grants a limited approval for a high-capacity well **only if operation of the system and the proposed withdrawal will adversely affect or reduce the availability of water to any public utility well based on statutory** language. . . . There are, however, no specific provisions in ch. 281. . . to consider the potential impacts groundwater withdrawal from high capacity wells may have on private wells or surface waters such as lakes, streams, and wetlands.

***

There have been a number of options considered over the past several years to address potential effects of high capacity wells on groundwater of surface water. Tom Dawson, former Wisconsin Public Intervenor, in a December 13, 1989 letter to Rep. Schneider and Sen. Helbach, suggested statutory amendments to allow consideration of environmental effects in the high capacity well permitting process. **His proposal was to make the criteria of s. 281.35(5) (formerly s. 144.026(5)), Stats., applicable to all high capacity wells, not just those with a capacity greater than 2mgd. Such legislation was not proposed.**

Status of Groundwater Quantity in Wisconsin, WDNR April 1997, PUBL-DG-043-97, p. 34-35, Ex. G.

Other sources have concurred with the Department's interpretation. For example, in 2003, the Wisconsin Groundwater Coordinating Council, made up of various agency staff,

the State Geologist, Governor's office staff, and University of Wisconsin representation, prepared a report to the Legislature on groundwater that acknowledges that under current law the Department "only had the authority to approve a high capacity well application if it is determined that the new well will interfere with a municipal water supply well." Wisconsin Groundwater Coordinating Council, *Report to the Legislature; Groundwater: Wisconsin's Buried Treasure*, pp. 4-12.

Similarly, in 2000, the University Of Wisconsin-Madison Extension Department of Urban and Regional Planning published a report entitled "*Modernizing Wisconsin Groundwater Management: Reforming High Capacity Well Laws*," which stated in part:

> Under Wis. Admin. Code ch. NR 812, the WDNR may deny or modify a permit application for a proposed high capacity well or high capacity property on the basis of deleterious physical impacts *only* if the supply of water to a public utility well may be impacted. [Emphasis in the original.]

In light of these determinations, the Department's interpretation of Wis. Stat. ch. 281 in granting the Approval should be given great weight deference. Wisconsin courts take a three-tiered approach to determining what level of deference to give to an agency conclusion of law, choosing between no deference[2], due weight deference[3], or great weight deference. *Brown v. Labor and Indus. Review Comm'n*, 2003 WI 142, ¶ 13, 267 Wis. 2d 31, 671 N.W.2d 279, summarizes the great weight standard as follows:

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[2] No deference is given to an agency's conclusion of law if the issue is "one of first impression or when an agency's position on an issue provides no real guidance". *Id.* at ¶ 14. Neither is true here. The Department's interpretation of this statute provides needed regularity and predictability in this permitting process by specifically listing the factors that will be taken into account in approving or conditioning a permit.

[3] Due weight deference is given to an agency's conclusion of law if "an agency has some experience in the area but has not developed the expertise that necessarily places it in a better position than a court to interpret and apply a statute." *Id.* at ¶ 15. The Department has expertise in the area of regulation of the waters of the state and the need for a permitting process for high capacity wells that gives certainty and predictability to the regulated public.

> Great weight deference is appropriate when: (1) an agency is charged with administration of the particular statute at issue; (2) its interpretation is one of long standing; (3) it employed its expertise or specialized knowledge in arriving at its interpretation; and (4) its interpretation will provide uniformity and consistency in the application of the statute. In other words, when a legal question calls for value and policy judgments that require the expertise and experience of an agency, the agency's decision, although not controlling, is given great weight deference.

Id. at ¶ 16.

Here all four criteria for great weight deference have been satisfied. First, the Department has been charged by the Legislature with the task of approving high capacity wells under § 281.17. Second, as set forth above, the Department's interpretation of its authority under this chapter is one of long standi ng. Third, "the D.N.R. is the state agency with the staff, sources and expertise in environmental matters. . . ." *Wisconsin Environmental Decade v. D.N.R.*, 115 Wis. 2d 381, 391, 340 N.W.2d 222 (1983). The DNR is required by law to manage and regulate waters of the state in such a way that the policy and purpose of ch. 281 are realized.

Finally, the Department's interpretation of its authority under this chapter will provide uniformity and predictability. This interpretation tells the regulated public exactly what factors will be considered in the well approval process. Any interpretation that requires the Department to consider other effects of a well, those **not listed** in Wis. Stat. § 281.17, would eliminate the consistency and predictability of the regulatory process under this section.

When great weight deference is given to an agency's conclusion of law, the court should not substitute its own view of the law for the agency's view. *Brown*, 2003 WI at ¶ 19. The agency's conclusions of law should be sustained if they are reasonable, "even if an

alternative view of the law is just as reasonable or even more reasonable." *Id.*

III. THE GROUNDWATER PROTECTION ACT OF 2003 DOES NOT CHANGE THE DEPARTMENT'S ANALYSIS IN THIS CASE.

Assembly Bill 926, the Groundwater Protection Act of 2003 (GPA), was recently passed by the Legislature, and is awaiting action by the Governor. This legislation underscores the Department's limited high capacity well authority and does not alter the Department's conclusion in this case for three reasons.

First, the Well No. 7 approval predates the effective date of the GPA. The GPA initially applies to an application for approval of a high capacity well that is received by the Department after the effective date of the legislation. 2003 AB 926 § 16. The application for approval of Well No. 7 was submitted in June of 2003, long before the GPA was enacted much less effective.

Second, these changes to groundwater law underscore the limited scope of department authority in this area. The GPA was the product of consensus-building by the legislative authors. During the process, many different people representing a variety of different interests participated. The only fact not in dispute was that the Department's authority is limited to reviewing the effects of a well on a public water utility. That was the whole purpose of the bill. If the Department could look at impacts beyond public water utility wells now, this legislation would not be needed.

Finally, even the changes in the GPA would not address the allegations of the Petitioner. If the changes pending in the GPA were in effect at the time that the application for approval of Well No. 7 was submitted, the added Department authority in this area

would still not apply under the undisputed facts of this case. The GPA only provides an expansion of DNR authority in these specific cases. The GPA allows the Department to consider additional factors based on the proximity of a proposed well to trout streams and outstanding or exceptional resource waters. Lake Beulah is not on any of those lists. *See, e.g.* Wis. Admin Code. ch. NR 102. The GPA also allows the DNR to condition approvals where the well will result in an interbasin water loss between the Great Lakes and the Mississippi basins exceeding 95% or will adversely affect a spring discharging to the surface of land. Neither of these new triggers apply to Well No. 7. Thus, even under an expanded view of DNR authority, Petitioner's claims cannot serve as a basis for changes to the approval for Well No. 7.

CONCLUSION

For the foregoing reasons, the Village requests that summary disposition be granted and the petition be dismissed.

DATED this 26th day of March, 2004.

Anderson & Kent, S.C.

By: _____

Paul G. Kent (#1002924)
1 N. Pinckney Street, Suite 200
Madison, WI 53703
608-246-8500
Attorney for Village of East Troy

STATE OF WISCONSIN | CIRCUIT COURT Branch 1 | WALWORTH COUNTY

LAKE BEULAH MANAGEMENT DISTRICT, AND LAKE BEULAH PROTECTIVE AND IMPROVEMENT ASSOCIATION,

Petitioners,

vs.

Case No. 06-CV-673 and
Case No. 07-CV-674

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent,

VILLAGE OF EAST TROY,

Intervening Respondent.

THE VILLAGE OF EAST TROY'S RESPONSE BRIEF

The Respondent, Village of East Troy (Village) by its attorneys, Anderson & Kent S.C., hereby submits the within Response Brief in the above captioned complaint.

INTRODUCTION

Despite the voluminous materials submitted by the Petitioners, the facts and legal issues are narrow and simple. This case is about two modifications to a municipal well approval for the Village of East Troy. The Village sought and obtained an approval for the well (Well #7) from the Department of Natural Resources so it could provide an adequate public water supply to its residents. The initial approval was issued in September 2003 (2003 Approval) and was re-issued in September 2005 (2005 Approval). *See* R. 49 and R. 1. Subsequent to the 2005 Approval, the Village sought and obtained from the DNR two minor modifications to the well construction that did not affect its pumping capacity, depth, or basic location. The modifications were issued in

2006 and 2007. Petitioners requested contested case hearings on those two minor modifications and the DNR denied the first and partially granted the second.

The only issue before the Court in this proceeding is whether Petitioners are entitled to a contested case hearing on the two minor modifications. Instead of focusing on that issue, Petitioners ask this Court to "remand this matter to the DNR with directions to hold a hearing to determine whether Well No. 7 will negatively impact the navigable water of Lake Beulah and if so, to direct the Village to discontinue use of that well." Pet Br. at 45. In short, Petitioners seek to parlay their request for a hearing on two minor modifications into an open-ended hearing on Well #7. Petitioners' request is improper on multiple grounds.

First, as a preliminary matter, judicial review of agency decisions under Wis. Stat. ch. 227 is a review on the record established by the agency. The question here is whether there is a basis for a hearing on the two modifications. Yet, the Petitioners rest most of the arguments in their 46-page brief on a three ring binder full of documents from five years of proceedings most of which are wholly outside of the record before the Court. Those documents are the subject of the accompanying motion to strike. The Village strongly disagrees with the misleading and inaccurate rendition of the history Petitioners derive from these documents. What these documents show is that the Petitioners fully exhausted their rights to challenge the 2003 Approval and lost, and that they subsequently waived their rights to a hearing on the 2005 Approval. More importantly, they are irrelevant to decide the narrow issues before this Court. Any decision on whether a hearing should be granted must be based on the record before this Court.

Second, case law is clear that a party cannot use a minor permit modification to circumvent the requirements for obtaining a timely review of the underlying permit. If a party

has waived or exhausted its review of the underlying permit, they do not get a second chance to challenge the permit simply because a subsequent modification is made to that permit. This is a fundamental principle of administrative law designed to ensure the orderly review of administrative determinations. Any hearing must be based on the modifications, not the underlying permit.

Third, in order to have the right to a hearing, any request for a hearing must relate to the standards that are relevant under the statutes as they are written. Those standards are in Wis. Stat. § 281.34 – standards completely ignored by the Petitioners. Petitioners suggest that because of the public trust doctrine, the statutes should be re-written (or ignored) so that any applicant for a high capacity well has the burden to demonstrate that the well will have no adverse impact on surface waters. That is not the law in Wisconsin. In delegating public trust authority to the DNR, the Legislature has carefully established a three-part statutory scheme for regulating high capacity wells. While those statutes do require a surface water impact analysis for **some** high capacity wells, they clearly **do not** require such an analysis for wells of the size and location involved here. Indeed, the Legislature has repeatedly refused to expand the DNR's authority for wells like Well #7. This is neither the time nor the forum to re-write state statutes. Any right to a hearing must be evaluated based on the standards in the statutes.

Finally, while the Village believes Well #7 will have no adverse impacts on surface water and has taken measures to ensure that will not happen, even if the Petitioners' fears about Well #7 are realized, there are an assortment of remedies to address such concerns outside of the well permit process. It is not necessary to re-write the state statutes at issue here to address Petitioners' concerns.

Thus, as a matter of established law, there is no basis to grant a hearing on an approval issued years ago simply because there are now two minor modifications to that approval. Nor is there a basis to grant a hearing on the modifications based on factors outside of what the statutes require. These are not merely "procedural issues," they are fundamental constitutional law and administrative law issues which have already been the subject to extensive and careful review. Given the applicable law, the Department should have denied both hearings outright, but certainly it was well within its discretion to deny the first and limit the scope of the second.

FACTS

The Statutory Scheme For Regulation Of High Capacity Wells

This case involves the alleged right to a hearing on a DNR decision to modify a high capacity well approval. To evaluate that claim, it is necessary to understand the statutory scheme under which such approvals are granted.

The Legislature has established a three-part scheme in Wis. Stat. § 281.34 for the regulation of wells based on the capacity of the well in gallons per day (gpd) and the location of the well. That statutory scheme can be summarized as follows:

- Wells below 100,000 gpd are not defined as high capacity wells under Wis. Stat. §281.34(1)(b) and therefore do not require any DNR approval or review.
- Wells between 100,000 gpd and 2,000,000 gpd require an approval in accordance with the standards under § 281.34(5). The specific standards that apply depend on the location of the well and are noted below.
- Wells over 2,000,000 gpd require an approval in accordance with the standards under § 281.35 that requires a detailed review of environmental factors and a determination of several factors including that no public rights in navigable waters will be adversely affected. [1]

[1] Stat. § 281.35(5)(d) provides that if the water loss exceeds 2,000,000 gallons per day, then the Department is required to review seven additional statutory criteria including whether the withdrawal will adversely impact public rights in navigable waters. Among other things, subsection (d) provides the following criteria:

1. That no public water rights in navigable waters will be adversely affected. . .

There has never been a dispute that Well #7 has a capacity of less than 2,000,000 gpd and therefore falls in the second regulatory category. Thus, the standards in § 281.35 regarding review of surface water impacts do not apply. The standards for wells like Well #7 in Wis. Stat. § 281.34(5) are as follows:

> (5) Standards and conditions for approval.
>
> (a) *Public water supply.* If the department determines that a proposed high capacity well may impair the water supply of a public utility engaged in furnishing water to or for the public, the department may not approve the high capacity well unless it is able to include and includes in the approval conditions, which may include conditions as to location, depth, pumping capacity, rate of flow, and ultimate use, that will ensure that the water supply of the public utility will not be impaired.

There is no dispute that Well #7 meets this standard because it does not impair the water supply of another public well.

Until 2004, that standard was in Wis. Stat. § 281.17 and it was the **only** standard applicable to wells of that capacity. In 2003 Wis. Act 310, the Legislature created Wis. Stat. § 281.34, effective May 6, 2004. Act 310 added a requirement for environmental review for wells in designated groundwater protection areas, wells with an impact on springs and wells with a certain high water loss within a basin. *See* Wis. Stat. §281.34(5) (b)-(d). There has never been a dispute that Well #7 is **outside** any of those areas.

Thus, under the statutory scheme, the DNR is only authorized and required to evaluate environmental impacts including impacts on surface waters for high capacity wells over 2,000,000 gallons per day and for wells in certain locations. Those standards do not apply to Well #7. The only standard applicable to Well #7 under this statutory scheme is Wis. Stat.

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5. That the proposed withdrawal and uses . . . will not be detrimental to the public interest.
6. That the proposed withdrawal will not have a significant detrimental effect on the quantity and quality of the waters of the state.

§ 281.34(5)(a). The DNR has no authority much less an obligation to consider impacts to surface waters for wells in the category of Well #7.

The Prior Proceedings

This case does have an extensive history. However, the only relevant facts from that history in the record before the Court are that the DNR issued high capacity well approvals to the Village of East Troy for a municipal well and granted modifications to the 2005 Approval in 2006 and 2007. If the Village's motion to strike is granted, the following material regarding the prior proceedings can be disregarded. If it is not granted, then the Court should review the following information in response to the misleading discussion of the procedural history surrounding Well #7 in Petitioners' brief.

2003 Approval and Review

Following the issuance of the 2003 Approval, the Petitioners sought and obtained a contested case hearing on the 2003 Approval. Petitioners assert that the Administrative Law Judge (ALJ) improperly dismissed the petition. Not so. The granting of the hearing request was for the ALJ to hold a hearing to determine "**whether** the Department should have considered . . . effects to the waters." Pet. Tab. 7. It does not direct the ALJ to hold an evidentiary hearing on those factors; it directs the ALJ to make the determination of **whether** the DNR should have considered those factors. That is precisely what the ALJ did. The Village moved for summary judgment on the grounds that the applicable statues do not require DNR to consider those factors and the ALJ granted the Village's motion on June 16, 2004. The ALJ stated in part:

> But a permit must be issued if the statutory standards are met. Here, **the Village has demonstrated compliance with the statutory standards and the permit must be issued.** Once such a permit is issued, the burden of persuasion and proof shifts to the party asserting that, despite the permit, that either the Department should rescind the permit of a private party should have some redress for an impact upon a private well. . . . Here the only facts before the Division indicate that the statutory standard have been met

> and any potential damage is purely speculative because there has been no factual record developed to support the allegations made in the petition. (Emphasis added.)

Pet. Tab. 9; Decision at 6. Petitioners omit from their rendition of the procedural history that they filed a motion for reconsideration, the ALJ invited the Petitioners to file evidentiary affidavits, and Petitioners refused to do so. To say the ALJ refused to follow the hearing request is simply wrong.

Next, the Petitioners filed a petition for judicial review in Walworth County Circuit Court. Judge Carlson issued a 15-page opinion on June 24, 2005, dismissing the case and upholding the ALJ. Judge Carlson rejected the Petitioner's claim that the DNR should look at factors beyond those in the statute:

> As the Village's proposed well will not trigger the requirements of Section 281.35, the DNR is not required to consider these criteria. Furthermore, **not only is the DNR not required to do so, it should not, as the criteria for approval of this type of well is clearly and unambiguously spelled out in Section 281.17 [now § 281.34].** A state agency has only the express or implied authority grant to it by statute. . . . There is a three-tiered structure of review depending upon the amount of water the well proposes to pump. As the proposed Village well falls into the middle tier it is that statutory criteria that must be followed by DNR. The statute is clear and unambiguous. . . .
>
> Petitioners wish the Court to reach beyond the statue in this case. This is not within the prerogative of the court nor the DNR, but rather is a matter for future legislation. (Emphasis Added)

Pet. Tab. 12; Decision at 11 -12. The Court also rejected the Petitioner's claim that they were deprived of an opportunity to present evidence to the ALJ:

> Nothing supplied by petitioners disputes that the Village established that it met the statutory requirements for a high capacity well. Petitioners argue that the public trust doctrine should be considered broadly, and that they wish the opportunity to show why they believe there will be scientific evidence showing the problem with granting the approval of the Village's well. **They were given that opportunity and failed to take it.** (Emphasis Added)

Id. at 14. Again, a subsequent motion for reconsideration was also rejected by the Court.

When the Petitioners filed their petition for judicial review in 2004, they also filed a separate action entitled a "Petition and Complaint for Judicial Review," and the cases were

consolidated. In the second action, the Petitioners' counsel obtained a Writ purportedly imposing a stay on well construction "until further order of the Court."[2] Pet. Tab. 11. Petitioners now contend that the "stay" was never lifted. Pet Br. at 14-15. That is absurd. There was a further order of the Court – one dismissing the entire action. Pet. Tab. At 12. The case was over and nothing more was required.

2005 Approval and Subsequent Review

By the time that Judge Carlson affirmed the ALJ decision and denied the motion for reconsideration, it had been nearly two years since the 2003 approval was granted. Since the 2003 Approval required that construction commence within two years, and the Village had refrained from construction during the litigation, it was necessary to obtain an extension before it expired on September 4, 2005.

In the intervening two years, the Legislature had passed 2003 Wis. Act 310. Act 310 also created a provision that allowed for modifications to well approvals issued under the old law. Based on that provision, the Village attempted to persuade the DNR to extend the 2003 Approval rather than issue a new decision. Having spent two years in litigation, the Village wanted to avoid starting the process over by a decision that would create new hearing rights.

Nevertheless, the DNR determined that because of the new law, it needed a new application fee and needed to confirm that the new standards did not apply. Pet. Tab.16. The Village provided that information but by the time the DNR issued the approval extending the time for construction, it was September 6, 2005 and the old approval expired. *Id.* The approval also expressly provided the Petitioners the right to ask for another contested case hearing and seek judicial review. The decision was mailed to Petitioners' counsel. *Id.* Petitioners, for

[2] The second action was both unnecessary and improper because Chapter 227 is the exclusive remedy for challenging an agency decision. *See* Argument I.A. Thus, there was no legal basis for the court to have issued any writ. Nevertheless, the Village did not construct the well during that time.

whatever reason, failed to request a contested case hearing.[3]

Given the fact that the DNR issued a new decision in September 6, 2005, the Village argued to the Court of Appeals that the appeal on the 2003 Approval was moot. The Court of Appeals agreed.[4] The Petitioners then filed a petition for review to the Supreme Court protesting the mootness determination but the petition was denied.

Summary of the 2003 and 2005 Approval History

Petitioners' repeated assertion that there was "malfeasance" by the DNR because it refused to hold a hearing on the well is not supported even by their own documents from outside the record. The DNR granted Petitioners' hearing request on the 2003 Approval. The ALJ reviewed the material submitted by the parties and ruled in favor of the Village. Whatever complaints the Petitioners had about the scope of that hearing were rejected on review all the way to the Supreme Court. As for the 2005 Approval, there is one and only one reason why Petitioners were not granted a contested case hearing – they did not ask for one.

The Approval Modification Proceedings Relevant to This Action

The case now before the Court is a consolidation of two separate actions in which the Petitioners requested contested case hearings concerning two minor modifications of the Village's 2005 Well Approval for Well #7.

The first modification was sought on May 19, 2006, to increase the well casing size of Well #7 six inches from 24 to 30 inches and to use an alternative drilling method. The modification was designed to aid construction and to insure constructability. R. at 49. The

[3] Nearly six months later, Petitioners filed a petition for judicial review. The timeliness of that petition is one of the issues that will need to be resolved in Case. No. 06-CV-172, but is not relevant for purposes of the cases currently before the Court.

[4] The Court of Appeals also rejected the attempt by the Attorney General to file an amicus brief taking a position different from that of DNR. Given that formal attorney general opinions are not binding on the Court, citation to an opinion expressed by an assistant attorney general in a rejected brief in a proceeding outside the record is wholly improper and irrelevant. *See F.A.S. v. Town of Bass Lake*, 2007 WI 73, ¶7, 301 Wis. 2d 321.

modification did not affect the depth of the well, its location, its pumping capacity or any other factor. R. at 46. The modification was granted by the DNR on May 25, 2006. ("2006 Modification").

On June 23, 2006, the Petitioners requested a hearing on the 2006 Modification." ("2006 Hearing Pet.") *See* R. at 40. As support for their request, the Petitioners state that, "the proposed Water Systems Facilities Plan involves a proposal to draw substantial amounts of groundwater that will adversely affect the waters of Lake Beulah. . . ." 2006 Hearing Pet. at ¶2; R. at 40. Nothing in the petition addressed how the modification of the well approval, apart from the well itself, affected their interests. In addition, nothing in the petition alleged that the modification failed to meet applicable standards in Wis. Stat. § 281.34(5)(a). The DNR denied this petition for failing to identify any injury to the Petitioners based on the actual modification. *See* R. at 38.

The second modification was sought on February 21, 2007, to move the well 12 feet. The modification was designed to address the fact that the temporary well casing had to be removed prior to installing the final casing, and the temporary casing could not be removed because the welds on the temporary casing broke. The modification did not affect the depth of the well, its pumping capacity or any other relevant factor. R. 22. The well was not moved any closer to Lake Beulah. R. at 30. The modification was granted by the DNR on March 16, 2007. ("2007 Modification"). R. 22. Petitioners filed a contested case hearing on this modification on April 13, 2007. ("2007 Hearing Pet.") R. at 6.

In support of their request for a hearing on that modification, the Petitioners claim that "[t]he Lake Association has a substantial interest in this matter because Well #7 will intercept and remove groundwater that would otherwise sustain Lake Beulah, thus causing harm to Lake Beulah contrary to the goals and values of the Lake Association." *See* 2007 Hearing Pet. at 4(b);

R. at 11. The Petitioners also claim that the modification makes it possible for the well to damage sensitive wetlands, encourage an adverse change in species of biota, harm the use and enjoyment of the lake by the Petitioners, reduce property values, and subject the Petitioners to claims for failure to uphold its legal duty to protect the Lake. *Id.* at 4(c)-(h). No allegation was made regarding the applicable standard under Wis. Stat. § 281.34(5)(a).

The DNR granted in part and denied in part the Petitioners' request for a hearing regarding the 2007 Modification. In so doing, the DNR allowed review of two issues:

> 1) Whether it was appropriate for the DNR to conditionally approve a modification of the Village of East Troy's Water Facilities Plan and Specification Approval for a High Capacity Well to change the location of Well No. 7 without using the environmental review process under s. 1.11, Wis. Stats., to the extent that any requirement to use that process applies only to the change in location of Well No. 7.
>
> 2) Whether all of the s. NR 811.16(4)(d), Wis. Admin. Code, requirements for separation distances from potential sources of contamination were complied with, given that the location of Well No. 7 was changed.

See 2007 Modification, R. at 1.

ARGUMENT

I. PETITIONERS CANNOT USE A MINOR PERMIT MODIFICATION TO OBTAIN A HEARING ON THE UNDERLYING PERMIT.

Petitioners repeatedly ask this Court to order a hearing that "the DNR granted four years ago" (Pet. Br. at 29, 41) and to determine the impacts of "Well No. 7." *Id.* at 45. There is no basis to grant a hearing on the 2003 or 2005 Approvals based on modifications issued years later.

A. There Is No Dispute That Petitioners Cannot Obtain A Hearing On The 2005 Approval.

The procedures for obtaining a contested case hearing are set forth by statutes and DNR administrative rules. The DNR rules that implement Chapter 227 expressly provide that a request for a contested case hearing must be made within 30 days of a final agency action unless another time is set by statute. *See* Wis. Admin. Code § NR 2.05. For high capacity well

approvals, the 30-day period applies, and this time limit was contained in the notice of appeal rights when the 2005 Approval was issued and sent to the Petitioners. Pet. Tab. 16.

Wisconsin courts have adopted "the general principle that where a method of review is prescribed by statute, the prescribed method is exclusive." *St. Ex. Rel.1st Nat. Bank v. M&I Peoples Bank,* 82 Wis. 2d 529, 542, 263 N.W.2d 196 (1978); *see also Jackson County Iron Co. v. Musolf,* 134 Wis. 2d 95, 101, 396 N.W.2d 323 (1986) ("This court has adopted the general principle that, where a method of review is prescribed by statute, the prescribed method is exclusive."). These same principles have been applied to hearings under Wis. Stat. § 227.42 and timeframes imposed by agency rules for § 227.42 petitions. *See Shearer v. DNR,* 151 Wis. 2d 153, 169-170, 443 N.W.2d 669 (Ct. App. 1989).

Compliance with statutory review timeframes is not simply an arbitrary rule, but one based on sound public policy to encourage orderly review of administrative decisions. As the court noted in *St. Ex. Rel. 1st Nat. Bank,* 82 Wis. 2d at 542-543:

> [This] rule is based on the strong public interest in creating effective administrative agencies, in insuring finality of agency determinations and certainty in legal relations; in establishing orderly judicial processes; in preventing a multiplicity of suits; and in achieving economy of judicial time.

There is no question that the time for requesting a contested case hearing on the 2005 Approval, much less the 2003 Approval, expired long ago and Petitioners cannot now obtain a hearing on those decisions.

B. Petitioners Cannot Obtain Indirectly What They Cannot Obtain Directly.

Knowing that they cannot get a hearing on the 2005 Approval directly, Petitioners attempt to obtain the same result by indirection. They attempt to use a hearing request on two minor modifications as a basis for "a hearing to determine whether Well No. 7 will negatively impact the navigable water of Lake Beulah. . . ." Pet Br. at 45. This case is not about Well #7, it

is only about the **modifications** to the prior approval for Well #7. Wisconsin and federal case law are clear that a party cannot use a permit modification as grounds for reopening long settled provisions of a permit.

In *Thiensville Village v. DNR*, 130 Wis. 2d 276, 386 N.W.2d 519 (Ct. App. 1986), the court rejected the same argument Petitioners are making here. In *Thiensville*, the DNR issued the Village a permit in 1977 with an expiration date of October 31, 1981, requiring that Thiensville construct an interceptor sewer to connect with Milwaukee Metropolitan Sewage District. *Id.* at 278. Several years later as the deadline approached, Thiensville sought an extension of the construction deadline. On October 15, 1981, the DNR issued a modified permit extending the permit. Thiensville objected to the new compliance dates in the permit modification **and** the requirements in the original permit. *Id.* The hearing examiner limited his review to the question of the reasonableness of the new compliance dates. *Id.* Thiensville appealed, arguing that "the hearing examiner erred in refusing to consider terms of the original permit which were not changed by the modified permit." *Id.* at 279.

The court rejected Thiensville's argument based on the language of the applicable permit statute in that case and general doctrines of administrative law. The Court of Appeals held that the hearing examiner properly limited his inquiry to the reasonableness of the modification. *Thiensville*, 130 Wis. 2d at 281. The Court noted that the policy of limiting review of permit modifications to the terms of the modification is sound and in keeping with the exhaustion of remedies doctrine long at the core of administrative law. *Id.*

Just like in *Thiensville*, the modifications to the Village's permit in this case were made by the DNR long after the underlying permit was issued and were based on events occurring after the permit was issued. There is no basis for this Court to allow a hearing on specific permit

modifications to open up the underlying 2005 Approval to the Village of East Troy. As in *Thiensville*, any hearing must be limited to the modification at issue.

The U.S. Supreme Court has reached a similar conclusion. In *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 217, 100 S. Ct. 1095 (1980), the Environmental Protection Agency (EPA) extended the expiration date of the City of Los Angeles' discharge permit for its sewage treatment plant. Pacific Legal Foundation attempted to use this modification to reopen the underlying permit. The Supreme Court rejected that argument and explained that parties "may not reopen consideration of substantive conditions contained within [a] permit through hearing requests relating to a proposed permit modification that did not purport to affect those conditions." *Costle*, 445 U.S. at 217.

Significant policy rationale supports limiting review of a permit modification to the modification triggering the challenge. In the case of *Sewerage Commission of Milwaukee v. DNR*, 102 Wis. 2d 613, 307 N.W.2d 189 (1981), the Wisconsin Supreme Court held that the failure to timely utilize the specified method of review precluded subsequent judicial review of the DNR's action on a WPDES permit. *See id.* at 621. "Such a challenge is 'ripe,' both as to fact and law, at the time the permits are issued; no delay is either necessary or appropriate." *Id.* at 625-626. It would undermine the principles of judicial economy and finality that form the basis for the procedures and time limitations in Wis. Stat. ch. 227 if the Petitioners were allowed to challenge the settled, unmodified provisions of the Village's well approval. The resulting uncertainty would cause significant waste of tax payer resources, not to mention years of unnecessary delay in attaining adequate water supplies for Village residents.

The time for a hearing on the 2005 Approval has expired. A similar analysis applies to the suggestion that the hearing granted to the 2003 Approval should be reopened. While there

are "issue or claim preclusion" arguments that could prevent the re-litigation of issues raised in Petitioners unsuccessful challenge to the 2003 Approval,[5] the Court need not reach those issues in this proceeding. The hearing and review process for the 2003 Approval has been exhausted. Even if some issues were not decided in those proceedings, there is no basis for further review of those agency actions because the timeframes in Chapter 227 have expired. The exclusive means for challenging both the 2003 Approval and 2005 Approval have expired.

Thus, to the extent there is any hearing right at this time that hearing arises from and is limited to the specific permit modifications, not the underlying permit. Alleged injuries from the approval of Well #7 cannot serve as a basis for a hearing, only alleged injuries arising from the modification to the 2005 Approval are relevant to whether a hearing should be granted.

II. PETITIONERS DO NOT STATE AN ADEQUATE BASIS FOR A CONTESTED CASE HEARING ON THE MODIFICATIONS.

A. Petitioners Must Meet All the Standards In Wis. Stat. § 227.42 For The Modification.

Wis. Stat. § 227.42(1) lists four requirements a petitioner must establish to gain the right to a contested case hearing:

> In addition to any other right provided by law, any person filing a written request with an agency for hearing shall have the right to a hearing which shall be treated as a contested case if:
>
> (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
>
> (b) There is no evidence of legislative intent that the interest is not to be protected;
>
> (c) The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and

[5] *See State v. Stuart*, 2003 WI 73, ¶24, 262 Wis. 2d 620("[A] court should 'be loathe' to reconsider previous decisions it or a coordinate court has rendered 'in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice.'") (quoting *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988)).

(d) There is a dispute of material fact.

As the court in *Metro. Greyhound Mgt. Corp. v. Racing Bd.*, 157 Wis. 2d 678, 692, 460 N.W.2d 802 (Ct. App. 1990) explained, a petitioner must establish prima facie entitlement to a contested case hearing. To receive a contested hearing under Wis. Stat. § 227.42(1), a person must satisfy the conditions in subsections (a) through (d). *See Milwaukee Metro. Sewerage Dist. v. DNR*, 126 Wis. 2d 63, 73, 375 N.W.2d 649, 652 (1985) (interpreting § 227.42, formerly numbered § 227.064).

Although the standard of review of an agency's denial of a contested case hearing may be *de novo*, a reviewing court must examine the record before the agency to determine whether a prima facie entitlement to a contested hearing has been made. *Metro. Greyhound* 157 Wis. 2d at 692 (citing *Shearer v. DNR*, 151 Wis. 2d at 165). An applicant who seeks a hearing is required "to meet a threshold burden of tendering evidence suggesting the need for a hearing." *Costle*, 445 U.S. at 217.

It is also worth noting that when reviewing an agency's denial of a contested case hearing, the court merely conducts a *de novo* review, and not a *de novo* trial. *De novo* review allows the reviewing court to limit the issues and evidence reviewed. Davis Admin. Law 2nd Ed., "Administrative Appeals", Vol. III, p. 90. *De novo* review is a standard that "accords due consideration to the arbitrator's decision, but the reviewing court is not bound by it." *Glendale Professional Policemen's Ass'n v. City of Glendale*, 83 Wis. 2d 90, 100, 264 N.W.2d 594 (1978).

B. The Petitioners Did Not Allege A Sufficient Injury In Fact.

1. The 2006 Casing Modification.

The Petitioners' request for a contested case hearing concerning the casing modification attempts to satisfy the requirements of Wis. Stat. § 227.42(1) (a) through (d) by claiming the following:

- "[T]he proposed Water Systems Facilities Plan involves a proposal to draw substantial amounts of groundwater" that will have adverse effects. *See* 2006 Hearing Pet. at ¶2.

- Lake Beulah will be injured in fact or threatened with injury if the 2006 Modification permits the Village's well to be located in its current location and under the permitted specifications. *See* 2006 Hearing Pet. at ¶3.

- The proposed harm directly relates to Lake Beulah, its groundwater resources, the Lake Beulah environment and the property owners who comprise the Lake District will be adversely impacted by said Water System Facilities Plan and Specification Approval. *See* 2006 Hearing Pet. at ¶4.

- "There is a dispute of material fact and the application of law, which forms the basis for the permit approval. In addition, the Petitioner believes that the Department of Natural Resources has failed to comply with other law which applies to this project including, without limitation, Wisconsin Administrative Code § NR 103.08..." *See* 2006 Hearing Pet. at ¶5.

The Petitioners explicitly state that their injury is related to the proposed "Water Systems Facilities Plan," not the "Modification of Water Systems Facilities Plan." Furthermore, the Petition claims an injury based on the "proposal to draw substantial amounts of groundwater that will adversely affect the waters of Lake Beulah. . . ." The casing modification approved by the DNR on May 25, 2006, does not affect the pumping capacity of the well (2006 Modification; R. at 46) and, therefore, is unrelated to the injuries alleged in the Petition.

Finally, the Petitioners allege a dispute of material fact and the application of law, but only as to that "which forms the basis for the permit approval," not the modification. None of the injuries alleged by the Petitioners can be attributed to a change in the casing of the well and, in fact, the Petitioners do not even make such an allegation. On its face, the petition for a contested case hearing does not allege an injury arising from the modification. The DNR was correct in denying the hearing.

2. The 2007 12-foot Modification.

The modification approved by the Department in 2007 allows Well #7 to be 12 feet from its original location. The DNR noted that the Modification "will not affect the anticipated pumping capacity of Well No. 7." R. at 22. Again, the Petitioners have alleged various hypothetical injuries, but none of them are related to the 12-foot change.

In support of their claim that the 2007 Modification injures or threatens to injure their substantial interest, the Petitioners' primary claims are as follows:

- The Lake Association has a substantial interest in this matter because Well #7 will intercept and remove groundwater that would otherwise sustain Lake Beulah, thus causing harm to Lake Beulah contrary to the goals and values of the Lake Association. *See* 2007 Hearing Pet. at 4(b).

- The modification makes it possible for the well to damage sensitive wetlands, encourage an adverse change in species of biota, harm the use and enjoyment of the lake by the Petitioners, reduce property values, and subject the Petitioners to claims for failure to uphold its legal duty to protect the Lake. *See* 2007 Hearing Pet. at 4(c)-(h).

However, the Petition is void of any specific assertion or explanation as to how the 12-foot change in location affects the Petitioners' substantial interests. The 2007 Modification merely moves the well 12 feet and the movement is no closer to Lake Beulah or any alleged shoreland wetlands. R. at 22. To establish prima facie entitlement to a contested case hearing, the Petitioners must specifically identify a substantial interest that is injured, or is threatened with injury, by the 12-foot change. This requisite element is not satisfied by asserting unsupported declarations that harm will occur as a result of the location of the well.

C. The Petitioners Have Not Alleged An Interest Protected By Law Or A Dispute Of *Material* Fact.

Even if the Petitioners alleged a sufficient injury, in order to be entitled to a hearing on an agency decision, a petitioner must allege interests protected by law and facts that are material to

the legal standards governing that decision. Wis. Stat. § 227.42(1)(b) and (d). This case involves the decision of the DNR to issue a modification to a permit for a high capacity well. As noted above, there is a detailed statutory scheme that defines the relevant factors and standards the DNR must apply in making those determinations.

Under that three-part scheme, the only applicable standard for Well #7 is Wis. Stat. § 281.34(5)(a) – whether it impacts other municipal wells. Petitioners make no claim in either petition that Well #7 fails to meet this standard. As a result, Petitioners have not asserted a right protected by law under Wis. Stat. § 227.42(1)(b) and, on that basis alone, the petitions should be denied. In addition, their claim that the well will cause other impacts is not material to the only applicable statutory standard. As a result, they do not meet the hearing requirement under § 227.42(1)(d).

The Petitioners wholly ignore the applicable statutory standards both in their petitions and in their brief before the Court. Instead, they accuse the DNR of malfeasance for not applying general public trust doctrine standards. Any analysis of a right to a hearing must be based on an analysis of the applicable law as written, not the law as Petitioners wish it to be.

1. DNR's Role In Approving High Capacity Wells Is Prescribed By Statute.

The suggestion that the DNR is obligated to implement the public trust doctrine apart from its statutory charge, reflects a fundamental misunderstanding of the public trust doctrine and separation of powers principles.

First, under the public trust doctrine, the Legislature, not the DNR, has the primary responsibility for implementing the public trust doctrine. *See Hilton v. Dept of Natural Resources,* 2006 WI 84, ¶19, 293 Wis. 2d 1 ("The legislature has the primary authority to

administer the public trust for the protection of the public's rights, and to effectuate the purposes of the trust."); *Gillen v. City of Neenah*, 219 Wis. 2d 806, 820-821, 580 N.W.2d 628 (1998); and *State v. Village of Lake Delton*, 93 Wis. 2d 78, 91, 286 N.W.2d 622 (Ct. App. 1979) ("The primary power to administer the trust for the enhancement of these public rights to use the water for commercial and recreational purposes reposes in the legislature.")

Second, to the extent that the Department of Natural Resources implements the public trust doctrine, it is only insofar as the Legislature has delegated it authority to do so. *State v. Town of Linn*, 205 Wis. 2d 426, 443-44, 556 N.W.2d 394 (Ct. App 1996) ("The legislature may delegate to the DNR the authority to exercise such legislative power as is necessary to make public regulations interpreting [its] statute[s] and directing the details of [their] execution. . . . This is precisely what the legislature has done with the public trust doctrine.")(internal citation omitted.) *See also Hilton*, 2006 WI at ¶20 ("the legislature has charged the DNR with regulating piers under §§ 30.12 and 30.13. . .").

This basic delegation principle follows from the constitutional principle of separation of powers. The DNR, like any state agency, has only those powers "which are expressly conferred or which are necessarily implied by the statutes under which it operates." *Wisconsin Citizens v. DNR*, 2004 WI 40, ¶14, 270 Wis. 2d 318 (quoting *Kimberly-Clark Corp. v. PSC*, 110 Wis. 2d 455 (1983)). "Every administrative agency must conform precisely to the statute which grants the power." *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929, 942 (1928). "Such statutes are generally strictly construed to preclude the exercise of power which is not expressly granted." *Browne v. Milwaukee Bd. of Sch. Directors*, 83 Wis. 2d 316, 333, 265 N.W.2d 559 (1978).

The only public trust question involved in this case is to what extent the Legislature has

delegated public trust authority to the DNR in the context of high capacity wells. That is a simple question and one wholly ignored by the Petitioners. Here, the Legislature has implemented its public trust duties with respect to high capacity wells through the statutory scheme in Wis. Stat. § 281.34. Under that scheme, there is no authority, much less a duty, to look at surface water impacts from wells like Well #7. Alleged "surface water impacts" are not material to the standards for Well #7 and can form no basis for a hearing.

In an attempt to circumvent that clear statutory scheme, the Petitioners assert that there is broad delegation to the DNR under the public trust doctrine and the provisions of Wis. Stat. §§ 281.11 and 281.12 (formerly §144.025). Petitioners are incorrect on both counts. As to the public trust doctrine, Petitioners ignore the fact that, "The public trust doctrine, in itself, does not create legal rights" *Borsellino v. DNR*, 2000 WI App 27, 232 Wis. 2d 430 (citing *Robinson v. Kunach*, 76 Wis. 2d 436, 452, 251 N.W. 2d 449, 451 (1977) and *State v. Deetz*, 66 Wis. 2d 1, 11, 13, 224 N.W.2d 407, 412-13 (1974)). Thus, the court in *Borsellino*, rejected an assertion similar to that raised by Petitioners here stating, "Although in granting pier permits under § 30.12, Stats. the DNR acts in furtherance of the public trust, **Borsellino cannot state a cause of action based only on a general allegation of a violation of the public trust doctrine.**" Borsellino 2000 WI App at ¶18. (Emphasis added). As in *Borsellino*, Petitioners cannot assert public trust doctrine violation when the DNR was acting in accordance with its delegated statutory authority.

Petitioners are equally incorrect in asserting that Wis. Stat. §§ 281.11 and 281.12 (formerly § 144.025) is a general grant of public trust authority that allows DNR to consider factors beyond those in specific statutes. In *Rusk County Citizen's Action Group, Inc. v. DNR*, 203 Wis. 2d 1, 10, 552 N.W.2d 110 (Ct. App. 1996), the court expressly rejected the argument that general authority cited in Wis. Stat. § 281.12 can authorize the DNR to impose conditions

beyond those established in a statutory scheme. In *Rusk County*, a citizen group petitioned the DNR to ban sulfide mining citing § 281.12. The Court noted that the DNR had a regulatory scheme to govern the issuance of mining permits and therefore, rejected the claim that the general provisions of § 144.025 could add to it:

> The Mining Act is the more specific statutory grant of authority dealing with the question of sulfide mineral mining and it was enacted eight years after § 144.025. When a specific grant of authority to an agency conflicts with a more general grant of authority, the specific statute controls. *Grogan v. PSC*, 109 Wis. 2d 75, 81,325 N.W.2d 82, 85 (Ct. App. 1982). This is especially true when the specific statute is enacted after the general statute as in this case.

Id. The same analysis holds true here. Wis. Stat. § 281.34 is a more specific and more recent enactment than §§ 281.11 and 281.12 and therefore controls the standards for granting high capacity wells.[6]

Thus, Petitioners assertion that the DNR needs "no statute or regulation" to evaluate impacts of high capacity wells on surface waters (Pet. Br. at 7) is simply at odds with established Wisconsin law. The Legislature has implemented its public trust duties with respect to high capacity wells by delegating authority to DNR through the statutory scheme in Wis. Stat. § 281.34. Neither the DNR nor the Petitioners can ignore that scheme. If there is to be a change to that scheme, it is for the Legislature to make.

2. Petitioners' Demand that DNR Hold a Hearing to Consider Alleged Surface Water Impacts for Well #7 Is Contrary to the Legislative Scheme and Is Thus Not An Interest Protected By Law.

Petitioners' attempt to expand the statutory criteria is directly contrary to the legislative history and principles of the statutory construction. Statutes must be read as a whole to give effect to the entire statutory scheme. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004

[6] In addition, Wis. Stat. § 281.11 is not even applicable to high capacity wells. Wis. Stat. § 281.11 is a statement of "the purpose of this subchapter" (i.e. subchapter II) not the entire chapter. The high capacity well provisions of Wis. Stat. § 281.34 are in Subchapter III.

WI 58, ¶46, 271 Wis. 2d 633. Here, the Legislature clearly has established a multi-level regulatory scheme in which environmental factors are to be considered before permit issuance in some categories and not others. Well #7 is in a category in which such review is not required. Petitioners demand to consider factors beyond and contrary to the legislative scheme is unwarranted.

The intent of this scheme is reflected in the legislative history. As the high capacity well statute has evolved, the Legislature has granted the DNR limited additional regulatory authority in a careful sequential process.[7] The Legislature has never given the DNR open ended authority. In addition to the changes enacted in 2003 Wis. Act 310, the Legislature also created a Groundwater Advisory Committee for the express purpose of reporting back to the Legislature in 2006 and 2007 regarding additional changes to the groundwater law.[8] The 2007 Report to the Legislature reviewed various changes to the existing law, one of which was to expand the environmental review for tier two wells to all waters.[9] That option was rejected and has not been adopted by the Legislature. There are obviously legitimate public policy considerations on both sides of this issue, but it is a legislative issue. If the Department has *carte blanche* authority as Petitioners assert, all of these careful legislative choices would be meaningless.

This same conclusion is supported by accepted statutory construction principles. Courts construe the statutory text so that no part of it is surplusage, "giving effect to all the words that

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[7] The original focus of the high capacity well statute was only the protection of public utility wells. *See* Wis. Stat. § 144.025(2)(e), Laws of 1965, ch. 614. In 1985, the Legislature granted additional authority to the Department to condition or deny approvals for wells over 2,000,000 gallons per day based on various factors including surface water impacts. *See* 1985 Wis. Act 60. As noted above, 2003 Act 310 also provided limited additional authority to DNR.

[8] *See* 2003 Wis Act 310 § 15.

[9] A copy of the 2007 Report is available on DNR's website at http://dnr.wi.gov/org/water/dwg/gac/GACFinalReport1207.pdf.

are used." *Randy A.J. v. Norma I. J.*, 2004 WI 41, ¶22, 270 Wis. 2d 384. *See also Kalal*, 2004 WI 58 at ¶46. Here, the Petitioners would render whole sections of the statutory scheme surplusage. Similarly, under the rule of construction, "*inclusion unius est exclusion alterius* . . . to include one thing implies the exclusion of the other." *Keip v. Wisconsin Dept. of Health and Family Services*, 2000 WI App 13, ¶18, 232 Wis. 2d 380. Sections 281.34(5)(a) state that the Department "shall" condition or deny an approval for a high capacity well to ensure "that the water supply of a public water utility will not be impaired." Because no other factors are listed, the Legislature intended to exclude any consideration of factors not expressly authorized. *See C.A.K. v. State*, 154 Wis. 2d 612, 623, 453 N.W.2d 897 (1990).

In short, there is no basis under current law to imply that the DNR has the authority to require environmental review or an evaluation of surface water impacts of high capacity wells beyond those expressly enumerated in the statutes. That being the case, Petitioners allegations that the 2007 Modification will allow Well #7 to intercept and remove groundwater, damage the sensitive wetlands at and adjacent to the Lake, and adversely alter the physical properties of the Lake are not material facts under Wis. Stat. § 281.34 and cannot not form the basis for a hearing. The same is true with respect to the alleged surface water impacts associated with the 2006 Approval. The only material fact – impact to public utility wells – was never alleged.

3. The Legislative Scheme Addresses Public Trust Impacts Through Other Remedies, Outside of the Permitting Process.

The Petitioners repeatedly chastise the DNR for "shifting its duty" under the public trust doctrine to Petitioners. The DNR has done no such thing. The DNR has followed the balance of public interests prescribed by the Legislature in the established three-part legislative scheme for regulating high capacity wells. The Legislature has provided other remedies to parties like the Petitioners who believe that there is the potential for other surface water impacts.

The Legislature is well within its prerogative to balance how public trust considerations are taken into account. The public trust doctrine is not absolute.[10] The three-part scheme adopted for high capacity wells is similar to many other legislative determinations affecting public trust waters. The Legislature has determined that some activities that impact navigable waters can be allowed by permit. *See, e.g., State v. Bleck*, 114 Wis. 2d 454, 467-68, 338 N.W.2d 492 (1983). In other cases, the Legislature has determined that some activities are exempt from regulation.[11] In still other cases, the Legislature has determined that some threshold must be reached before regulation is necessary. Wisconsin water law is replete with examples where such lines have been drawn by the Legislature.[12] That does not mean that there are no impacts to public trust waters from such activities, only that those impacts are not sufficient to warrant regulation by permit.

Equally important, the statutes provide that even when the DNR is not required to consider public trust impacts as part of its permitting scheme, members of the public have other remedies if they can come forward and show some actual detriment to the public trust. For example, the DNR has authority to address certain "infringement of the public rights relating to

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[10] *See State v. Village of Lake Delton*, 93 Wis. 2d 78, 96, 286 N.W.2d 622 (Ct. App. 1979), ("[N]o single public interest in the use of navigable waters, though afforded the protection of the public trust doctrine, is absolute. Some public uses must yield if other public uses are to exist at all. The uses must be balanced and accommodated on a case by case basis.")

[11] For example, agricultural uses of land, highway projects, and projects in Milwaukee County have been exempt from the requirements of that section of Wis. Stat. § 30.19 since the early 1960s governs connected enlargements to navigable waters and grading on the banks of such waters.

[12] For example, permits for grading on the banks of a navigable water are required only where the grading exceeds 10,000 square feet, § 30.19(1g)(c); permits for unconnected ponds are required only where the pond is within 500 feet of a navigable water, § 30.19(1g)(am); permits for stormwater discharges from construction sites are required for activities of one acre or more in accordance with federal requirements implemented under § 283.33(1)(a); stormwater permits for municipalities are limited to those exceeding the population limits in § 283.33(1)(b)-(cr); and shoreland zoning requirements apply only to those areas defined as shorelands within unincorporated areas governed by § 281.31 and § 59.692.

navigable waters" pursuant to Wis. Stat. § 30.03(4)(a).[13] *See ABKA Limited Partnership v. DNR*, 2002 WI 106, ¶17, 255 Wis. 2d 486. Similarly, DNR and members of the public also have the right to bring nuisance abatement actions under the provisions of Wis. Stat. § 30.294. *See Gillen v. City of Neenah,* 219 Wis. 2d at 828-829. The same is true here. If Petitioners can come forward with facts to show an actual adverse impact, they have other remedies available to them outside of the permitting scheme should they chose to use them. Those remedies however, do not include altering the regulatory scheme for issuing permits under Wis. Stat. §281.34.

III. IF A HEARING IS GRANTED ON THE MODIFICATIONS, IT MUST BE LIMITED TO ISSUES RELEVANT UNDER THE APPLICABLE LAW.

Based on the foregoing analysis, the Village maintains that no contested case hearing is warranted because the Petitioners have not met the requirements for a hearing under Wis. Stat. § 227.42. However, if the Court should grant a hearing, the scope of that hearing must conform to the standards under Wis. Stat. § 281.34 and Chapter 227. Any contested case hearing must be limited in two primary respects:

- The hearing must be limited to the modification, not the underlying permit.
- The hearing must be limited to the standards under the statute and not an open ended inquiry as to whether "Well No. 7 will negatively impact the navigable waters of Lake Beulah."

The only applicable standard to Well #7 is set forth in Wis. Stat. § 281.34(5)(a). If there is a hearing, the hearing must be limited to whether the modification affects that standard. Any authorization of a hearing beyond those parameters is a clear violation of the scope of the statutes under which the Village's approval was granted and Chapter 227.

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[13] This section provides: (a) If the Department learns of a possible violation of the statutes relating to navigable waters or a possible infringement of the public rights relating to navigable waters, and the Department determines that the public interest may not be adequately served by imposition of a penalty or forfeiture, the Department may proceed as provided in this paragraph, either in lieu of or in addition to any other relief provided by law.

CONCLUSION

This is not the forum for the Petitioners to obtain the hearing they requested (and lost) on the 2003 Approval four years ago, nor is it the forum to obtain a hearing on the 2005 Approval which they waived, nor is it the forum to re-write the statutes governing the issuance of high capacity well permits in Wisconsin. This case is about whether Petitioners have stated a sufficient interest to have a hearing on two minor modifications to the Village's municipal well. There is no basis for any hearing, but if one is granted, it must be limited to the requirements that apply to the permit modifications at issue. If there really is an impact on surface water from Well #7 at some future time, the Petitioners can bring an appropriate action at that time, but this case should be dismissed.

DATED this 19th day of June, 2008.

ANDERSON & KENT, S.C.

By: _____

Paul G. Kent (#1002924)
Abigail C. S. Potts (#1060762)
1 N. Pinckney Street, Suite 200
Madison, WI 53703
(608) 246-8500
Attorneys for Village of East Troy

STATE OF WISCONSIN: CIRCUIT COURT: WALWORTH COUNTY

Lake Beulah Management District,
Petitioner,
and

Lake Beulah Protective and
Improvement Association,
Petitioner/Intervener,
vs.

Case No. 04-CV-683
Case No. 04-CV-687

State of Wisconsin Department of
Natural Resources,
and
Village of East Troy,
Respondents.

AFFIDAVIT OF ROBERT J. NAUTA

I, Robert J. Nauta, do hereby attest that:

1. I am a licensed professional geologist in the State of Wisconsin, (Lic. No. G-035), currently employed by RSV Engineering, Inc.

2. I have more than 18 years experience performing and interpreting hydrogeological studies.

3. I have been retained by the Lake Beulah Management District ("LBMD") to provide hydrogeological consulting services related to assessing the probable impacts the proposed Village of East Troy high capacity Well No.7 will have on the environment.

4. I have reviewed the following technical reports relating to the application of the Village of East Troy (the "Village") for a high capacity well permit for proposed Well No. 7 (the "Well" or "Well No. 7").

EXHIBIT
A

a. *Report on the Task 1.0 Geologic Reconnaissance Study to Identify Potential Municipal Well Sites for the Village of East Troy, Wisconsin*, by Layne-GeoSciences, dated March 2001.

b. *Pumping Test Analysis, Safe-Yield Projections and Recommended Well Design for Village Well No. 7, East Troy, Wisconsin*, by Layne-Northwest, dated April 2003.

c. *Lake Beulah Sensitive Area Assessment*, by the Southeast District Water Resources staff of the Wisconsin Department of Natural Resources, dated May 1994.

5. In addition to my review of the documents identified in paragraph 4 above, I have installed test wells and conducting groundwater and surface water studies relating to the hydrology of Lake Beulah, Wisconsin (the "Lake").

6. I make this declaration in support of the LBMD's Motion For Reconsideration and Relief From Judgment based on my personal knowledge and the specific references cited.

7. The short time period allowed by the court to file technical documentation of adverse environmental impacts from the proposed well was insufficient due to the complex nature of the technical hydrogeological issues involved in this project. Typically, proper groundwater studies require months of planning and years of data collection over seasonal weather changes, followed by weeks of computer modeling, before factual conclusions can be confidently drawn.

8. The Layne-GeoSciences screening study identified two locations where the shallow sand and gravel aquifer showed potential for providing adequate water to

satisfy the Village's needs. The two locations were: An area south of the East Troy municipal airport (the "Airport Site") and the area where the test well was installed by Layne-Northwest to the south of Lake Beulah (the "Proposed Well Site").

9. The Airport site was rejected by the Village due to a potential for the shallow sand and gravel aquifer to be contaminated by a nearby landfill.

10. The Proposed Well Site south of Lake Beulah was recommended and chosen by the Village as their primary study site. The test well that Layne-Northwest installed at the Proposed Well Site by is within 1,200 feet of a shoreland wetland adjacent to the south shore of Lake Beulah (the "Sensitive Wetland").

11. The Sensitive Wetland identified in paragraph 10 above has been classified by the Wisconsin Department of Natural Resources as "Sensitive Area #8" in a published Water Resources publication dated May 1994 (See document excerpt Exhibit "1").

12. The Village has distributed at least two publications informing the public that the proposed Well No. 7 would protect the Lake from any negative impacts based on the existence of "over 50 feet of clay and 150 feet of fine silty sand" that would serve to limit the migration of water between the upper and the lower portions of the aquifer.

13. Data from borings performed by Layne-Northwest do not indicate the presence of such a clay layer or a continuous confining layer of fine silty sand. Consequently, it is my professional opinion that there is only one aquifer in the sand and gravel penetrated by the test well, that there is only one water table in the aquifer and

that any silty sand or clay in the aquifer would not limit the migration of groundwater between the upper and lower portions of the aquifer.

14. Assuming the Village's position of the existence of a clay layer separating the upper aquifer from the lower aquifer were present and also assuming said clay layer were continuous from the Lake to the Well No. 7 site, the Lake bed would likely lie below the clay layer, resulting in any draw down of the aquifer by the pumping at Well No. 7 being directly connected to and influencing water levels in the Lake.

15. I began working with the Lake Beulah Management District ("LBMD") in the summer of 2003 to collect hydrogeologic and hydrologic data to study the Lake Beulah watershed. In 2003, RSV began recording stream flow data from immediately below the dam, which controls the lake level.

16. In the summer of 2004, RSV installed a series of ten wells at five locations around the lake, and measured water levels in these wells twice per week during warm weather months. The data collected are being used to estimate the water budget for the Lake, which includes a record of inflow to and outflow from the Lake.

17. From my work at RSV I have concluded that groundwater appears to be the primary source of water for the Lake. Lesser amounts of water are contributed to the Lake from precipitation and surface flow.

18. The LBMD study has shown that the Lake is a "flow-through" lake, meaning that groundwater enters the Lake at one end (the south end), and the Lake water discharges to the groundwater system at the other end (north end) (see Figure 1).

19. The LBMD is also providing funding for the completion of a three-dimensional groundwater flow model, to be used to assist in the water budget calculations, and to simulate the impacts of stresses to the aquifer (e.g., pumping). This model is estimated for completion in the fall of 2005.

20. Layne-Northwest performed an aquifer test at the approximate site of proposed Well No. 7 in February 2003. The test well was test pumped at a rate of 400 gpm, which is less than one-half the requested Well No. 7 permit capacity of 1,000 gpm, for a period of only 72 hours. Several wells were monitored for changes in the groundwater elevation in the area surrounding the test well during the pump test. One of those wells was a shallow well point installed in the Sensitive Wetland on the south shore of Lake Beulah and mentioned in paragraph 10 above. Additionally, two shallow wells were also monitored.

21. The documentation presented in the Layne-Northwest April 2003 report identified in paragraph 4 above confirmed that the groundwater level beneath the referenced wetland was lowered nearly 0.2 foot during the relatively short duration of the test pump period. In addition, the same documentation disclosed that the aquifer had not yet reached steady state before the test pump was terminated, indicating that, water levels were still dropping when the pump was turned off.

22. The documentation presented in the Layne-Northwest April 2003 report proving a loss of nearly 0.2 foot of water in the wetland along the shore of Lake Beulah, along with substantial lowering of groundwater levels in the shallow monitoring wells during the test, proves that the Village's claims that the upper and lower

water depths were confined from each other to prevent migration of water between them, are false.

23. Based on the results of the Layne-Northwest pumping test and the proposed pumping rate for Well No. 7, I believe that the actual drawdown of shallow groundwater in the wetland area will be greater than 0.2 foot, if the well is constructed and put into operation.

24. The documentation presented in the Layne-Northwest April 2003 report proves the proposed high capacity Well No. 7 will intercept groundwater that would otherwise flow northward and discharge into the lake, a condition which potentially could result in reversing the groundwater flow direction beneath the south end of Lake Beulah. If groundwater flow were reversed, surface water in the Lake would flow out of the Lake and toward the pumping well to the south.

25. As part of RSV's groundwater monitoring around the Lake, I have observed an upward groundwater flow gradient present around the southern perimeter of the Lake, except during the 72-hour pump test. An upward groundwater flow gradient means that groundwater flows into the Lake from the aquifer in this area. Based on the magnitude of the observed gradient and the results of the pumping test completed by Layne-Northwest, I believe that a significant reduction or reversal of this gradient could be caused by the proposed Well No. 7, resulting in the reduction or elimination of groundwater flow into this portion of the Lake.

26. The land area surrounding the site of the proposed Well No. 7 is proposed as a planned residential development. Such a change in land use will add roofs, paved roadways and paved driveways that will intercept and direct precipitation in a

very different pattern to that which exists today, thus reducing the amount of storm water that now recharges to groundwater and eliminates that flow to Lake Beulah.

27. The planned development will reduce groundwater recharge in the area, thereby further reducing the water available for discharge to the wetland and Lake Beulah.

28. Groundwater removed from proposed Well No. 7 will be used by the Village and discharged by means of sanitary sewer to a watershed other than that of Lake Beulah. Consequently, the water removed by Well No. 7 will be permanently taken from the Lake Beulah watershed, thereby reducing the water available for discharge to the Sensitive Wetland and to Lake Beulah.

29. It is my opinion that the aquifer test performed by Layne-Northwest was inadequately designed and improperly conducted for the purposes of evaluating environmental impacts and therefore did not properly evaluate the potential impacts to sensitive environmental features and navigable surface water. Nevertheless, the brief aquifer test performed did confirm a lowering of groundwater levels in and adjacent to the Sensitive Wetland and Lake Beulah. Such results clearly demonstrate potential for adverse impacts to Lake Beulah and to an environment already classified by the WDNR as a sensitive environmental feature. Moreover, the aquifer test results clearly demonstrate interruption or disruption of groundwater supply to Lake Beulah and a diversion of surface water from Lake Beulah, which are likely to cause adverse effects to the Lake and wildlife dependent upon the Lake.

30. I shared the concerns state in the paragraphs above with hydrogeology experts at the United States Geological Survey ("USGS") and the Southeastern Wisconsin Regional Planning Commission ("SEWRPC"). Both the USGS and SEWRPC experts concurred with our conclusions in written statements (Exhibit "2").

31. It is my opinion that the existing data can only support the conclusion that pumping of proposed Well No. 7 would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah.

32. It is my opinion there is no "protective layer" hydraulically separating the deeper groundwater the Village proposes to pump from the shallow groundwater that feeds Lake Beulah and the Sensitive Wetland.

33. It is my opinion that the scientific data from the tests conducted do not support the Village's claim that proposed Well No. 7 will not cause adverse environmental impacts or adverse effects to the navigable waters of Lake Beulah.

34. If the court had provided adequate time for the LBMD to present technical documentation, the following work would have been completed:

a. A detailed summary and analysis of the aquifer test data, providing documentation of the uncertainties of the report is conclusions.

b. A discussion of the testing necessary (and deficient in the Layne-Northwest study) to adequately evaluate the potential impacts on environmental features, including reduction in groundwater discharge to wetlands and Lake Beulah and effects on lakebed temperature and chemistry caused by a reduced influx of groundwater.

c. Computer simulation showing the potential extent of impacts when pumping continues beyond the 72 hours that the well was tested, as would be the case if proposed municipal Well No. 7 is placed in operation. This computer simulation would have combined data obtained by Layne-Northwest with data collected by the LBMD, which has shown the sensitivity of Lake Beulah to changes in its hydrology.

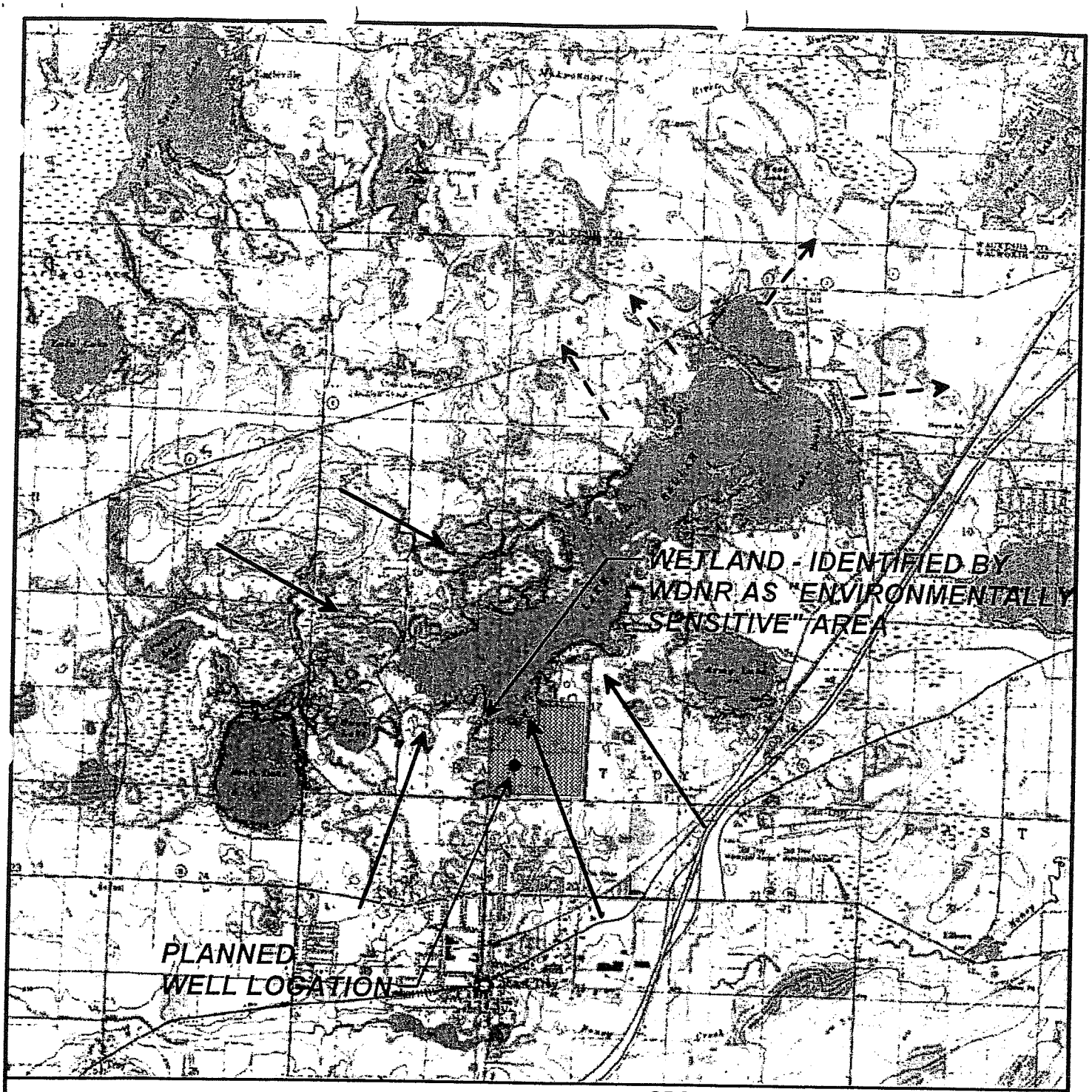
Dated this 4th day of August 2005.

Robert J. Nauta

Subscribed and Sworn to me
this 4th day of August 2005.

Notary Public
My commission expires: 1-11-2008

NOTARY PUBLIC
VICTORIA J. SCHMIDT
STATE OF WISCONSIN



BASE MAP SOURCE: USGS 7.5 MINUTE TOPOGRAPHIC QUADRANGLES, MUKWONAGO, WISCONSIN (1960, REV. 1994) AND EAST TROY, WISCONSIN, (1960, REV. 1994).

RSV ENGINEERING, INC.
Engineers • Land Surveyors • Environmental Scientists
112 S. MAIN STREET JEFFERSON, WISCONSIN 53549 (920)674-3411

LAKE BEULAH MANAGEMENT DISTRICT
LAKE BEULAH, WISCONSIN
LAKE MAP

FIGURE 1

DRAWN BY	PROJ. No.	DATE	FILE NAME
RN	02-368	18 JUL 05	BEULAH MAP

Lake Beulah
Sensitive Area Assessment

Final Report
May 1994

Prepared By
Kathi Dionne
Water Resources Specialist
Dan Helsel
Water Resources Management Specialist
Southeast District
Wisconsin Department of Natural Resources

EXHIBIT
1

Provided by:
Lake Beulah Protective and Improvement Association

Lynn Carlson

LAKE BEULAH SENSITIVE AREA STUDY

DNR WATER RESOURCES
MAY, 1994

INTRODUCTION

Lake Beulah is a valuable resource of the state of Wisconsin held in trust for the general public. The lake provides recreation, aesthetic enjoyment, opportunities for fishing and wildlife observation, boating and swimming. Lake Beulah has offered enjoyable conditions such as good water quality, abundant fisheries of good sized game fish and areas of aesthetic beauty.

The aquatic plants in this lake are a diverse community which has served the lake well, keeping nutrients and sediments to a minimum and providing valuable food and habitat for many desirable animals such as game fish and waterfowl.

In July of 1993, Department of Natural Resources staff visited Lake Beulah for the purpose of identifying areas which are sensitive and therefor in need of extra protection. Areas are considered sensitive if they fall under the following definition:

> "... areas of aquatic vegetation identified by the department as offering critical or unique fish and wildlife habitat, including seasonal or lifestage requirements, or offering water quality or erosion control benefits to the body of water." (NR 107, 1989)

These might include:

- Diverse stands of high quality native aquatic plants which help provide a buffer against invasion of Eurasian water milfoil, a very aggressive non native aquatic plant which is increasingly becoming a nuisance in Wisconsin's lakes.
- Areas of vegetation which trap sediments and nutrients flowing into the lake thereby improving water clarity and reducing available nutrients for undesirable plant growth.
- Areas of vegetation which offer spawning nesting or feeding habitat for fish or wildlife.
- Areas of vegetation whose species composition or hydrology make it an ecologically unique community.

Lake Beulah is an 834 acre drainage lake, with a maximum depth of 58 feet and an average depth of 17 feet. The water clarity at Lake Beulah typically ranges between 6 and 11 feet during the summer. There are eight areas in Lake Beulah identified as sensitive. Each of these areas possesses characteristics which are beneficial to the lake as a whole. Their protection will help to preserve the quality of the water in Lake Beulah. A brief description of the eight identified sensitive areas follows:

- Sensitive Area 1 is located along the eastern shore of Jesuit island in the northeastern part of the lake.
- Sensitive area 2 is a small cove located across from Jesuit island.
- Sensitive area 3 is located around a small island along the northeastern shore of the lake.
- Sensitive area 4 is located along the southern shore of the lake in the area also know as Mueller's Cove.
- Sensitive area 5 is in the south shore cove area, located on the southern shore of the eastern end of the lake.
- Sensitive area 6 is located in the narrows between the two basins of the lake.
- Sensitive area 7 is located in the bay near the inlet form Pickerel Lake in the southwestern part of the lake.
- Sensitive area 8 is located just southeast of the East Troy boat launch on the southwestern shore of the lake.

In general, these areas support a diverse community of native aquatic plants with limited areas of Eurasian water milfoil. They offer spawning and nursery areas for several fish species, nesting habitat for animals, act as a sediment and nutrient trap, as well as helping protect the shoreline from erosion.

Sensitive areas are determined by assessment of a team of scientists from the Wisconsin Department of Natural Resources, including fisheries, wildlife, water resources and water regulation and zoning staff. Each team member has expertise in areas relating to water quality and fish or wildlife biology and the ecological value of the area being assessed. The members of the team which investigated this area are:

Doug Welch (Fish Management)
Dan Helsel (Water Resources)
Mark Anderson (Wildlife Management)
Liesa Nesta (Water Regulation and Zoning)

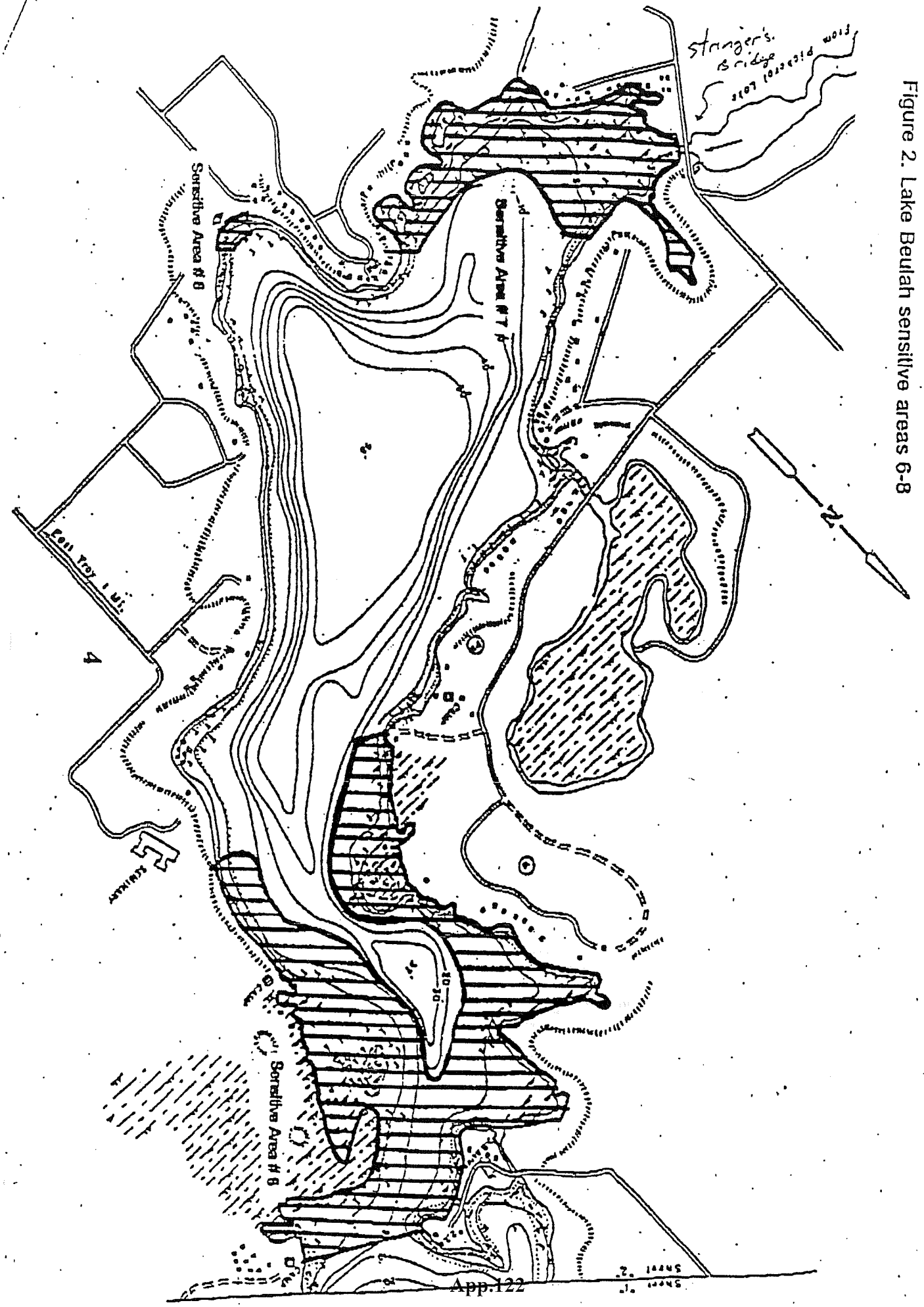


Figure 2. Lake Beulah sensitive areas 6-8

SENSITIVE AREA SITE DESCRIPTION

Sensitive area #8 is located just southeast of the East Troy boat launch on the southwestern shore of Lake Beulah. (Figure 2 and 3)

RESOURCE ASSETS OF SENSITIVE AREA #8

Sensitive area #8 supports an diverse reservoir of native aquatic plants, both submergent and emergent, and only limited areas of Eurasian water milfoil (*Myriophyllum spicatum*). (Table 1) The emergent and floating leaved community includes swamp loosestrife (*Decodon verticillatus*), bulrushes (*Scirpus sp.*), white water lily (*Nymphaea tuberosa*) and yellow water lily (*Nuphar variegatum*). The submergent community includes native water milfoil, (*Myriophyllum heterophyllum*), and a variety of pondweed species (*Potamogeton spp.*).

Fish utilize this community in a variety of ways. The diverse community of emergent and submerged aquatic plants provide excellent spawning habitat for northern pike, and very good spawning habitat for largemouth bass and bluegills. The less heavily vegetated areas provide spawning areas for crappie and walleye. The vegetated areas also provide high quality nursery areas for northern pike, largemouth bass, walleye, crappie and bluegill. All these species will also find ideal feeding habitat in these areas.

Wildlife also depends on the resources provided by sensitive area #8. This area offers high quality habitat for a variety of wetland species. Ducks such as mallards and wood ducks will nest, feed, and rear their young here. Wading birds such as the great blue heron, smaller herons and bitterns feed here, and stop here during migration. Shorebirds such as sandpipers will be found feeding here, and songbirds will find nesting habitat, and will feed and rear their young in the trees and shrubs along the wetlands. Muskrats, opossum and raccoons can be found here year round, feeding, nesting and raising their young.

The plant community in sensitive area #8 acts as a sediment and nutrient trap, as well as protecting the shoreline from erosion. It also stabilizes the bottom sediments. These functions benefit the entire lake in that they reduce nutrients available in the water to support the growth of nuisance aquatic plants, and improve the clarity of the water. (Table 2)

Sensitive area #8 is ecologically important to the lake for several reasons. The excellent native species reservoir will act as a buffer against invasion by exotic plant species, as well as a refuge where native species have established and can continue to spread. The emergent, floating leaved and submergent plant community and the

spawning grounds th.. provide for fish are unique to the lake. (Table 2)

MANAGEMENT RECOMMENDATIONS FOR SENSITIVE AREA #8 (Table 4)

In-lake activities:

Aquatic plant control:

1. Chemical: chemical treatment of aquatic plants will be permitted in this area, but is limited to control of Eurasian Water Milfoil. These chemical applications should be as selective as possible to reduce impacts on the native aquatic plant community and be part of a lake wide Eurasian water milfoil control plan.

2. Mechanical: mechanical control of any type is not recommended.

Water Regulation and Zoning:

1. Dredging will not be permitted.

2. Filling will not be permitted.

3. Pea gravel/sand blanket will not be permitted.

4. Aquatic plant screens will not be permitted.

5. Special permitted piers/boardwalks for water access will be considered on a case by case basis.

Riparian Activities:

1. Wetland alterations of any type will not be allowed without the proper DNR and Army Corp of Engineers permits.

2. Boardwalks will be considered on a case by case basis for the purposes of limited riparian access and public education.

3. Shoreland zoning standards do not allow new homes or other structures such as gazebo's and decks to be built in wetlands. All other construction must comply with all Walworth County requirements, especially the 75 foot setback from the shoreline.

4. Shoreline protection will not be permitted as it is unnecessary in this area.

Common Name	Scientific Name	Sensitive Area Occurrence
Eurasian water milfoil	*Myriophyllum spicatum*	1,2,3,4,5,6,8
Swamp loosestrife	*Decodon verticillatus*	1,5,6,7,8
White water lily	*Nymphaea tuberosa*	1,2,3,4,5,6,7,8
Yellow water lily	*Nuphar variegatum*	1,2,3,4,5,6,7,8
Variable leaved water milfoil (native)	*Myriophyllum heterophyllum*	1,2,4,5,6,7,8
Sago pondweed	*Potamogeton pectinatus*	1,5,6,7
Clasping leaved pondweed	*P. richardsonii*	1,4,6,7
Floating leaved pondweed	*P. natans*	1,6,7
Large leaved pondweed	*P. amplifolius*	1,5,6,7
Narrow leaved pondweed	*P. spp.*	2
White stemmed pondweed	*P. praelongus*	4
Curly leaved pondweed	*P. crispus*	2
Bladderwort	*Utricularia sp.*	1,2,6
Wild celery	*Valisneria americana*	1,2,5,6,7
Musk grass	*Chara sp.*	1,2,4,5,6,7
Duckweed	*Lemna sp.*	5
Narrow leaved cattail	*Typha angustifolia*	6
Large leaved elodea	*Elodea canadensis*	6
Bulrushes	*Scirpus spp.*	4,6,7,8

Table 1. Aquatic plant species found in Lake Beulah sensitive areas and their locations

Resource Value	Area 1	Area 2	Area 3	Area 4	Area 5	Area 6	Area 7	Area 8
Diverse Native Plant Community	X	X	X	X	X	X	X	X
Sediment & Nutrient Trap- protects water quality	X	X	X	X	X	X	X	X
Wildlife & Fishery Value- spawning, nursery, feeding, etc.	X	X	limited by size	X	X	X	X	
Shoreline Erosion Protection	X	X	X	X	X		X	
Stabilization of Bottom Sediments- protects water quality	X		X			X	X	X
Ecological/ hydrological/other	spawning	buffer / refuge	fish cover		very diverse	traps incoming nutrients from Pickerel lake	buffer / refuge	

Table 2. Resource values of sensitive areas in Lake Beulah.

	Activity	Sensitive Area 1	Sensitive Area 2	Sensitive Area 3	Sensitive Area 4
In Lake Activities	Chemical control of aquatic plants	Allowed only as part of a Eurasian water milfoil control plan	Allowed only as part of Eurasian water milfoil control plan	Allowed only as part of Eurasian water milfoil control plan	Allowed only as part of Eurasian water milfoil control plan
	Mechanical harvesting of aquatic plants	Not recommended	Not recommended	Not recommended	Recommended only for Eurasian water milfoil
	Dredging	Navigational purposes only- native plantings required. Southern part only	May be permittable on a case by case basis - native planting required	Permit required - native planting required	Permit required - native planting required - not in shoreline area of bulrushes and willow
	Filling	Not permitted	Not permitted	Not permitted	Permit required
	Pea gravel / sand blanket	Not permitted	Not permitted	Permittable on a case by case basis	Permittable on a case by case basis
	Aquatic plant screens	Permittable	Permit required	NA	Permittable on a case by case basis
	Boardwalks and special permitted piers	Permittable on a case by case basis	Permittable - must meet local and DNR standards	NA	Permittable on a case by case basis
	Other - Seawall construction	Generally not permitted but possible if conditions warrant	Generally not permitted but possible if conditions warrant	NA	Generally not permitted but possible if conditions warrant
Riparian Activities	Wetland alterations	Permit required	NA	NA	NA
	Boardwalks	Permittable for limited riparian and educational uses	NA	NA	NA
	Shoreline protection	Riprap only- not in wetland- only in cases where erosion is occurring	Permit required	Permit required	Permit required
	Shoreline zoning	Must comply with local standards, 75 foot setback	Must comply with local standards	Must comply with local standards	Must comply with local standards

Table 3. Management recommendations and restrictions for Lake Beulah sensitive areas 1-4.

	Activity	Sensitive Area 6	Sensitive Area 7	Sensitive Area 7	Sensitive Area 8
In Lake Activities	Chemical control of aquatic plants	Allowed only as part of Eurasian water milfoil control plan	Allowed only as part of Eurasian water milfoil control plan	Not permitted	Allowed only as part of Eurasian water milfoil control plan
	Mechanical harvesting of aquatic plants	Not recommended	Recommended for navigational channels only	Recommended for navigational channels only	Not recommended
	Dredging	Permittable but limited - native planting required	Not permitted	Not permitted	Not permitted
	Filling	Not permitted	Not permitted	Not permitted	Not permitted
	Pea gravel / sand blanket	Not permitted	Pea gravel possible- sand not permitted	Not permitted	Not permitted
	Aquatic plant screens	Permit required	Permit required	Not permitted	Not permitted
	Boardwalks and special permitted piers	NA	Permittable on a case by case basis	Permittable for limited water access only	Permittable on a case by case basis
	Other - Boating regulations	NA	Recommended to remain slow / no wake	NA	NA
	Other - Seawall construction	NA	NA	Generally not permitted but possible if conditions warrant	NA
Riparian Activities	Wetland alterations	NA	Not permitted	Permit required	Permit required
	Boardwalks	NA	Permittable for education and riparian access	Permittable for education and riparian access	Permittable for education and riparian access
	Shoreline protection	Riprap permittable - only in cases where erosion is occurring	Not permitted	Riprap permittable - only in cases where erosion is occurring	Not permitted
	Shoreline zoning	Must comply with local standards	Must comply with local and shoreline wetland zoning standards	Must comply with local and shoreline wetland zoning standards	Must comply with local and shoreline wetlands zoning standards

Table 4. Management recommendations and restrictions for Lake Beulah sensitive areas 5-8.

Bob Nauta

From: "Daniel T Feinstein" <dtfeinst@usgs.gov>
To: <whiskey@direcway.com>
Cc: <jtkrohel@usgs.gov>
Sent: Tuesday, June 03, 2003 3:05 PM
Subject: East Troy pumping test

Bob,

About two weeks ago you asked me to take a look at the pumping test analysis presented by Layne-Northwest of the East Troy, Wisconsin test well. After a quick, informal review of their report, I have the following comments:

1) The test appears to have been well designed and the analysis is generally well presented. The fact that the specific yield values from the analysis are reasonable suggests that the methodology has some merit.
2) It is difficult to interpret the transmissivity results. If the thickness of the coarse-grained material (about 80 ft) is applied to the results for MW2 and MW3, the derived hydraulic conductivity (K) is about 550 ft/day for the sand/gravel and the implied vertical conductivity of the overlying more fine-grained material is about 1 ft/day. These values seem high. If the well point is assumed to be far enough away so that its drawdown represents the response of the entire 260 ft thick system, then the average K is on the order of 45 ft/day. This estimate for the bundle of bedrock valley deposits also seems high.
3) One possibility not accounted for in the use of the Neumann solution is that Lake Beulah is acting as a head-dependent boundary that depresses drawdown and yields unreasonably high estimates of K when neglected. It would be interesting to take account of that boundary (using a numerical model and see if the K values decrease and if the specific yield values still remain reasonable. One difficulty would be the conductance value to assign the lakebed ? much would depend on its resistance.
4) Another possibility to explain the apparent high K results is that the underlying bedrock contributes transmissivity and should be included in the thickness (thereby reducing the overall K). Our databases show that the Silurian pinches out just in this area (with some islands further to the west). It also shows that the Maquoketa subcrop runs under this area. It is possible that remanants of these units plus weathred Sinnipee dolomite contributes transmissivity to the system, but it seems unlikely that the effect would be dominant.
5) There is no question that pumping from the test well has an effect on Lake Beulah. The period of pumping is not shown on Figure 9, but if it is between 4000 and 8320 minutes, then the drawdown at the lakeshore is on the order of 0.1 ft and is increasing at the end of the test. A longer pumping test would be valuable in this regard. It is interesting that Layne's predictive analysis also suggests an effect on the lake. It shows that after 2 years of pumping there would be 2 ft of drawdown adjacent to the lake if the aquifer properties from the well point are assumed.
6) I quickly looked for data from the staff gage, but didn't find any. I

EXHIBIT
2

8/28/2003

assume the lake level did not change during the test (??).
7) The predictive analysis conducted by Layne (Figure 13) doesn't really indicate equilibrium conditions after 2 years as assumed on p. 8 of text. Again, however, this analysis is suspect because the lake is not a head-dependent boundary.
8) It is unlikely that long-term pumping would reverse groundwater gradients into the lake, but clearly the magnitude of the gradients into the lake would be reduced and base flow into the lake would be affected.
9) Given the size of Lake Beulah, it is unclear if the reduction in base flow from long-term pumping at an average rate of 333 gpm would have significant effect on total base flow to the lake. However, it is likely that it would be the major source of water to the well, especially if the high K material is of limited extent. A more sophisticated modeling effort calibrated to the pumping test and then used in predictive mode could address that question.
10) One caveat ? The table on p 4 appears to indicate that well MW-2A experienced drawup of 0.26 ft during the test, but the plot in appendix C shows drawdown of 1 ft. I am missing something here.

Again I emphasize that these remarks are based on a very quick review and do not represent a thorough analysis of the problem.

Daniel

SOUTHEASTERN WISCONSIN REGIONAL PLANNING COMMISSION
W239 N1812 ROCKWOOD DRIVE • PO BOX 1607 • WAUKESHA, WI 53187-1607• TELEPHONE (262) 547-6721
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July 28, 2003

Mr. David Skotarzak
Chairman
Lake Beulah Management District
P.O. Box 71
East Troy, WI 53120-0071

Dear Mr. Skotarzak:

This is to acknowledge receipt of your June 21, 2003, letter requesting that the Regional Planning Commission review and comment on issues raised concerning, and further proposed evaluations relating to, the development of a high-capacity well in the southwest one-quarter of U.S. Public Land Survey Section 17, Township 4 North, Range 18 East, Town of East Troy. In addition to the well construction, a subdivision with about 110 lots is proposed to be constructed in the same area. However, the well capacity is such that it appears to be designed to provide a water supply to a much larger area than the subdivision itself. Your letter describes issues of concern related to the possible negative impacts of the well by reducing the groundwater flow to the wetland complex on the south end adjacent to Lake Beulah, the nearshore area to the wetland complex, and to the Lake itself. These impacts include a reduction in groundwater input and an associated reduction in water levels. You also note the potential impacts on the Lake of nutrients in runoff from the proposed development.

In your letter, you also suggest that several additional studies should be conducted, including:

- An additional well pumping test and groundwater level monitoring analysis to better estimate the expected changes in groundwater levels in the surrounding area after the pumping system is operating.
- A wetland delineation and characterization and an evaluation of the expected impact on the wetland complex resulting from the estimated changes in the groundwater regime.
- Groundwater elevation monitoring to define the natural, or pre-construction, groundwater conditions.
- Analysis using a groundwater model to estimate the impacts of the well pumpage on the wetland, Lake, and surrounding area.

Pursuant to your request, the Commission staff has reviewed the materials provided with your letter and Commission file data relating to groundwater conditions in the subject area and offers the following comments for your consideration:

1. The District's consultant reported that the well capacity is proposed to be 1,000 gallons per minute, or 1,440,000 gallons per day, with the anticipated typical use being about one-third of that capacity.

2. Review of the Commission groundwater inventory (see SEWRPC Technical Report No. 37, *Groundwater Resources of Southeastern Wisconsin*, June 2002) indicates that the groundwater elevation in the subject area is relatively flat, with little gradient. Thus, the Lake, wetland, and general area water table are all likely at a similar elevation.

3. The Commission staff agrees with the concerns raised in your letter relating to the potential for negative impacts on the wetland complex and the Lake itself, due to the pumping from the well. However, as you indicate, the current level of knowledge is not adequate to make reasonable estimates of the severity of impacts. In addition to the issues you have raised, the potential impacts on surrounding private wells is another concern. There are several private wells within 1,000 feet of the proposed well.

4. The four additional studies that you have suggested be conducted are logical steps in determining the potential impacts of the proposed well. However, these studies will be of little value if the proposed well siting is not deferred until the evaluations needed to better define the impacts are completed and the option of changing the proposal is left open should the negative impacts be estimated to be significant. Once the well and subdivision is constructed, there is little that can be done to mitigate any significant negative impacts. The wetland delineation and characterization, pumping test, and modeling would all be important in this regard. The groundwater level monitoring will be useful, but will take a considerable period in order to characterize the natural fluctuations. However, such a groundwater monitoring program could be initiated and used as part of the pumping test and as modeling input.

5. Groundwater impacts are an important factor in determining the quality of lake systems, such as Lake Beulah, given the clean and low temperature characteristics of groundwater inflow. The well construction being considered, as well as the subdivision construction itself, will have the effect of reducing the groundwater flow to the Lake. The significance of that effect is not known. Given the size of the Lake and tributary watershed, the loss of about 400,000 to 500,000 gallons per day of groundwater may not have a major impact, However, over the long-term, this is not yet known. In any case, it is important to minimize such impacts, since the cumulative impact of this and similar actions can be significant when taken in aggregate over a long period of time.

6. The concern you raise regarding nutrient runoff from the subdivision can be partially mitigated by installing a high level of stormwater management control measures. However, given the density of the proposed subdivision, there will be some increase in nonpoint source pollutant loadings to the Lake and a reduction in groundwater inputs due to the increase of imperviousness resulting from the subdivision. This location would be one where stormwater infiltration measures can be appropriate as part of a series of stormwater management measures. This could help, somewhat, to reduce the impact on groundwater levels due to increased impervious area development.

Based upon the foregoing, it is recommended that the studies you have outlined be undertaken. However, in order to be effective, it is recommended that the well construction be deferred until such a time as a reasonable estimate of the impacts of the proposed actions is determined and that, if appropriate, alternatives to the proposed action be considered. Thus, it is recommended that the studies be undertaken in a cooperative effort involving the Village of East Troy, the Town of East Troy, and the Lake Beulah

Management District. It is further recommended that the well development proposal be reevaluated on a cooperative basis by these parties once the impacts are properly known.

We trust this responds to your request. Should you have any questions on this response or need anything further, please do not hesitate to call.

Sincerely,

Philip C. Evenson

Philip C. Evenson
Executive Director

PCE/RPB/pk
#85009 V1 - SKOTARZAK LTR

cc: Ms. Judy A. Weter, Village of East Troy
Mr. Clayton O. Montez, Town of East Troy
Mr. Neal A. Frauenfelder, Walworth County
Mr. James D'Antuono, WDNR, Southeast Region

STATE OF WISCONSIN CIRCUIT COURT WALWORTH COUNTY

LAKE BEULAH MANAGEMENT DISTRICT,

Plaintiff,

-vs-

VILLAGE OF EAST TROY,

Defendant.

Transcript of Proceedings

Case No. 08-CV-915

Proceedings held before the Honorable ROBERT J. KENNEDY, Circuit Court, Branch 1 in Elkhorn, Wisconsin, on April 29, 2009.

JUDGE'S ORAL DECISION

APPEARANCES:

PAUL P. KENT, ESQ., appeared on behalf of the Plaintiff.

DEAN G. LAING, ESQ., appeared on behalf of the Defendant.

Margaret A. Techert, Court Reporter.

THE COURT: Call Lake Beulah Management District versus Village of East Troy, 8-CV-915. Appearances first by -- on behalf of the movant party here for summary judgment, Village of East Troy.

MR. KENT: We have the Village of East Troy, attorney Paul Kent of Anderson and Kent.

THE COURT: On behalf of the Lake Beulah Management District?

MR. LAING: Good morning, Your Honor; Dean Laing.

THE COURT: A few preliminary remarks as I rule on this motion for summary judgment. I have been extremely busy over the last few weeks. I don't know why. Things go like that. Although, quite frankly, I'm usually pretty busy. Usually I am able to get enough time by working on weekends and evenings to accomplish all the work that I feel I have to do to the quality that I want to do it.

The reason I am mentioning this is, this is one case where, as a result of the tremendous volume of work, I put out the equivalent of three decisions just today, which had been prepared over the course of the last few days and I've done other decisions. And decisions, as you gentlemen probably know, take a lot more time than just, you know, handling the procedures

of cases.

I have come up with what I believe my decision should be in this particular case but it is not a model of literary excellence. It is not. I'm not even close to it. I am going to apologize to the parties, and to the appellate court later on, if I fail to mention a particular fact or discuss it in the appropriate way or overlooked some argument of a party that I shouldn't have overlooked. But I did the best I could and this is the result of that work within the limited space and time I had.

One other further mild excuse, my wife has even suggested -- and she did it laughingly because she's a very nice lady -- but she suggested that perhaps I should just stay here and -- because I have been coming into this courthouse at 6:30 and 7:00 o'clock in the evening and working until 10:00 and 11:00 o'clock trying to prepare these various things that I have to prepare and the volume of work I have. There are probably judges who work more efficiently than I do and don't have that problem, but I've done the best that I could.

So here it is. Here is my decision on the motion for summary judgment; and gentlemen, bear with me. It is somewhat lengthy as it is. Possibly

because the briefs and attached materials that the two parties provided me with was very lengthy.

The Village of East Troy in this particular case initially sought and obtained a high capacity well approval or permit from the DNR. This well we'll refer to as well No. 7, as I have done in many other cases already. They got that technically final approval -- or actual approval on 9/6/05. There was prior approval but they got a new one on 9/6/05, and then the approval was granted only after a long history of resistance from some of the property owners around Lake Beulah and resistance from Lake Beulah Management District, who primarily during the preceding cases acted as sort of a second foil. Party plaintiff in the cases but allowing the homeowners association to take the main laboring oar.

Both in the years before September 6, '05 and in the years thereafter, the opponents of the well No. 7 filed a number of related cases that attacked the grounds for an initial DNR approval in September of '03 and the subsequent September '05 approval of well No. 7, as well as subsequent DNR approvals of requested modifications after September of '05.

The summary essence of the attacks were that the proposal -- was that the proposed well would

detrimentally affect the Lake Beulah water shed and water quality. The attached never provided, in the opinion of the Court -- and not in the opinion, obviously, of the Lake Beulah Management District or of the property owners association, they don't agree with me; but I felt that the attacks never provided any actual evidence that the proposed well would adversely affect the waters of Lake Beulah.

There were contested and -- as well as requests for contested hearings before the DNR in these matters, and there were numerous cases before judge James Carlson and this present judge; and there was even an appellate proceeding, all of which resulted in the approval of the well by the DNR being again and again upheld. And you can see for a detailed history of those matters, and I really think any appellate court looking at this, should actually see the decisions and materials on those cases because that history and involved history is really necessary.

One of the reasons I give the decision I'm giving is because I'm fortunately very familiar with them because I handled a number of them and indirectly handled the earlier ones by having to review them extensively and given my decisions on the later ones. Those files were 4-CV-683 and 687, 6-CV-172 and 673,

and 7-CV-674, and then finally the present case that I'm dealing with, 8-CV-915.

In all of these cases, except the last, that is this one, the Lake Beulah Protective and Improvement Association was one of the plaintiffs. The plaintiff in the present case, Lake Beulah Lake Management District, was also a plaintiff in 4-CV-683, 6-CV-172 and 673, and 6-CV-674. I might add I took a look at these brief print-outs in the computer and I'm not at all sure that maybe the Management District wasn't a party in one of the other ones I've skipped here but it wasn't mentioned on the print-out.

The DNR was a defendant in 4-CV-683 and 687, and in 6-CV-182 and 673. That, of course, is the Department of Natural Resources. The Village of East Troy was a defendant in all of these cases. In all of these cases up to the present one, the plaintiffs took the position that the DNR was obligated, by the Public Trust Doctrine, to protect the waters of the State of Wisconsin; and that the DNR, in its various decisions -- its various and successive decisions to approve well No. 7, had violated that obligation. The plaintiffs claimed that well No. 7 would seriously detrimentally affect the Lake Beulah water shed and lake quality.

In all of these prior cases, the DNR ruled and the Court upheld the DNR findings that the plaintiffs had not provided any significant evidence that well No. 7 would adversely affect the waters of Lake Beulah and/or its water shed.

The present plaintiff, which is the Lake Beulah Management District, and I'll refer to it usually as District, has now again attempted to block the Village use of well No. 7 but this time with a different tactic. I might add that they would argue that -- I think they would say: We're not trying to block well No. 7. We're doing something else which we're entitled to do under our authority as the lake district. I'll come back to that.

The District itself is an inland lake district created under the authority of Chapter 33 of the Wisconsin Statutes. The District's boundaries do not include the location of well No. 7 within it, although it is almost certainly drawing water from it or at least one of the same sources that supply the water shed of Lake Beulah. At least the plaintiffs in prior cases have so argued and defendants have never actually contested that claim.

On 12/11/06, the District adopted ordinance number 2006-03 which asserts that any person diverting

or transferring groundwater out of the Lake Beulah groundwater basin must obtain a permit from the District. Furthermore, the ordinance disallows the granting of any permit unless at least 95 percent of said water is returned to that basin by the user.

However, this ordinance effectively appears to be a shutdown of well No. 7, since the well serves the Village of East Troy, whose wastewater is discharged outside and away from the Lake Beulah basin. By the way, there is nothing in the opposing brief suggesting what it would take the Village in costs to modify its wastewater discharge system to divert it into the Beulah basin, but presumably the cost would be significant enough to make well No. 7 too much of a burden and in that -- in that case for the Village.

For instance, although I do not know this, it seems reasonable to surmise that they'd literally have to pump their wastewater uphill or dig tunnels through intervening hill or high country so that the water could eventually be pumped through -- under those hills or over those hills so it would then enter the Lake Beulah basin and then flow down to Lake Beulah in order for them to have their wastewater, which would largely be coming from the well, end up

95 percent back in the basin, at least the District's basin.

I might add that it seems likely that the well water that's coming out of that basin is being pumped, probably to some extent, uphill. I don't know for sure of that but it's being pumped and sent to the Village, which apparently is not in that basin.

On 7/22/08, the District filed the present complaint alleging that the District had learned that the Village intended to begin operating well No. 7 in August of '08. The District alleges that they advised the Village of ordinance 2006-03, which I'll refer to as ordinance or the ordinance, but the Village indicated it would not comply with it. Therefore, the District has asked this Court to declare a declaratory judgment that the Village is required to comply with the District ordinance. That's what they're asking for in essence.

The Village answered denying that the District had the authority to enact the ordinance. Further, that the District could exercise such powers outside its own -- could not, sorry, exercise such powers outside its own boundaries and within the boundaries of the Village; and admittedly, well No. 7 is not within the District's territorial service

boundaries and is within the Village's territorial service boundaries.

The Village also pointed out that the Village would operate well No. 7 based on its authority to do so from the approval or permit granted by the DNA that I have talked about before in this history, and that the District was estopped to collaterally attack the DNR permit except through a Chapter 227 procedures. In other words, attacking the DNR's decision, which methods they've already tried and failed. The prior cases, as I say, had involved Chapter 227 attacks by those plaintiffs on the DNR decision itself.

The Village answers also raised other affirmative defenses. After the answer was filed, there was some procedural discussions culminating in the defendant Village filing its brief in support of its motion for summary judgment on 2/25/09 and the District filing its brief in opposition in March and the Village filing its reply brief on 4/22/09.

Some of that procedural delay, by the way, was caused as this Court, I think, was wrestling with in deciding one and then a couple more of those other cases I have cited. And I might add that a number of them appear to be up on appeal right now.

This matter is now ripe for decision on the motion for summary judgment.

This Court starts with a discussion of the Village's initial 2/25/09 brief. The Village raises numerous grounds to support its claim that the District's ordinance does not apply or bind the Village. The Village starts at Page 5 with the fact that the DNR has opined, in regard to the District's ordinance, that said ordinance is invalid. Just a minute. And that is found on Exhibit No. 17 to their brief, which is a 12/18/08 DNR letter. Bear with me a second.

That letter says: Dear Mr. Kent, obviously referring to the attorney for the Village. You recently informed the Department of Natural Resources by letter that the Lake Beulah Management District has created an ordinance with the intent of regulating wells and water use within an area around Lake Beulah, including the Village of East Troy. You provided me with a copy of the ordinance, etcetera. You indicated that you advised the District that there is no authority for the District to enact the ordinance and asked the DNR for its position regarding whether the ordinance is pre-emptory. I have reviewed the ordinance upon your request.

By the way, I'm not reading this verbatim. I occasionally change the wording for my convenience but I do not change the meaning. Anybody claims I do, interrupt me and tell me.

The second paragraph goes on to say: The ordinance regulating water use is pre-empted and invalid under state law. Under Sec. 280.11(1) and 281.11 Wisconsin Statutes, the DNR has general supervision and control of all methods of obtaining groundwater for human consumption, shall do any act necessary for the safeguarding of public health and serves 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.

The Wisconsin Supreme Court stated that issues involving water supply and the promotion and protection of public health are matters of state-wide concern. And they cite City of Fond du Lac v. Empire, 273 Wisconsin 333, a 1956 case. An ordinance passed by the Town of Empire regulating the drilling of wells in the town was ruled invalid because the Supreme Court said the town had no authority to adopt the ordinance.

Now, I want to add here that this is not in

the letter; but subsequent to that time, towns were given some authority on wells but only if the DNR approved it, at least according to the statutory language. I'll come back to that and I may not dwell on that to any great degree though because it's not really important in this decision.

The next paragraph said: The DNR's authority to supervise the quality and management of the waters of the state has been reaffirmed recently by the legislature. 2003 Act 310 grants the DNR expanded authority to protect against adverse environmental impacts when considering whether to issue high capacity well approvals.

And I have that act and that act does do that and that's my aside. That's not in the letter.

They also went on to say: 2007 Act 227, which the Court also got and read, at least in applicable part and then I -- back to the letter, establishes a DNR permit process to regulate withdrawals of surface water and groundwater from the Great Lakes basins. These legislative enactments make it clear that DNR -- the DNR is the entity charged with regulation of the quality and management of the waters of the state.

Now, the above letter is a powerful argument

itself but the Village then left that argument, which was an extremely powerful one, and they left it for the latter part of their brief and changed direction. What they did is they switched to a brief discussion of the summary judgment methodology at that point, which was sufficient for purposes of this motion; and then they started with Roman Numeral I with the assertion that the District does not have the authority to enact this said ordinance.

The Village set forth numerous grounds for that proposition and they follow. They used a subparagraph capital A and said that the District cannot exercise any authority within the Village's territorial boundary. Now, we stop here. It's an established fact that this well is, surface-wise, not in the District's boundaries. It's only in the Village's boundaries.

The Village goes on to point out that Safe Way Motor Coach v. Two Rivers, 256 Wisconsin 35 at Page 43, 1949, held that cities -- that the authority of cities and their jurisdiction are limited to within their boundaries unless there is express legislative authority to the contrary. The Village argues by analogy that the same rule applies to all villages, districts, etcetera. The Village argues that nothing

in Chapter 33, which deals with lake districts -- that is Chapter 33 statutes -- provides a District with express statutory authority to regulate matters beyond their own boundaries.

The Village also cites various subsections of Chapter 33 and discussion of District powers in Donaldson v. Board of Commissioners, 272 Wis. 2d 146, 2004 in support of the above assertion. The District's position is not convincing in opposition to this. The District answers this at Pages 10 to 12 of its March 30, '09 brief. The District relies on cases where the legislature expressly authorized extraterritorial power. No such extraterritorial power appears to be granted in Chapter 33. All the District can do is argue that implicitly the District's power must cover the whole Beulah water shed, including beyond its boundaries.

Now, before I go on, I had a major practical problem with that. There are many areas of the state where they share -- one area will share a water shed with another area that might be a hundred miles or 200 miles away, or 50 miles away or 25 miles away, or might be 35 miles north and 14 miles west, depending on the undersurface geography.

Now, theoretically, according to the

District's position, let's say the Lake Beulah District's waters were shared with a township that was 75 miles away but it just so happened the underground water percolates through that area and eventually reaches Lake Beulah; or even better, maybe the water from Lake Beulah goes and percolates that way. And if you take water away from there, you'll increase the water flow out of Lake Beulah to the other area. It could happen either way.

Theoretically, under the District's position, the District could pass an ordinance that said that this distant municipality or town cannot take that water unless it returns 95 percent of it back to the Lake Beulah basin. That's the kind of logic that I found unconvincing, and I say it with respect, but that opens a huge Pandora's box about the extraterritorial effect of a District attempting to go beyond its surface territorial boundaries and enforce its arm beyond there.

I then return to the Village's brief and the Village, as a second point, argued that even if the well No. 7 were within the District's boundaries, the District could not regulate it if it were within the Village's boundaries. They point to Sec. 33.22(4) which states -- bear with me a second. I've got to

have that. Actually, it's cited on Page 8 of the defendant's brief. I'll just use that. Here it is. That says: Districts shall not exercise the town sanitary district powers authorized under sub (3) within the boundaries of an incorporated municipality unless the governing body of the municipality consents.

In addition, districts shall not exercise town sanitary district powers in any territory included in an existing -- in an existing town sanitary district except by contract under Sec. 66.031 or unless the sanitary district merges under 33.235(3). Of course, note, they're are talking about districts and towns, not districts and villages but nevertheless, seems in principal.

They then go on to say that when a city or village annexes an area that overlaps the district territory, there are other restrictions upon the District's power; and they refer to Sec. 33.36(2) and (2)(a). And there it says: Whenever any territory containing less than an entire district is incorporated as a city or village, consolidated with a city or village or is annexed to a city or village, the district shall survive, and the district shall continue to operate under this chapter subject to the

following modifications: Sub (a), the district shall exercise only those powers granted under this chapter. Sanitary district powers shall not be exercised unless consent for such exercise is obtained in advance from the governing body of the city or village.

Of course, they are referring to sanitary powers. And that leaves one wondering exactly what sanitary powers are as compared to water supply but it is instructive to suggest that the legislature is pointing out that districts can't do things inside a city or perhaps a village without their consent.

The Village points out that clearly the Village has not consented. The District does not really rebut this argument. And therefore, in my opinion on this issue, the Court rules that the District's ordinance has no effect outside its boundaries; and even if the District had the power to enact the ordinance, the District cannot require the Village to submit to it.

That does not mean I end my discussion. Probably the attorneys would wish I would and they could get home; but they discuss so many other things, and I'm aware that appellate courts sometimes disagree with trial courts and I feel I better discuss the other issues. On that issue alone I would have

granted the summary judgment because I would have believed that the ordinance would have no extraterritorial effect and could not be imposed upon an adjoining municipal unit.

Well, the Village goes on, though, in their next argument by -- they call that category capital B. They then assert that the ordinance is invalid because it is an exercise of general regulatory authority which the District does not have. The Village points to case law that the districts have, quote, only the powers set forth, quote, by statute. And they refer to Haug, H-A-U-G, v. Wallace Lake Sanitary District, 130 Wis. 2d 347 at 351, which is Court of Appeals 1986.

The Village then argues that Sec. 33.22 outlines the limits of lake district powers, and they cite that language on Page 9 of their brief where they say -- and this is quoting from the Donaldson case: A lake district's powers are set out in Wisconsin Statute 33.22. They include the power to sue and be sued, make contracts, purchase, lease or otherwise acquire property, disburse money, contract debt -- and this is key language -- and do other acts necessary to carry out a program of lake protection and rehabilitation. Wisconsin Statute Sec. 33.22(1).

The Donaldson court went on to say, continuing its quote: The District may also create, operate and maintain a water safety patrol and so on. Oh. It also assumes sanitary district powers and they refer to the sections of Chapter 33 which I'll omit.

The Village claims that Sec. 33.22(1) does not include express legislative authority to regulate wells. For the first time I find myself seriously in disagreement with the Village. The Village does not cite any statutory language or case law that says a district can only exercise expressly stated power. You should not confuse that with the need to express -- to express extraterritorial power that we talked about before.

The Village downplays the, quote, other acts necessary, quote, language in 33.22(1) and the Village tries to argue that subsection (6) of 33.22, which they also cite on Page 9, narrows the other acts necessary, quote, language but that ignores, quote, any other necessary measures found under program -- the definition of program in No. 6.

Suffice it to say that the Court does not really buy the Village's arguments set forth in B-1 of their brief. However, I do note the Village does make a good ejusdem generis -- for the court reporter,

that's E-J-U-S-D-E-M, generis, G-E-N-E-R-I-S -- argument and in pari, P-A-R-I, materia, M-A-T-E-R-I-A, argument as reasons the District's authority to require well permits are barred but the arguments are not overwhelming in my mind.

Note on Pages 5 through 10 of the District's 3/30/09 brief, the District specifically points to the, quote, do any other acts, quote, language as authority for such an ordinance and does provide a solid counter-argument to the Village in this regard.

Under a category called B-2, the Village argues in its brief that if Chapter 33 is ambiguous, which they don't think it is, then legislative history shows that the District's authority does not include well regulation nor does it permit the enacting of ordinances about the same.

I'm going to by-pass this particular argument for the same reason above. First of all, I'm not convinced that it's ambiguous but I'm also not absolutely convinced that it means what the Village says. But even if it were ambiguous, I don't find the argument thoroughly enough developed -- in the legislative history thoroughly enough developed to demonstrate that they did not mean to allow a lake district to put in such an ordinance.

The Village then, starting at Page 12 of their brief, finally comes back to what I think is its strongest argument. Note, I've already ruled in favor of the Village on a prior argument but I still think this is the strongest argument. And they, of course, briefly refer to it on Page 5 of their brief, which I started out by discussing and their reference to Exhibit 17, which was the DNR 12/18/08 letter.

They entitle this argument Roman numeral No. II, and they argue that the ordinance is pre-empted and conflicts with state law. Now, a partial excuse for the Court's delay in getting at this matter is when I first reviewed the briefs, I also had the benefit of Mr. Kent filing an interesting additional brief in a different case in which there was an argument over DNR authority. And he had cited a case which I'm going to discuss shortly that the Supreme Court had ruled on and I felt his argument was going to be substantially the same.

But he ended up arguing somewhat differently in this particular brief although, he did cite that significant case. As I say, I'll come back to it.

Returning now to Roman No. II of the plaintiff's argument, I go to sub argument capital A there. There the Village argues the State has

expressly pre-empted local regulation of ground water resources, and the District files its response to that on its Page 13 of its brief.

The victim (sic) points out that the regulation of the public water supply is subject to Chapter 280 Statutes. I might add that I find that the regulation of wells is subject to Chapter 281 Statutes.

Now, in Chapter 280, the DNR, in the opinion of the Court, is clearly given primary control over obtaining -- or the obtaining of pure drinking water for public consumption and is also given that same -- that power in connection therewith in regard to well construction. Sec. 280.11(1) says it well enough. Hold on. That section says, 280.11(1): The Department shall, after a public hearing, prescribe, publish and enforce minimum reasonable standards and rules and regulations for methods to be pursued in obtaining of pure drinking water for human consumption and establishing of all safeguards deemed necessary in protecting the public health against the hazards of polluted sources of impure water supplies intended or used for human consumption, including minimum reasonable standards for the construction of well pits.

It shall have general supervision and control of all methods of obtaining groundwater for human consumption, including sanitary conditions surrounding the same, the construction or reconstruction of wells, and generally to prescribe -- prescribe, amend, modify or repeal any rule or regulation thereto prescribed and shall do and perform any act deemed necessary for the safeguarding of public health.

And I might add that they enacted two NR regulation chapters, which I believe are 811 and 812. 811 dealing with the drinking water, 812 dealing with well construction, which are rather extensive, and I reviewed that as well and have the book here.

So continuing on, it appears to this Court that the only role of local government in regard to the public water supply is reserved to towns. I'm going to change that slightly, as the legislature is rather confusing. The way they wrote Chapter 280, it looked like they were going to limit it to towns but even the towns could only act to the extent that they were authorized by the DNR to act. See Sec. 280.21 which reads: The Department may authorize counties to adopt ordinances under 59.70(6)(b) and (c) relating to the enforcement of this chapter and rules of the

Department under this chapter. The Department shall establish by rules, standards or approval of ordinances and enforcement programs, etcetera, etcetera.

I might add that -- Hold on a second. Well, I'll just read that language as it is. It did indicate that towns would have this kind of authority. However, then I looked at Chapter 59 and specifically Sec. 59.70(6) and noted that that does authorize counties also to enact private well and well construction ordinances but only, again, if authorized by the DNR.

Furthermore, Sec. 59.70(6)(e) strictly limited such well authority and any municipality's authority by prohibiting them from enacting or enforcing any ordinance, quote... regulating matters covered by Chapter 280 or by the Department -- that obviously means the Department of Natural Resources -- rules under Chapter 280. See also, for instance, in the same regards, the same effect NR 845.03, which is the regulation basically going right along with the statute.

The Village goes on to demonstrate that well No. 7 was approved by the DNR pursuant to Chapter 280 and NR 811 and also, obviously, NR 812. And there is

a note on NR 811.01 on -- and Exhibit 1 to the Village's brief, which I instructed in that regard. Hold on a second. That note at the end of 811 of NR says: The authority to promulgate and enforce these rules is contained in Chapters 280 and 281 Statutes. Pursuant to Sec. 299.97 Statutes, any person who violates -- and then they go on with the potential violation and forfeiture.

So the DNR itself is taking the position that its right to enforce these statutes come from Chapter 280.

One should also take a look at NR 812. Just to refresh everybody's memory, that's the extensive language about well construction and pump installation under the DNR's authority, which also comes from Chapter 280.

The Village's brief appears to clearly demonstrate that the State made its administrative agency, the DNR, the prime director of methods of clean water supply to the public, including the permitting, regulation and operation of wells, which are one of the methods of supplying such water.

Having established this point, the Village then cites DeRosso Landfill Company v. City of Oak Creek, 200 Wis. 2d 642 at Page 641, 1996 to, the

effect that -- Just a second. Off the record.
(Discussion off the record.)
THE COURT: And that says as follows: Nevertheless, a municipality's ability to regulate matters of state-wide concern is limited. As the Court stated six decades ago, quote, municipality's may enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with but rather compliment the State's legislature. Citing Fox v. Racine, 225 Wis. 542 at 546, 1937, which in turn was quoting Milwaukee v. Child's Company, 195 Wis. 148 at 151 (1928).
Therefore, wrote the Fox court where -- this is another single quote -- the State has entered the field of regulation, municipalities may not make regulation inconsistent therewith, single quote, because, single quote, a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required -- or authorize what the legislature has expressly forbidden. And then they give a further citation to the Fox case and another case.
And then they say: The principle announced in Fox has been the rule in Wisconsin and still is,

quote, the rule when addressing the question of whether State legislation pre-empts a municipal ordinance. By the way, that last quote was actually a single quote. And then they cite some other cases.

The Court having now read that, also notes that -- and here I look to the defendant's brief on Page 15 and 16 and 14, I should say. I'm going to actually quote from the plaintiff's brief -- not the plaintiff's. I'm sorry. The defendant's Village's brief to the effect that: The Wisconsin Supreme Court has long acknowledged that the regulation of groundwater is a matter of statewide concern that pre-empts local regulation. They cite in the City of Fond du Lac v. Town of Empire, 273 Wis. 333 at 334. They said 34 but it's at 334, 1956.

They point out the Court struck down a Town of Empire ordinance that attempted to regulate a municipal well in the City of Fond du Lac. The ordinance adopted by the Town prohibited the drilling of a well in the Town of Empire with casing in excess of six inches in diameter except by permission of the town board upon a finding that the well would not adversely affect private wells in the town.

The Court in Town of Empire noted the regulation of groundwater was a statewide concern and

stated, quote, we can find no authority, even under the home-rule amendment or under Chapter 61 Statutes, that would authorize the Town of Empire to adopt the ordinance under attack, end of quote. And that can be found at Pages 338 to 339 of the Empire decision.

The Village goes on to say: Thus, even a municipal well ordinance by a general purpose local government was deemed pre-empted.

The next paragraph they say: Although the test for preemption has become more exacting over the years, the holding of Town of Empire remains valid. Town of Empire has been relied upon by the DNR to oppose local well ordinances. In addition, in 81 opinion of Attorney General 56 at Page 62, 1993, the Attorney General cited Town of Empire as authority in a formal opinion for the proposition that the legislative determination that water resources management required statewide regulation and control was entitled to, quote, great weight, period.

I might add there's more to that Attorney General's decision and I'll come back to it because defense cited it in rather depth.

They go on to say: If anything, the rationale of Town of Empire has become even more compelling today than it was in 1956 because of the

expansion of state law regulating groundwater. In Town of Empire, the Court noted that the legislature, quote, has done very little to regulate the use of groundwater. Of groundwater is in brackets, end quotes. And they're citing to Page 338.

They go on to say: Since 1956, the State has greatly expanded it's regulatory role over groundwater and high capacity wells. And they then refer to the 1985 Wisconsin Act 60. I won't state everything they said about it but they have correctly cited it here. It is clearly an indication that the State is putting that authority and duties on the DNR.

And then they go on to say in the next paragraph the reference to the comprehensive statewide scheme for regulating high capacity wells with the criteria that are needed, which they cite; and then they point out that since 1956, the legislature and the DNR have adopted numerous other provisions regulating groundwater which include -- and they go through a list of those ones, including the 1984 Wisconsin Statute Chapter 160, and the DNR adopted NR 140 which establishes groundwater qualities and etcetera, etcetera.

And then they say: If the State interest was significant enough to preclude the Town of Empire

from enacting its ordinance in 1956, it certainly is sufficient now to preclude the District from enacting its ordinance. The District's enactment of ordinance 2006-03 interferes with the State's regulatory scheme for high capacity wells and is pre-empted no less than the Town of Empire ordinance.

Now I return basically to my own decision but I found that language very compelling and I've quoted it substantially.

Then the Village, in its next argument, pointed out that not only is the District pre-empted but the District's proposed ordinance would undo the DNR approvals because the ordinance would effectively bar the use of well No. 7 despite the DNR approval. That's my words, not the Village's words; but in essence, that's what they were saying.

I asked myself as a court: How can a lake management district impose restrictions on the public water supply that totally undo a DNR approval for supplying the same water to the public. The Village inferentially poses this question and then answers it not only by the preemption argument above but by the conflict argument that they also make.

The victim -- excuse me. I keep saying the victim. The Village points to a parallel case where

the DNR had been given control of the regulation of chemical treatment of aquatic nuisances. I might add this is the very case I mentioned earlier that I expected to be a major part of the Village's argument in the first place.

This case was Wisconsin Environmental Decade, Inc. v. DNR, 85 Wis. 2d, 518, 1978. In that case the City of Madison -- and this is a rough translation of what happened. There are a lot more facts in that case but this is a rough, shortened version. In that case, the City of Madison did not agree with the DNR's decision to permit three groups to chemically treat weeds in designated areas of Lake Mendota and Monona. In fact, the City had a few years before passed an ordinance that objected to the DNR granting any such permits.

The City and Wisconsin Environmental Decade, Inc., which is why the case is named that, jointly filed a petition for review of the validity of the DNR's permit. The Supreme Court first pointed out that the State had empowered the DNR to control the regulation of chemical treatment of aquatic nuisances. The DNR statutory authority, which the Supreme Court discussed, does not need to be discussed here. This is a parallel case. But suffice it to say that the

statutory authority of the DNR re: the chemicals was similar to the statutory authority of the DNR to regulate water supplies in wells found in the present case.

The Supreme Court went on to point out that to the extent Madison had power to control chemical treatment of aquatic weeds, that power was granted by the legislature. I might add that the Court made it clear that the Madison, by its general powers and the language of its granted powers, did have the power to do something like this.

But the Court then stated at 85 Wis. 2d, 518 Page 534 -- bear with me: We believe that the power to prohibit chemical treatment of aquatic nuisances in the waters of Lake Mendota and Monona is one which the legislature could confer on Madison and therefore is one which the City now passes -- possesses under Sec. 62.11(5) Stats. unless as prescribed in Sec. 62.11(5) itself there is an express language elsewhere in the statutes restricting or revoking it.

This Court has added a further limit on municipalities' exercise of authority pursuant to the legislature's broad grant of power in Sec. 62.11(5) Statutes; i.e., ordinances may not infringe the spirit of state law or general policy of the state. Citing

Fox v. Racine again at Page 545.

We approve of the rule as set forth in Solheim, Conflicts Between State Statute and Local Ordinances in Wisconsin, 1975 Wisconsin Law Review, 840 at Page 848 where it stated -- and that's my language, quote, 2, if a municipality acts within the legislative grant of power but not within the constitutional initiative, the State may withdraw the power to act; so if there is logically conflicting legislation, or an express withdrawal of power, the local ordinance falls. Furthermore, if the State legislation does not logically conflict, or does not expressly withdraw power, it is possible that the local ordinance nevertheless must fall if an intent that such an ordinance not be made can be inferred from the fact that it defeats the purpose or goes against the spirit of the state legislation.

They then went on to say: If Resolution 21.527 -- by the way that is the resolution that Madison had passed establishing their control over chemical -- chemicals in the lake to control weeds, they said: If Resolution 21.527 establishes a city policy to effectively prevent the use of herbicides or chemical treatment in Madison lakes, we conclude that the resolution must fall. The statutes reveal no

express withdrawal of power. However, the broad grant of power to the DNR to supervise chemical treatment of waters under Sec. 144.025(2)(i) Statutes, is logically inconsistent with the existence of power in the city to prevent chemical treatment of Madison lakes entirely. The city's policy conflicts with the DNR's program under Sec. 144.025(2)(i) involving limited chemical treatment by individuals or groups operating by permit and under the supervision of the Department. The city contends that Resolution 21.527 and Sec. 144.025(2)(i) Statutes are not logically inconsistent.

I might add -- and this is an aside here -- that's the same argument that the lake district is using here; that the ordinance and the DNR's authority are not inconsistent.

I go on with the Supreme Court's quote. The Supreme Court said: We do not believe this contention is sound. The city has not moved in the same direction farther but not counter to the DNR, citing Fox v. Racine. The resolution and the statute as implemented by the DNR are diametrically opposed. City's reliance on Fox v. Racine and LaCrosse Rendering v. LaCrosse, 231 Wis. 438, 1939, where this Court upheld municipal ordinances which are not in logical conflict with the state statute, is

inappropriate in the light of the facts in this case.

The Village cites a few more cases to support its assertion that even if the District had the authority to enact its disputed ordinance, that ordinance cannot stand because the DNR has express legislative control in the area of human water supply, including wells for that purpose, and the said ordinance is logically inconsistent with the DNR's authority in that area, especially since the ordinance conflicts with the DNR's decision to allow the well to be used and to pump. And if the ordinance were enforced, it would set the DNR's decision at naught. It would be useless. It would be a meaningless set of words. Or in other words, the ordinance conflicts with state law and thus is invalid.

The District's counter-argument relies heavily on an opinion by the Attorney General quoted extensively on Pages 13 and 14 and again Pages 15 and 16 of their brief. And it's a good argument except -- and by the way, I'm saying that the Attorney General made a good argument and counsel for the plaintiff was well advised to adopt the argument. But in the opinion of the Court, although it's a good argument, it really applies when ordinance and DNR decisions don't conflict. If the AG opinion really concerned a

situation where the municipal government and the DNR actions, in the opinion of the Attorney General writing the decision, did not actually conflict and actually complimented each other. You can see Tab B -- and by the way, it's Tab B, not Tab 2. Counsel for the defense actually called it Tab 2; but in his tabs, he had A and B and it's B.

In any case, if you see that tab to the brief, Page 1 Paragraph 3, here it points out that the ordinance -- it talks about the fact that if the ordinance clearly interferes with the well, then it conflicts with state law. I'm sorry. That's my comment. But I guess I'm going to go to that particular Attorney General's brief. Bear with me a second. Not brief but opinion.

On Page 1 of that Attorney General's decision, it says in about the middle of the page: Local laws that conflict or interfere with state laws and programs for the protection and management of state waters are pre-empted by state law and are subject to legitimate legal challenge in a court of law. Furthermore -- I'm getting ahead of myself.

The second paragraph after that says: The Town of Richfield ordinance does -- and there there's a misprint in the opinion because the word not should

be between the word does and conflict, in order for that sentence to make sense.

So the sentence really should read: The Town of Richfield ordinance does not conflict with or interfere with provisions in Wisconsin Statutes Chapter 281 for regulating high capacity wells and the DNR does not make such a claim or showing. In other words, the case that the Attorney General was handling involved a case where there was no conflict and the DNR wasn't claiming any conflict. The DNR was just simply saying: You're out of the ballpark. You can't do this. You can't make this decision. You can't pass this law, even though it does not conflict with anything that we are doing.

As I say, in the present case that I am handling, the ordinance clearly interferes with the well -- excuse me. Here the ordinance clearly interferes as well as conflicts with the state law. Besides, the AG opinion concerned a local town zoning ordinance controlling matters within the town itself. They weren't controlling matters outside the town.

Also the AG opinion points out that the town ordinance did not conflict with or interfere, as I said, with the DNR duties under Chapter 281 to regulate high capacity wells. You can see that at

Page 1, Paragraph 5 of the AG opinion. And I've already read that.

Here the ordinance itself -- again, back to our case, the ordinance itself conflicts and interferes with the DNR powers under Chapter 281 and 280, as well as various NR regulations. If allowed to stand and apply to the Village, it will totally vitiate the DNR actions in regard to Chapter 280 and 281 reference well No. 7 and the Village's, that is, the public's water supply.

A lake district action of this type is pre-empted, in the opinion of this Court, and also is void, even if not pre-empted, because it conflicts with the DNR regulation of the public water supply and well regulation. I find the same basic argument that the Supreme Court used in the Wisconsin Environmental Decade case to apply here, although we are not talking about chemical application to aquatic weeds.

The District also argues -- and for that I'll turn to Page 7 of their brief -- 17, I'm sorry, that a determination of such legislative intent is necessary in order to determine whether one state law pre-empts the effect of another. And they cite to the DeRosso case, which I've already mentioned, and they cite to In Re: The Finding of Contempt in Interest of

J.S. and M.S. v. Racine County, 137 Wis. 2d, 217 at 224, Court of Appeals 1987.

They go on to say -- and I'm again, quoting from the defendant's -- the plaintiff's brief here, the District's brief. They say: A local governmental entity's ordinance is pre-empted if, but only if: 1, the legislature has withdrawn the entity's power to act. I stop here. I don't think they've withdrawn the power to act. I don't. And there's no problem there.

But then the next two, three and four are a problem because the defense goes on to admit that the case law says that the entity, the governmental entity's ordinance is pre-empted if two, the ordinance and issue logically conflicts with state legislation. I find it clearly does. It basically regulates and prevents a well from being operated because a local government says -- sets restrictions upon that well use; and even though the DNR has held hearings and done its job to okay the well, everything the DNR did was useless. It has conflicted with state legislation, which meant to grant to the DNR this job about supplying public water and constructing and using wells for that purpose.

Three, the ordinance is pre-empted if the

ordinance defeats the purpose of state legislation. I find that's clearly what it does here. The ordinance defeats the purpose of giving the DNR the job of providing this public water, of overlooking the safety of the public water, and construction and use of wells for that purpose.

And finally, four, the ordinance is pre-empted if the ordinance violates the spirit of state legislation. Again, there's a citation to DeRosso and some other cases, but I clearly find in this case the ordinance is violating the spirit of state legislation because the spirit of state legislation is to give the primary preeminent job to the DNR to oversee the water supply of the public and the construction and use of wells as part of that purpose.

The essence, then, of the District's argument is that the District can, by ordinance, prohibit the use of a well authorized by the DNR because the District says the water is being drawn from the well, although the well is outside the District's surface territorial boundaries and is water which would eventually -- or is water which would eventually flow into the subsurface or surface areas within the District's boundaries or be drawn from

those areas within the District's boundaries.

As I said before earlier on in this decision, under that theory, a lake district could effectively veto wells a hundred miles from their territory as long as they could show an interconnection of their water -- their underground waters with the area 100 miles away. What happens if the Village passes an ordinance that the District can't use any water that comes from the subsurface area under the victim's (sic) territory.

The City -- the Village, there is legislation on the books that clearly indicate the Village had authority to pass various ordinances for various reasons to protect their citizens. What's to prevent, if the District can do what they're doing, the Village to correspondingly come back and pass their own ordinance that prohibits any of the Lake Beulah from keeping any of the water that happened to be temporarily under the Village's boundaries but might eventually flow into Lake Beulah? I can't see any way they can do that but if you accept -- if this Court adopts the argument of the District, then the Village can do that, just as well as the District can do it.

The end result of my decision, and I agree

it is a -- as I say klutzy decision because I had to put it together fast, is that with great respect for both sides' arguments, this Court finds that the ordinance is invalid as applied to the Village. The ordinance is invalid generally because it conflicts with the obligations, duties and powers of the DNR, and for all the various other reasons that I have said.

And therefore, I declare that the ordinance is void and unenforceable in this particular case, certainly as to the Village of East Troy but I think it's void and unenforceable, period, even within its own boundaries under the circumstances; and that is the way the Court rules.

I will request that the prevailing party on the summary judgment prepare an order that simply says the motion for summary judgment is granted for the reasons stated on the record. I sincerely hope a higher court, which will no doubt see this case under the circumstances, can figure out what I was saying and either agree with it or point to me why not.

And with that, is there anything else that the parties need from me at this time? Plaintiff?

MR. LAING: No, Your Honor.

THE COURT: Defense?

MR. KENT: No, Your Honor. Thank you.

THE COURT: Thank you very much and thank you for your patience, people.

MR. KENT: Thank you, Your Honor.

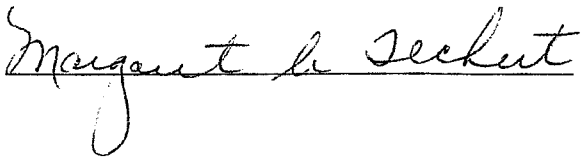
THE COURT: All right.

(Proceedings concluded.)

STATE OF WISCONSIN)
)
COUNTY OF RACINE)

I, Margaret A. Techert, a Court Reporter for Racine County, certify that the above and foregoing is a true and correct transcript of the hearing in the above entitled matter as contained in my stenographic notes taken on said hearing.

Dated at Racine, Wisconsin this day 29th of May, 2009.



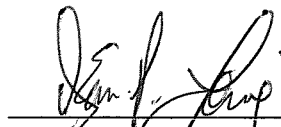
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(2)(a)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) a copy of any unpublished opinion cited under s. 809.23(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further hereby certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 6th day of December, 2010.

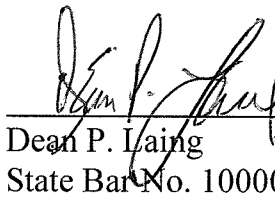


Dean P. Laing
State Bar No. 1000032

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 6th day of December, 2010.



Dean P. Laing
State Bar No. 1000032

STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2009AP002021

LAKE BEULAH MANAGEMENT DISTRICT,

Plaintiff-Appellant-Petitioner

vs.

VILLAGE OF EAST TROY,

Defendant-Respondent.

BRIEF AND APPENDIX OF THE VILLAGE OF EAST TROY DEFENDANT-RESPONDENT-RESPONDENT

Petition for Review of an Opinion and Order of the Court of Appeals, District II, dated August 25, 2010, affirming a Final Decision entered in the Walworth County Circuit Court on May 7, 2009
The Honorable Robert J. Kennedy, Judge,
Walworth Circuit Court Case No. 08-CV-915

STAFFORD ROSENBAUM LLP
Paul G. Kent (#1002924)
Barbara A. Neider (#1006157)
P.O. Box 1784
Madison, WI 53701-1784
608-256-0226
pkent@staffordlaw.com
bneider@staffordlaw.com

December 27, 2010

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STATEMENT OF ISSUES

1. **Does a special purpose lake district have extraterritorial powers that allow it to enact an ordinance that applies outside of the District's boundaries and prohibits the Village of East Troy from constructing and operating a municipal well within the Village?**

   Answered by the Circuit Court: No. The Circuit Court stated:

   > And therefore in my opinion on this issue the Court rules that the District ordinance has no effect outside its boundaries and even if the District had the power to enact the ordinance the District cannot require the Village to submit to it.

   Circuit Court decision at 18; R-App. 18.

   Answered by the Court of Appeals: The Court of Appeals did not decide this issue because it determined that the District's Ordinance was preempted by state law, and that issue was dispositive. Court of Appeals Decision ¶10 n. 4; R-App. 50.

2. **Is the District's Ordinance preempted by state law when the Ordinance prohibits the Village from utilizing the high capacity well approval issued by DNR pursuant to the standards created by the Legislature?**

   Answered by the Circuit Court: Yes. The Circuit Court stated:

   > [T]he ordinance itself conflicts and interferes with the DNR powers under Chapter 281 and 280 as well as various NR regulations. If allowed to stand and apply to the Village it will totally vitiate the DNR actions in regard to Chapter 280 and 281 reference well No. 7 and the Village's, that is, the public's water supply.

   Circuit Court decision at 39; R-App. 39.

Answered by the Court of Appeals: Yes. The Court of Appeals agreed that the District's Ordinance prevented the Village from using the approval DNR granted for Well #7 and therefore presented a direct conflict with state law.

Court of Appeals Decision ¶16, R-App. 53.

INTRODUCTION

This case arises out of the ongoing efforts of the Lake Beulah Management District (District) to prevent the Village of East Troy (Village) from utilizing a municipal well (Well #7) that is needed to provide an adequate public water supply to its residents. The Department of Natural Resources (DNR) approved Well #7 in 2005; and in 2006, the District enacted an ordinance (Ordinance) that purported to prohibit the use of Well #7. In so doing, the District claims it has extraterritorial power to enact an ordinance that extends outside of District boundaries and into the Village, and that it can prohibit the use of Well #7 notwithstanding DNR approval of that well. For the District's Ordinance to stand, the District must prevail on two independent questions.

The first is a question of authority: Does a special purpose district have the authority to enact an extraterritorial ordinance that applies in an incorporated village absent express legislative authority to do so? The answer to this question is straightforward. No municipality, not even a general purpose home rule municipality, has any extraterritorial powers absent authority expressly granted by the Legislature, and no express extraterritorial authority has been granted to lake districts. Indeed, the only

ordinance authority granted to lake districts provides that an ordinance cannot be enforced in a city or village absent consent from the city or village, and no consent was obtained in this case.

The second question is one of preemption. Assuming there was authority in the first instance, may a lake district enact an ordinance that prohibits a village from utilizing a high capacity well approval issued by DNR? The answer to this question is more complex, but ultimately no less clear. Where the Legislature has established a detailed statutory framework for the permitting of high capacity wells, as is the case here, a local government cannot disregard that framework and prohibit what the DNR has expressly authorized.

The circuit court overturned the Ordinance on both authority and preemption grounds. The Court of Appeals overturned the Ordinance on preemption grounds and did not reach the question of the District's authority. Nevertheless, for the District to prevail, it must have the authority to enact the Ordinance in the first instance, *and* the Ordinance must not conflict with state law. (Because both questions are at issue in this case, like the circuit court, the Village will first address the threshold

question of the District's authority and then turn to the preemption analysis.)

The District attempts to sidestep both questions by an assertion that "surely some governmental entity must have the authority to regulate high capacity wells." Dist. Br. at 8. The District's assertion is not a substitute for legal analysis.

First, conflict or no conflict, the District must have the authority to enact the Ordinance in the first instance. Extraterritorial ordinance authority does not automatically spring to life based on a misperception that DNR's authority is inadequate. Wanting authority is not the same as having authority and the District has no extraterritorial authority. The District's argument also ignores the fact that DNR *does* have authority to address impacts from certain high capacity wells through its permitting program and that DNR also has authority to address other impacts from high capacity wells through other statutory and common law actions.

Second, the District's assertion that its Ordinance does not conflict with state law because the Ordinance is merely filling in "gaps" in the DNR's permitting framework is simply incorrect. Where the Legislature has made careful choices on which wells to regulate through permits and

the extent of environmental review for those wells, municipal governments may not make contrary choices. Similarly, municipal governments cannot prohibit an activity that the DNR has approved. The District disagrees with that legislative framework and those standards, and has chosen to prohibit the well which the DNR has expressly authorized. That *is* a direct conflict.

The decision of the circuit court and Court of Appeals to overturn the District's Ordinance should be affirmed. The District lacks authority to enact the Ordinance in the first instance, and the Ordinance directly conflicts with state law.

STATEMENT OF THE CASE

The Village's Siting Of Well #7

The Village began the well siting process in 2000 for Well #7 to provide an adequate water supply to the Village. R.6:1, ¶2.[1] The Well #7 site was annexed into the Village in August 2003. R.6:1, ¶4. The Wisconsin Department of Natural Resources issued permits in the form of an "approval" for Well #7 on two occasions – in 2003 and 2005. (2003 Approval and 2005 Approval). R.5:6-8, 10-11; R-App. 66-70. The 2003 Approval was upheld by an administrative law judge and the Walworth

[1] R.__ citations are to the record in the Court of Appeals in this case. R-App. ___ citations are references to the Respondent Village's Appendix.

County Circuit Court in Case Nos. 04-CV-683 and 04-CV-687, and the ensuing appeal was dismissed. The 2005 Approval was upheld by the Walworth County Circuit Court on September 20, 2008, but was reversed on appeal. This Court accepted review and that case is now pending before this Court. *See Lake Beulah Management District v. DNR,* Appeal No. 2008AP3170.

Well #7 is located in the Village in an area known as the Lake Bluff Subdivision. R.6:1, ¶3. Construction on Well #7 began in 2006 and it became operational on August 1, 2008. R.6:1, ¶5. Well #7 has been pumping since that time.

The Lake Beulah Management District Ordinance

The Lake Beulah Management District is a Lake District. It is a special purpose district governed by the provisions of Wis. Stat. ch. 33. Like many lake districts, the Lake Beulah Management District started out as a Town Sanitary District. R.5:44. On October 16, 1995, the Town of East Troy converted the Sanitary District into the Lake Beulah Management District. R.5:44-46. There is no dispute that the Lake Bluff Subdivision in which Well #7 is located is outside of the boundaries of the Lake District. *See* District Map at R.5:50; R-App. 63.

On December 11, 2006, the District adopted Ordinance No. 2006-03 (Ordinance) which purported to grant itself regulatory authority over Well #7. The Ordinance requires a permit for any person diverting or transferring groundwater out of the "Lake Beulah Groundwater Basin," also known as the "Hydrologic Basin." Ordinance § 1.A; R.5:63-67; R-App. 55-62. The Ordinance establishes its own permitting standards and certain *de minimis* thresholds. Although Well #7 is *outside* of the District boundaries, it is located *within* with the District's self-designated "Hydrologic Basin." *See* Basin Boundary Map, R.5:74; R-App. 64.

In addition to the Ordinance's permit requirement, Ordinance § 4.C.8.a. also provides a prohibition on wells within the Hydrologic Basin that result in a diversion of water out of the Hydrologic Basin:

> No proposed use, diversion or transfer shall be permitted unless a volume of water equal to at least 95% of the water actually diverted or transferred is returned to the Hydrologic Basin at the location(s) where the adverse effects of the proposed use, action, diversion or transfer will be mitigated.

R-App. 60. Municipal water used by the residents of the Village for domestic purposes is treated by the Village's wastewater treatment plant pursuant to a separate DNR permit. R.6:2, ¶6. The treatment plant discharges to Honey Creek which is outside of the "Hydrologic Basin." As a result, 95% of the water removed by Well #7 would not be returned to the

basin as defined by the Ordinance. R.6:2, ¶6. Thus, there is no dispute that the operation of Well #7 is *prohibited* under the Ordinance.

Procedural History

Following passage of the Ordinance, the Village wrote to the District on December 19, 2006, stating that the District did not have the authority to enact such an Ordinance and that the Village did not consent to the Ordinance. R.5:76. When the District inquired whether the Village would comply with the Ordinance, the Village responded by again asking for the legal authority under which the District purported to act. The District refused to provide an answer to that inquiry. R.5:78-85. Instead, the District commenced a declaratory judgment action in Walworth County Circuit Court seeking a declaration to uphold its Ordinance. R.1. Subsequently, on December 18, 2008, DNR wrote to the Village and District advising that the Ordinance was preempted by state laws. R.5:96; R-App. 65.

The Village moved for summary judgment, which was granted by the circuit court on May 7, 2009. R.12; R-App. 1-45. The circuit court began its analysis by determining that the District had no authority to enact an ordinance that was to have effect within the Village:

> And therefore in my opinion on this issue the Court rules that the District ordinance has no effect outside its boundaries and even if the District had the power to enact the ordinance the District cannot require the Village to submit to it.

Circuit Court decision at 18; R-App. 18. As an additional ground, the circuit court held that the District's Ordinance conflicted with state law:

> [T]he ordinance itself conflicts and interferes with the DNR powers under Chapter 281 and 280 as well as various NR regulations. If allowed to stand and apply to the Village it will totally vitiate the DNR actions in regard to Chapter 280 and 281 reference well No. 7 and the Village's, that is, the public's water supply.

Circuit Court decision at 39; R-App. 39.

The Court of Appeals upheld the circuit court's decision in its Decision and Order of August 25, 2010 but confined its analysis to the question of preemption. The Court of Appeals held that the Ordinance presented a direct conflict with state law stating, "the Ordinance casts the District and the DNR as 'locomotives on a collision course,' in direct conflict with one another." Decision at ¶16; R-App. 53.

STANDARD OF REVIEW

This case was decided by the circuit court on summary judgment. The rules for granting summary judgment are well established. A court must grant summary judgment when there is no genuine issue of material fact and a party is entitled to a judgment as a matter of law. Wis. Stat. § 802.08(2). *Diamondback Funding, LLC v. Chili's of Wis., Inc*., 2004 WI

App 161, ¶6, 276 Wis. 2d 81, 687 N.W.2d 89. In this case, the material facts are undisputed and the issues are issues of law that should be resolved on summary judgment.

While it is true that a court ordinarily affords an ordinance a presumption validity, that presumption is rebuttable.[2] The Court's function is "determining whether legislative action under the power delegated to the municipality passed the boundaries of its limitations or exceeded the boundaries of reason." *Sluggy's Lake Front Inn, Inc. v. Town of Delavan*,125 Wis. 2d 199, 202, 372 N.W.2d 174 (Ct. App. 1985). For the reasons, set forth below, the District's Ordinance surpassed its "boundaries" both legally and physically.

ARGUMENT

In order for the District's Ordinance to be upheld, the District must have the authority to enact it in the first instance, *and* it must not conflict with state law. The Ordinance fails on both counts. The District's authority is lacking for two independent reasons: (1) the District has no extraterritorial power and (2) the District's only ordinance authority

[2] The District cites *Town of Rhine v. Bizzell*, 2008 WI 76, ¶26, 311 Wis. 2d 1, 20, 751 N.W.2d 780 for the proposition that "an ordinance will be held constitutional unless the contrary is shown beyond a reasonable doubt" Dist. Br. at 17-18. *Bizzell* is inapposite. This case does not raise a constitutional challenge to the Ordinance, it raises a question of whether the District has authority to enact it and whether it is preempted by state law.

prohibits enforcement of ordinances within the Village absent the Village's consent. This alone requires affirmance of the Court of Appeals' decision.

But there is more. The Ordinance is also preempted by and in conflict with state law, because it directly prohibits what the state has authorized and approved through the legislative framework for granting high capacity well permits. Accordingly, the decision of the circuit court and Court of Appeals to overturn the District's Ordinance should be affirmed both on the grounds that the District lacked authority to enact it and that it is in conflict with state law.

I. THE ORDINANCE IS INVALID BECAUSE THE DISTRICT HAS NO EXTRATERRITORIAL AUTHORITY.

There is no dispute that the District's Ordinance attempts to regulate (and indeed prohibit) activity outside of the District's boundaries. The District claims that it has "virtually unlimited powers" and therefore can regulate activities outside its borders. Dist. Br. at 23. Such an assertion is patently false. The District has no authority to regulate activity in the Village and on this basis alone the Ordinance is invalid.

A. Local Governments Only Have The Authority Delegated By The Legislature.

It is well established that local units of government, no less than

state agencies, are creatures of the Legislature and have only those powers granted to them. *Schroeder v. City of Clintonville*, 90 Wis. 2d 457, 464-65, 280 N.W.2d 166 (1979) ("Cities are creatures of the legislature and have only such powers as are expressly granted to them and such others as are necessary to implement the powers expressly granted."); *Scharping v. Johnson*, 32 Wis. 2d 383, 388, 145 N.W.2d 691 (1966) ("The creation of municipal corporation is peculiarly within the province of the legislature. A unit of local government is a creature of the legislature.")

Lake districts are special purpose districts created under Wis. Stat. ch. 33. Special purpose districts, as their name implies, are created for specific limited purposes and they have "only the powers set forth" by statute. *Haug v. Wallace Lake Sanitary Dist.*, 130 Wis. 2d 347, 351, 387 N.W.2d 133 (Ct. App. 1986). Lake district powers were "designed to enable these special purpose districts to coexist among more traditional local governmental units." *Donaldson v. Board of Comm'rs of Rock-Koshkonong Lake Dist.*, 2004 WI 67, ¶22, 272 Wis. 2d 146, 680 N.W.2d 762.

B. No Local Government Has Extraterritorial Authority Absent Express Statutory Authorization.

There is no dispute that a local government's "jurisdiction and authority is limited to the territory within its boundaries." *Safe Way Motor Coach Co. v. City of Two Rivers,* 256 Wis. 35, 43, 39 N.W.2d 847 (1949). *Safe Way* was cited with approval in *Wis. Env'tl. Decade, Inc. v. DNR,* 85 Wis. 2d 518, 539, n.8, 271 N.W.2d 69 (1978) ("This is not to imply that the jurisdiction and authority of a city is not limited to the territory within its boundaries. It is. *Safe Way Motor Coach v. Two Rivers*, 256 Wis. 35, 39 N.W.2d 847 (1949). **Its ordinances have no extra-territorial effect.** *Cegelski v. Green Bay*, 231 Wis. 89, 285 N.W. 343 (1939).") (Emphasis added).

The *only* exception to the rule that municipal jurisdiction is limited to the territory within its boundaries is where the Legislature has *expressly* granted extraterritorial power to municipalities. Such powers have been rarely granted and even then only under limited conditions. The sole statutory exceptions to the rule against extraterritorial powers are the following:

- **Wis. Stat. § 62.23(7a)(a) – Extraterritorial zoning.** This section allows *cities and villages* to zone unincorporated areas *within 3 miles of a city or 1-1/2 miles of a village* in accordance

with statutory procedures and standards including input from impacted towns.

- **Wis. Stat. §§ 236.02(5) and 236.10(1) – Extraterritorial plat approval.** This section allows *cities and villages* to have plat approval authority *within 3 miles of a city and within 1-1/2 miles of a village*.

  Wis. Stat. § 66.0415 – Extraterritorial nuisance authority. Subsection (1) allows *cities and villages* to license or prohibit, "any industry, thing or place where any nauseous, offensive or unwholesome business is carried on" within 4 miles of a city or village under § 66.0415(1).

  Subsection (2) allows *cities and villages* to enact "reasonable regulations governing areas where refuse, rubbish, ashes or garbage are dumped or accumulated in a town" within 1 mile of the city or village limits with approval of the affected Town Board.

  A similar provision directed at the regulation of smoke within 1 mile of a *city or village*, is found at Wis. Stat. § 254.57.

- **Wis. Stat. § 30.745(1) – Jurisdiction over navigation aids.** This section allows *cities, villages and towns* to control certain navigation aids adjacent to the municipality and outward for a *distance of 1/2 mile*.

- **Wis. Stat. § 114.136 – Regulation of building heights by airports**. This section allows *cities, villages, counties and towns* who own airports to *regulate building height within 3 miles of the airport sit*e.

These are the exceptions that prove the rule. Unless a local unit of government falls within these express provisions, there is no extraterritorial power. Because none of these exceptions apply to special purpose lake

districts, the District has no extraterritorial power. That should be the end of the inquiry.

While the lack of coverage under these exceptions is dispositive on the invalidity of the Ordinance, the scope of these exceptions is also instructive in two other respects. First, these statutes limit the geographic reach of extraterritorial powers (usually to 3 miles or less) and limit the scope of those powers to specific issues such as zoning, plat approval or building height. Municipalities are not free to create their own extraterritorial concepts and boundaries such as the "Lake Beulah Groundwater Basin." When extraterritorial power is granted, it is carefully circumscribed by the Legislature.

Second, express authorization for the exercise of extraterritorial authority is required even for cities and villages which have far broader authority than special purpose districts. Cities and villages have constitutional home rule powers under article XI, section 3 of the Wisconsin Constitution.[3] *See State ex rel. Michalek v. LeGrand*, 77 Wis.

[3] This section provides, " (1) Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature."

2d 520, 526, 253 N.W.2d 505 (1977). In addition, cities and villages have also been given broad statutory police powers by the Legislature, sometimes referred to as "statutory home rule." *See, e.g.*, *Helgeland v. Wisconsin Muns.*, 2008 WI 9, ¶67, 307 Wis. 2d 1, 745 N.W.2d 1. For example, the statutes give to cities, "the largest measure of self-government compatible with the constitution and general law" which powers are "limited only by express language." *See* Wis. Stat. §§ 62.04, 62.11(5).[4] If cities and villages with the broadest powers under the constitution and the law still require express statutory authorization to exercise extraterritorial jurisdiction, certainly special purpose districts require no less.

There is no dispute in this case about whether the District has been granted express authority to exercise extraterritorial jurisdiction. It has not. In the absence of such express authorization, the Ordinance is invalid.

C. The District's Assertion Of Extraterritorial Zoning Authority Is Baseless.

The District's position is that unlike any other local unit of government, the District has extraterritorial zoning authority without express statutory authorization and without any statutory limitations. Its two pages of argument on this key issue is baseless. (Dist. Br. at 24-26)

[4] Similar provisions exist for Villages. *See* Wis. Stat. § 61.34(1), (5).

1. There is No Basis to Ignore the Well-Established Law Limiting the Extent of Local Jurisdiction.

The District claims the rule limiting local jurisdiction and authority to municipal boundaries that was articulated in *Safe Way, Cegelski, and Wis. Env'tl. Decade,* can be ignored because those cases are factually distinguishable from this case. The District asserts the local units of government in those cases were "not seeking to regulate conduct occurring outside their boundaries where that conduct was causing harm within their boundaries." Dist. Br. at 25. Such a factual distinction is irrelevant and does not change the basic proposition that municipal authority is limited to its jurisdictional boundaries. Indeed, an express grant of extraterritorial power has always been necessary if a local government wants to do what the District is claiming to do here – regulate conduct outside of its boundaries to prevent alleged harm within its boundaries. For example, the purpose of extraterritorial zoning and plat approval has always included protection of land *within* the municipality from conflicting uses on the *outside* of its border.[5]

[5] *See* Marygold Melli and Robert Devoy, *Extraterritorial Planning and Urban Growth*, 1959 Wis. L. Rev. 55, 56. ("The purpose of extraterritorial control is two-fold: (1) it helps municipalities to form the development of area which will probably be annexed; (2) it helps municipalities to protect land use near corporate limits from conflicting uses outside the limits.")

In essence, the District's argument is that extraterritorial powers *can* exist in the absence of an express grant of authority. The District cites no authority for this proposition and there is none. Instead, the District merely asserts that it would be "ridiculous if a municipality could not regulate [such conduct]." *Id.*

Wanting authority is not a good faith basis for asserting authority. The Legislature has determined when extraterritorial regulatory authority should apply and under what conditions. Local units of government do not have the ability to unilaterally decide to extend their jurisdiction and powers. Those are decisions for the Legislature. *See, e.g.*, *Rice v. City of Oshkosh*, 148 Wis. 2d 78, 91, 435 N.W.2d 252 (1989). ("The League also argues it is good public policy to allow cities to regulate the public improvements of extraterritorial plats. Public policy as to what governmental unit or units should be authorized to establish . . . is a matter for the legislature.")

Abiding by jurisdictional limits is not ridiculous, despite the District's assertion to the contrary. When an action outside municipal boundaries occurs that results in damage or injury within the municipality, the municipality has various remedies including the following: (1) If there

is express extraterritorial power, it can exercise that authority; (2) If there are damages from such an activity, the municipality or its residents may pursue a civil action for damage, or (3) If the matter is a violation of state law, then there can be enforcement under state law. What the municipality does not have is the ability to grant itself extraterritorial power it has not been granted by the Legislature.

The District's assertion that local units of government are able to exert extraterritorial powers whenever and wherever they chose is not only contrary to well established law, it is an invitation to jurisdictional chaos between local governments. There is no basis in law or policy for such a result.

2. Wis. Stat. § 33.15(4) Does Not Grant Extraterritorial Powers to Lake Districts.

The District next argues that, "section 33.15(4) expressly grants lake districts the power to perform 'work in the lake ***or its watershed*** which will protect or enhance the opportunities for public enjoyment of the lake.'" (Emphasis in original) (Dist. Br. at 24). The District raised this argument for the first time in its Court of Appeals reply brief.[6] Accordingly, it has

[6] *See* R.10, Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment, in which no reference to § 33.15(4) was provided. *Compare*, the District's

waived this argument by not raising it before the circuit court, and by raising it for the first time in a reply brief. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶23, 303 Wis. 2d 258, 735 N.W.2d 93. ("Generally, arguments raised for the first time on appeal are deemed waived."); *Bilda v. County of Milwaukee*, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief.")[7]

Regardless, the District's interpretation of Wis. Stat. § 33.15(4) is patently false. First, §§ 33.11 to 33.18 make up Subchapter III of Chapter 33, which governs "Lake Protection and Rehabilitation Projects." Subchapter III applies *only* to a proposed activity by a lake district that involves an application for state aids or an application for a permit under Wis. Stat. Chapter 30. Wis. Stat. § 33.12 defines the scope of Subchapter III and states as follows:

> **33.12 Scope. Any proposed activity by a district which does not involve an application for state aids or an application for a ch. 30 permit is exempt from subch III.** If a proposed activity by a district involves an application for state aids subch III applies. If a proposed activity by a district involves an application for a ch. 30 permit, subch III. shall apply only if the department determines that the activity

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Appeal Brief in which no reference to § 33.15(4) was provided, with District's Appeals Reply Brief at 4-6, in which the argument first appeared.

[7] The Village moved to strike this new argument in the Court of Appeals. The Court of Appeals denied the motion, but it did so on the grounds that it was not necessary to reach the authority question given its ruling on preemption. Decision ¶9 n. 4.

> requiring the permit is an integral part of a lake rehabilitation project. (Emphasis added).

The District's enactment of the Ordinance did not involve an application for state aids or an application for a Chapter 30 permit. Therefore Subchapter III in general, and § 33.15(4) in particular, is irrelevant to this case.

Second, *projects* governed by Subchapter III, are different from regulatory programs such as the Ordinance at issue here. The term "project" is defined in Wis. Stat. § 33.01(7) as "activities or works such as are described in s. 33.15(4) which are subject to the procedures of subch. III." The provisions of Section 33.15(4) state, "(4) Implementation **work** may consist of any **work** in the lake or its watershed which will protect or enhance the opportunities for public enjoyment of the lake." (Emphasis added).

There is a fundamental distinction in municipal law between the authority to engage in "public works" or projects and the authority to regulate. Public works typically involve contracts for specific tasks and are often subject to public bidding and other requirements.[8] The same is true

[8] *See* Wis. Stat. § 59.52(29) for counties; § 60.47(1) for towns; § 61.54 for villages; § 62.15 for cities and § 66.0901 for general provisions regarding municipal public works and contracts.

for lake districts.[9] An ordinance is not a public work.

In short, § 33.15 provides no basis for an extraterritorial ordinance. It is not an express grant of extraterritorial authority.

3. The General Powers in Wis. Stat. § 33.22(1) Do Not Grant Extraterritorial Powers to Lake Districts.

The District states in an earlier portion of its brief that it has "virtually unlimited powers" under Wis. Stat. § 33.22(1) and it suggests that those powers necessarily include extraterritorial powers. The District is wrong for several reasons.

First, Wis. Stat. §33.22(1), says nothing about extraterritorial powers. This section provides in its entirety as follows:

> **(1)** Any district organized under this chapter may select a name for the district, sue and be sued, make contracts, accept gifts, purchase, lease, devise or otherwise acquire, hold, maintain or dispose of property, disburse money, contract debt and do any other acts necessary to carry out a program of lake protection and rehabilitation. All contracts in excess of $2,500 for the performance of any work or the purchase of any materials shall be let by the commissioners to the lowest responsible bidder in the manner they prescribe.

There is no express grant of extraterritorial power.

Second, the limited scope of lake district powers under this section is also emphasized in the legislative history. The Legislative Council

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[9] *See* Wis. Stat. § 33.22(1) that notes "**contracts in excess of $2,500 for the performance of any work** or the purchase of any materials shall be let by the commissioners to the lowest responsible bidder in the manner they prescribe. (Emphasis added).

explicitly noted in the 1973 drafting notes to Wis. Stat. § 33.22(1) , that this section "[s]ets out the general powers of the district. *Since the district will have only these powers specifically granted, a full enumeration is necessary.*" (Emphasis added.) 1973 Wis. Laws, ch. 301, Drafting Record, LRB-170/6; R.5:98; R-App. 71. A similar note was placed in the section governing the powers of the District Board. R.5:99-100; R-App. 72-73. The Legislature clearly intended that lake districts only have those powers specifically granted in § 33.22(1) . Extraterritorial powers were not among them.

Third, as noted above, extraterritorial grants have been express. Where the Legislature wanted to grant extraterritorial powers, it has done so; and it has not done so here. If extraterritorial authority cannot be implied for cities and villages, it certainly cannot be implied for special purpose governments with limited statutory powers.

Thus, the District's claim that it has "virtually unlimited powers" including extraterritorial authority is simply wrong. Dist. Br. at 23. In the absence of an express grant of extraterritorial power, the District's Ordinance is invalid.

II. THE DISTRICT HAS NO ORDINANCE AUTHORITY THAT CAN BE APPLIED WITHIN THE VILLAGE ABSENT THE VILLAGE'S CONSENT.

Apart from the lack of the District's extraterritorial authority, there is a second and independent basis to strike down the Ordinance for want of authority. The District has no ordinance authority that can be applied within Village limits, absent the Village's consent, and the Village has not consented. The District's reliance on § 33.22(1) as a source of unlimited ordinance authority is again without merit.

A. The District Does Have Ordinance Authority Under Wis. Stat. § 33.22, But That Authority Cannot Be Exercised Within The Village Absent Its Consent.

Wis. Stat. § 33.22(3)(a) provides that a lake district may exercise the powers of a town sanitary district under Wis. Stat. §§ 60.77 and 60.78, and in so doing adopt ordinances. In particular, § 60.77(5m) allows sanitary districts to enact and enforce ordinances to implement the powers granted to the sanitary district.

However, Wis. Stat. § 33.22(4) provides that when a lake district exercises town sanitary district powers, those powers require the consent of any incorporated area such as the Village:

> **(4)** Districts shall not exercise the town sanitary district powers authorized under sub. (3) within the boundaries of an incorporated

> municipality **unless the governing body of the municipality consents.** (Emphasis added.)

There is no dispute here that the Village has not consented to the District's Ordinance. Indeed, the District does not dispute that if it were exercising sanitary district powers, it could not do so within the Village. Instead, it asserts that "the lake district did not enact the ordinance under its powers as a town sanitary district, but did so under its powers as a lake district." Dist. Br. at 27. The problem with the District's argument is that it has no ordinance powers "as a lake district" applicable here other than town sanitary district powers.[10]

B. The District Has No General Ordinance Authority.

The District asserts that it has plenary ordinance authority under its general powers in § 33.22(1) to, "do any other acts necessary to carry out a program of lake protection and rehabilitation," and that authority allows it to override the restriction in Wis. Stat. §33.22(4). This argument is also without merit.

[10] Although not applicable here, lake districts also have limited authority to enact *boating* ordinances that affect incorporated municipalities, but again *only* if there is consent. Under Wis. Stat. § 30.77(3)(am), a lake district may enact certain boating ordinances provided that towns, villages, and cities consent. Similar provisions apply to boating regulations on icebound lakes under Wis. Stat. § 30.81(1m).

1. Section 33.22(1) Does Not Provide General Ordinance Authority to the District.

Section 33.22(1) says nothing about ordinance authority. When the Legislature intended to grant lake districts ordinance authority it expressly so provided as it did with respect to the exercise of sanitary district powers.

As noted above, the legislative history to the lake district statute expressly notes that " the district will have only those powers specifically granted." R-App. 71. Construing the phrase "any other acts necessary" to include plenary ordinance authority, directly contravenes this legislative intent.

Furthermore, as a matter of statutory construction, the phrase "any other acts necessary" should be read in the context of the other enumerated powers. Under the doctrine of *ejusdem generis*, when a general word or phrase follows a list of specific persons or things, the general word or phrase must be interpreted to include only persons or things of the same type as those listed. *See In re A.S.*, 2001 WI 48, ¶33, 243 Wis. 2d 173, 626 N.W.2d 712. In this case, the specific powers listed under Wis. Stat. § 33.22(1) are administrative in nature and not regulatory in nature. Enacting an ordinance regulating the water supply of an incorporated municipality is not an within the scope of the enumerated powers.

Finally, the notion that construing general language such as §33.22(1) may be used to overturn an express statutory framework has been rejected in the closely related area of sanitary district powers. In *Haug v. Wallace Lake Sanitary Dist.,* 130 Wis. 2d at 352, the sanitary district asserted it had broad authority because it had "charge of all affairs of the town sanitary district." *Id.* Therefore, it claimed it had the authority to decrease its own boundaries. *Id.* The court rejected this claim noting that there was a specific procedure in the statutes for altering district boundaries. *Id.* The same is true here. There are specific provisions limiting the regulatory authority of lake districts within incorporated areas. Those provisions should not be circumvented.

2. Construing Wis. Stat. § 33.22(1) to Allow Lake Districts to Exercise Unlimited Ordinance Authority Creates Conflicts with General Purpose Local Governments.

The phrase "any other acts necessary in section 33.22(1) upon which the District relies, also needs to be construed in the context of the statute as a whole. *See State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110; *State v. Clausen*, 105 Wis. 2d 231, 244, 313 N.W.2d 819 (1982). The lake district statute was "designed to enable these special purpose districts to coexist among more traditional local

governmental units." *Donaldson v. Board of Commissioners*, 2004 WI 67, ¶22. Several sections underscore that lake districts are to cooperate with local governments, not unilaterally overrule local government decisions.

First, the specific language in § 33.22(1) is limited to lake protection programs. The term "program of lake protection and rehabilitation," under Wis. Stat. § 33.01, provides that such programs can include "securing cooperation of units of general purpose government to enact necessary ordinances." The clear implication is that except as specifically provided elsewhere, lake districts have no power to *enact* ordinances, they can only attempt to *secure the cooperation* of general purpose governments to enact such ordinances.

Similar language is found in the section specifying the powers of the lake district board of commissioners. Wis. Stat. § 33.29(1)(c) provides that the district board shall be responsible for,

> [C]ontacting and attempting **to secure the cooperation of officials of units of general purpose government in the area for the purpose of enacting ordinances** deemed necessary by the board as furthering the objectives of the district. (Emphasis added.)

Interpreting this language to allow lake districts the power to unilaterally impose ordinances on general purposes governments, turns this directive on its head. Moreover, if lake districts had independent authority to issue

ordinances, this section would be superfluous. Statutory language should be read to avoid rendering portions surplusage. *Bruno v. Milwaukee County*, 2003 WI 28, ¶24, 260 Wis. 2d 633, 660 N.W.2d 656.

Second, in the only two instances where the Legislature *has* given ordinance authority to lake districts (sanitary district powers and boating regulations), that authority requires the express consent of the municipality. The District should not be allowed to circumvent that requirement by an assertion of "general authority."

Third, the requirement for municipal consent before a lake district can regulate activities in an incorporated area is also seen the sections governing the formation of a lake district. When a lake district is formed, it cannot include the territory of a city or village absent consent of that body. Lake districts can be created in one of three ways: (1) by a municipality under Wis. Stat. § 33.23 in which case consent is implied; (2) by a town board converting from a town sanitary district under Wis. Stat. § 33.235 in which case only town territory is involved and consent of an incorporated area is not an issue;[11] or (3) by a county under Wis. Stat. § 33.24 in which

[11] Under the express terms of Wis. Stat. § 60.71(5), "[a] town sanitary district may not include any territory located within a village or city."

case express municipal consent *is* required. Wis. Stat. § 33.24(2) provides in part:

> **(2)** The county board of any county may establish districts within the county if the conditions stated in s. 33.26 are found to exist. Before a district that includes any portion of a city or village may be formed under authority of this section, **the city council or village board must have previously approved the inclusion of its territory within the boundaries of a proposed district.** (Emphasis added.)

Thus, a lake district cannot include territory within an incorporated area without its consent. The District's claim that it can regulate activities in the Village without its consent is contrary to these provisions.

In summary, Chapter 33 is very careful to avoid conflicts between lake districts and incorporated areas, so that they may "coexist." The exercise of lake district regulatory jurisdiction within incorporated municipalities requires cooperation and consent. Allowing the District to assert unilateral ordinance authority in the Village to prohibit Well #7 is precisely the kind of conflict Chapter 33 was designed to avoid. The District had no authority to enact the Ordinance, and in the absence of authority the Ordinance is invalid.

III. THE DISTRICT'S ORDINANCE IS PREEMPTED BY STATE LAW.

In addition to the lack of authority for the Ordinance, the District's Ordinance is also preempted by and conflicts with state law. There is no

dispute about the applicable test for determining whether a local ordinance is preempted by state law. In *DeRosso Landfill Company, Inc. v. City of Oak Creek,* 200 Wis. 2d 642, 651-52, 547 N.W.2d 770 (1996) the court stated:

> A municipal ordinance is preempted if (1) the legislature has expressly withdrawn the power of municipalities to act; (2) it logically conflicts with state legislation; (3) it defeats the purpose of state legislation; or (4) it violates the spirit of state legislation.

See Dist. Br. at 18. The first test focuses on the question of express preemption. The latter tests focus on whether there is a conflict between local law and state law. The District's Ordinance fails under both sets of preemption analysis.

A. The District Ordinance Conflicts With State Law.

In explaining the scope of conflict preemption, the court in *DeRosso* stated:

> **[A] municipality's ability to regulate matters of statewide concern is limited**. As the court stated six decades ago, "municipalities may enact ordinances in the same field and on the same subject covered by state legislation **where such ordinances do not conflict with, but rather complement, the state legislation**." *Fox v. Racine*, 225 Wis. 542, 546, 275 N.W. 513 (1937) (quoting *Milwaukee v. Childs Co.*, 195 Wis. 148, 151, 217 N.W. 703 (1928)). Therefore, wrote the *Fox* court, where "`the state has entered the field of regulation, municipalities may not make regulation inconsistent therewith'" because "**a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required,** or authorize what the legislature has expressly forbidden." *Fox*, 225 Wis. at 545, (quoting *Hack v. Mineral Point*, 203 Wis. 215, 219, 221, 233 N.W. 82 (1930)). (Emphasis added.)

200 Wis. 2d at 651. The Ordinance conflicts with state law in two ways. First, it conflicts with the statutory framework for permitting high capacity wells. Second, it prohibits the use of Well #7 which DNR expressly authorized in the 2005 Approval.

1. The Ordinance Conflicts with the Statutory Framework for High Capacity Wells.

The scope of the Legislature's grant of authority to DNR for permitting high capacity wells is the focus of the companion case on appeal before this Court in Appeal No. 2008AP3170. In short, the Legislature has established a detailed framework of procedures *and* standards to be used for each of three permit categories:

- **Category 1:** Wells *below 100,000 gpd* are not high capacity wells under § 281.34(1)(b) therefore do not require any DNR approval.

- **Category 2**: Wells *between 100,000 gpd and 2,000,000 gpd* require an approval in accordance with the standards under §§ 281.34(4) and (5). The general standard is whether the well will affect a public water supply.

  Sections 281.34(4) and (5) also provide that *if the well meets one of the following three additional criteria, DNR is required to undertake the environmental review process* in Wis. Stat. § 1.11:

  - Wells within 1,200 feet of "groundwater protection areas" which are defined as trout streams, outstanding and exceptional natural resource waters

- Wells that could affect springs with a flow of 1 cubic feet per second

- Wells involving high (95%) interbasin water loss, such as a loss from the Great Lakes basin

- **Category 3:** Wells *over 2,000,000 gpd* require an approval in accordance with the standards under § 281.35(5) including a detailed review of environmental factors and public rights.

This framework prescribes which wells are subject to environmental review, and establishes specific standards for each well category. The DNR granted the Village an approval for the well in 2003 and again in 2005 because it met the general standard applicable to Category 2 wells.

The District asserts that "the fact that the Lake District's Ordinance enlarges upon the provisions of sections 281.34 and 281.35, Wis. Stats., which are silent as to whether the DNR may consider potentially adverse effects of a well with a capacity of less than 2 million gpd on navigable waters, creates no conflict therewith…" Dist. Br. at 21. The District is wrong as a matter of fact and law.

First, on the facts of this case, the Legislature was not silent about the state permitting framework. Allowing the District to create an alternative permitting framework directly conflicts with legislative choices

made in Wis. Stat. §§ 281.34 and 281.35 in several respects, including the following:

- The Legislature established specific standards for granting permits for each category of wells. The Ordinance creates a different set of application criteria and standards for granting approvals. *Cf.* Wis. Stat. §§ 281.34 and 281.35 and Ordinance § 4; R-App. 59-60.
- The Legislature provided priority protections to municipal wells in Act 310.[12] The Ordinance provides no such protections.
- The Legislature authorized environmental review of wells in three specific circumstances for wells between 100,000 gpd and 2,000,000 gpd; and for wells of more than 2,000,000 gpd.

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[12] When the Legislature expanded DNR's authority for certain wells in Act 310, it did so with an exception for public water supply wells like Well #7. For example, wells in a groundwater protection area are subject to environmental review, but Wis. Stat. § 281.34(5)(b) provides:

> 2. **Subdivision 1 does not apply to a . . . water supply for a public utility** engaged in supplying water to or for the public, if the department determines that there is no other reasonable alternative location for a well and is able to include and includes in the approval **conditions, . . . that ensure that the environmental impact of the well is balanced by the public benefit of the well related to public health and safety.** (Emphasis added.)

Identical language applies to wells impacting springs. Wis. Stat. § 281.34(5)(d).

The Ordinance requires environmental review for all wells except residential wells and wells of 1000 gpd or less. *See* Ordinance § 5B; R-App. 61.

- The Legislature provided a permitting framework for high capacity wells, while the Ordinance establishes a number of prohibitions. *See* Ordinance § 2 and § 4.C.8; R-App. 58, 60.

The Legislature was not "silent," it made specific regulatory choices. It is not for the District to second guess those legislative choices.

It should also be recalled that, apart from this permitting program, DNR also has authority to address impacts to navigable waters through other authority. Among other things, DNR has authority to address "infringement[s] of the public rights relating to navigable waters" pursuant to Wis. Stat. § 30.03(4)(a), and the State has enforcement authority to address nuisance conditions caused by water withdrawal, regardless of whether there is a permit. *See State v. Michels Pipeline Construction, Inc*., 63 Wis. 2d 278, 219 N.W.2d 308 (1974); and *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974).

Second, the District's argument that any statutory exemptions and limitations create openings for municipal regulations has been consistently

rejected by the courts. In *DeRosso*, the city of Oak Creek attempted to regulate an area that was exempted under state law. 200 Wis. 2d at 646-647. State regulations have a process for regulating solid waste facilities which provided for a local approval process. The DNR adopted an exemption for certain "clean fill" sites and, as a result, there was no longer a requirement for local approvals. *Id.* at 647. Nevertheless, the city of Oak Creek attempted to regulate the clean fill site claiming, like the District, that as a result of the exemption, the regulatory field "is left wide open for local municipalities." *Id.* at 654. The court squarely rejected this argument:

> In making the determination that clean fill facilities … are therefore entitled to an exemption under Wis. Stat. § 144.44(7)(g), the DNR has not ceded jurisdiction or authority but has proactively exercised its authority to promulgate rules and regulations rendering that exemption effective.

Id. at 659. The court held that the City's attempt to prohibit the deposit of clean fill at the plaintiffs' site, "is in direct conflict with the DNR's own regulatory scheme." *Id.* at 662. The same is true here.

In *Wis. Env't. Decade, Inc.*, the city of Madison attempted to prohibit the application of herbicides in area lakes not withstanding DNR's permitting program for such activities. 85 Wis. 2d at 523-524. The city argued, as the District argues here, that it was merely supplementing the state regulations, which it viewed as inadequate. The court rejected this

notion stating, "The city has not 'moved in the same direction . . . farther but not counter to . . . ' the DNR." 85 Wis. 2d at 535. Thus, the court concluded that the Ordinance was in conflict with state law:

> [T]he legislature has expressly sanctioned the chemical treatment of aquatic nuisances under the control of the DNR. **A city cannot '. . . lawfully forbid what the legislature has expressly licensed, authorized or required**, or authorize what the legislature has expressly forbidden.' (Emphasis added).

85 Wis. 2d at 529.

A similar situation occurred in *Pace v. Oneida County*, 212 Wis. 2d 448, 569 N.W.2d 311 (Ct. App. 1997). In *Pace*, the court held that Oneida County could not enact an ordinance that prohibited the rebuilding of boathouses destroyed by fire when there was a statute authorizing the rebuilding of such structures. 212 Wis. 2d at 458-459.

Indeed, it has long been the rule that state law preempts local well regulations, like the District's Ordinance. Over 50 years ago in *City of Fond du Lac v. Town of Empire*, 273 Wis. 333, 77 N.W.2d 699 (1956), the Town of Empire was attempting to regulate a municipal well that the City of Fond du Lac was drilling on land the city purchased within the town. The ordinance adopted by the town prohibited the drilling of a well in the town of Empire with casing in excess of 6" in diameter except by permission of

the town board upon a finding that the well would not adversely affect private wells in the town. *Id.* at 335.

In overturning the ordinance, the court in *Empire* concluded that "[t]he ordinances of the town of Empire conflict with these general laws of the state…" *Id.* at 341. Although the test for preemption has become more exacting over the years, the holding of *Empire* remains valid and *Empire* has been relied upon by the DNR to oppose local well ordinances.[13] If anything, the *Empire* holding is more compelling today because this holding occurred when state regulation of groundwater was in its infancy. In *Empire,* the court noted that the Legislature "had done very little to regulate the use [of groundwater]." 273 Wis. at 338. Since 1956, the state has done a great deal more to regulate groundwater.[14] There is no basis for this Court to overturn *Empire*.

Thus, the District's claim that the presence of exemptions or limitations within the permitting framework for high capacity wells is an invitation for local regulations, is simply incorrect. Where the state has

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[13] *See* R.5:96; R-App. 65.

[14] As noted in the companion case, 2008AP3170, DNR authority over high capacity wells has been expanded several times since 1956. In 1985, Wis. Act 60, the Legislature expanded DNR authority over high capacity wells by requiring that the DNR evaluate the impact of the wells on public rights in navigable waters for wells withdrawing over 2,000,000 gallons per day (gpd). In 2004, the Legislature acted again to expand the DNR's regulation of high capacity wells through 2003 Wis. Act 310.

adopted a statutory framework for regulation, as it has done for high capacity wells, local governments cannot adopt ordinances which run contrary to that framework.

2. The Provisions of the District's Ordinance Are in Direct Conflict with DNR's 2005 Approval.

The District's Ordinance is not just in conflict with the statutory framework, it creates a direct conflict with a specific DNR permit, the 2005 Approval. Pursuant to the legislative framework in Wis. Stat. § 281.34, the DNR applied the applicable standards in evaluating the Village's well application and issued the 2003 Approval and 2005 Approval.

The District Ordinance directly conflicts with the 2005 Approval because it directly prohibits the use of Well #7. Under the District's Ordinance, Well #7 is prohibited because of the amount alleged water loss to the "Hydrologic Basin," regardless of actual impact. *See* Ordinance § 2; and § 4.C.8; R-App. 58, 60. Thus, the Ordinance directly violates the established rule that "a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required." *Fox v. City of Racine*, 225 Wis. 542, 545, 275 N.W.2d 542 (1937).

B. The District Ordinance is Also Expressly Preempted.

The regulation of public water supply wells, like Village's Well #7,

is subject to the high capacity well requirements of Wis. Stat. § 281.34 and 281.35, but it is also subject to the public water supply provisions of Wis. Stat. ch. 280. Wis. Stat. § 280.21(1), expressly preempts local regulation and provides in part as follows:

> **280.21 (1) Ordinances.** The department **may authorize counties** to adopt ordinances under s. 59.70(6)(b) and (c), relating to the enforcement of this chapter and rules of the department under this chapter. The department shall establish by rule standards for approval of ordinances and enforcement programs. (Emphasis added.)

This section limits the role of local regulation of public water supply wells to counties and no one else. Wis. Stat. § 59.70(6)(e), provides:

> *Other municipalities.* **No municipality may enact or enforce an ordinance regulating matters covered by ch. 280 or by department rules under ch. 280.** (Emphasis added).

Similar language is found in DNR rules at Wis. Admin. Code § NR 845.03.

There is no dispute that DNR promulgated Wis. Admin. Code ch. NR 811 pursuant to Chapter 280. There is also no dispute that the 2003 Approval and the 2005 Approval for Well #7 were issued based on an application of the standards in Wis. Admin. Code ch. NR 811. *See* R.5:6-8; R-App. 66-68. For example, the 2003 Approval notes that the project submittal was "of sufficient detail to meet the requirements of NR 811.13(3)" (R.5:6; R-App. 66) and noted that the project was reviewed "for

compliance with Chapters NR 108 and NR 811 Wis. Adm. Code."[15] R.5:7; R-App. 67. Well #7 is clearly regulated in part under ch. 280 and NR 811.

The District claims that high capacity wells are regulated under Wis. Stat. §§ 281.34 and 281.35 and that "high capacity wells and more particularly their potentially adverse effects on navigable water are not regulated by chapter 280." Dist Br. at 21. That may be true for some industrial or agricultural high capacity wells, but Well #7 is a high capacity well that *is* used for a public water supply and is regulated under both provisions. Since Well #7 is in part regulated under Chapter 280, the preemption provisions under § 280.21(1) apply and therefore the District's Ordinance may not regulate Well #7.

In summary, the District's Ordinance is preempted on several independent grounds. The Ordinance conflicts with the statutory framework in Wis. Stat. §§ 281.34 and 281.35 and it directly prohibits what DNR has authorized through the issuance of the 2005 Approval. In addition, the Ordinance is expressly preempted under Wis. Stat. §280.21 because Well #7 is a public water supply well regulated in part under the provisions of Chapter 280.

[15] The 2005 Approval incorporated the findings and conditions of the 2003 Approval by reference. R.5:10.

CONCLUSION

The District's assertion that it has authority to prohibit a high capacity well outside of its jurisdictional boundaries and within an incorporated municipality is without any legal basis. Instead of citing a legal basis for such authority, the District simply asserts it "must" have this power so that it can remedy what it perceives to be short comings in the DNR's authority to regulate high capacity wells. Apart from the fact that DNR has ample authority to address impacts from high capacity wells in addition to its permit authority, the District's assertions fail to address the legal questions of authority and preemption.

Whether the District has statutory authority for the Ordinance is a function of what authority the Legislature has granted to the *District*, not to DNR. In this case, there is no question that the Legislature has not granted extraterritorial authority to the District and that the District cannot enact ordinances in the Village without its consent. Whether the District's Ordinance is preempted depends on an analysis of whether the Ordinance conflicts with the statutory framework as a whole, not on whether the statutory framework itself has limitations. Here, the Ordinance poses a

direct conflict with specific legislative choices, and prohibits what the DNR has permitted. There is no clearer example of a conflict.

The Ordinance is invalid both because the District lacks authority to enact it, and because it is preempted by state law. As a result, the Court of Appeals decision should be affirmed.

DATED this 27th day of December, 2010.

Respectfully submitted,

STAFFORD ROSENBAUM LLP

By: */s/Paul G. Kent*

Paul G. Kent (#1002924)
Barbara A. Neider (#1006157)
P.O. Box 1784
Madison, WI 53701-1784
608-256-0226
pkent@staffordlaw.com
bneider@staffordlaw.com

Attorneys for the Village of East Troy

CERTIFICATION

I hereby certify that this petition conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional font. The length of this brief is 9,136 words.

/s/Paul G. Kent
Paul G. Kent (State Bar #1002924)
Attorneys for the Village of East Troy

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of December, 2010.

/s/Paul G. Kent
Paul G. Kent (#1002924)

CERTIFICATE OF SERVICE

I, Marjorie Irving, am secretary to Paul G. Kent. I hereby certify that I caused three true and correct copies of this Brief and Appendix of the Village of East Troy, Defendant-Respondent to be served on counsel by placing the same in U.S. mail, first class postage, on this date:

Dean P. Laing
Attorney at Law
O'Neil, Cannon, Hollman, De Jong & Laing, S.C.
111 East Wisconsin Avenue, Suite 1400
Milwaukee, WI 53202-4870

Dated this 27th day of December, 2010.

/s/Marjorie Irving
Marjorie Irving, Legal Assistant

STATE OF WISCONSIN
SUPREME COURT

LAKE BEULAH MANAGEMENT DISTRICT,

Plaintiff-Appellant-Petitioner

vs.

VILLAGE OF EAST TROY,

Defendant-Respondent.

Appeal No. 2009AP002021
Walworth Circuit Court Case No. 08-CV-915

VILLAGE OF EAST TROY
APPENDIX IN SUPPORT OF RESPONSE

Petition for Review of an Opinion and Order of the Court of Appeals, District II
dated August 25, 2010, affirming A Final Decision Entered on
In The Walworth County Circuit Court on May 7, 2009
The Honorable Robert J. Kennedy, Judge,
Walworth Circuit Court Case No. 08-CV-915

STAFFORD ROSENBAUM LLP
Paul G. Kent (#1002924)
P.O. Box 1784
Madison, WI 53701-1784
608-256-0226
pkent@staffordlaw.com

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APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court record entries;

(3) the findings or opinion of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 27th day of December, 2010.

/s/Paul G. Kent
Paul G. Kent (#1002924)

STATE OF WISCONSIN
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STAFFORD ROSENBAUM LLP
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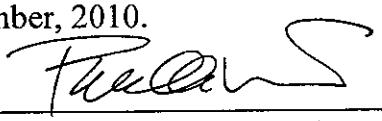
Dated this 27th day of December, 2010.



Paul G. Kent (#1002924)

STATE OF WISCONSIN CIRCUIT COURT WALWORTH COUNTY

LAKE BEULAH MANAGEMENT DISTRICT,

Plaintiff,

-vs-

VILLAGE OF EAST TROY,

Defendant.

Transcript of Proceedings

Case No. 08-CV-915

Proceedings held before the Honorable ROBERT J. KENNEDY, Circuit Court, Branch 1 in Elkhorn, Wisconsin, on April 29, 2009.

JUDGE'S ORAL DECISION

APPEARANCES:

PAUL P. KENT, ESQ., appeared on behalf of the Plaintiff.

DEAN G. LAING, ESQ., appeared on behalf of the Defendant.

Margaret A. Techert, Court Reporter.

THE COURT: Call Lake Beulah Management District versus Village of East Troy, 8-CV-915. Appearances first by -- on behalf of the movant party here for summary judgment, Village of East Troy.

MR. KENT: We have the Village of East Troy, attorney Paul Kent of Anderson and Kent.

THE COURT: On behalf of the Lake Beulah Management District?

MR. LAING: Good morning, Your Honor; Dean Laing.

THE COURT: A few preliminary remarks as I rule on this motion for summary judgment. I have been extremely busy over the last few weeks. I don't know why. Things go like that. Although, quite frankly, I'm usually pretty busy. Usually I am able to get enough time by working on weekends and evenings to accomplish all the work that I feel I have to do to the quality that I want to do it.

The reason I am mentioning this is, this is one case where, as a result of the tremendous volume of work, I put out the equivalent of three decisions just today, which had been prepared over the course of the last few days and I've done other decisions. And decisions, as you gentlemen probably know, take a lot more time than just, you know, handling the procedures

of cases.

I have come up with what I believe my decision should be in this particular case but it is not a model of literary excellence. It is not. I'm not even close to it. I am going to apologize to the parties, and to the appellate court later on, if I fail to mention a particular fact or discuss it in the appropriate way or overlooked some argument of a party that I shouldn't have overlooked. But I did the best I could and this is the result of that work within the limited space and time I had.

One other further mild excuse, my wife has even suggested -- and she did it laughingly because she's a very nice lady -- but she suggested that perhaps I should just stay here and -- because I have been coming into this courthouse at 6:30 and 7:00 o'clock in the evening and working until 10:00 and 11:00 o'clock trying to prepare these various things that I have to prepare and the volume of work I have. There are probably judges who work more efficiently than I do and don't have that problem, but I've done the best that I could.

So here it is. Here is my decision on the motion for summary judgment; and gentlemen, bear with me. It is somewhat lengthy as it is. Possibly

because the briefs and attached materials that the two parties provided me with was very lengthy.

The Village of East Troy in this particular case initially sought and obtained a high capacity well approval or permit from the DNR. This well we'll refer to as well No. 7, as I have done in many other cases already. They got that technically final approval -- or actual approval on 9/6/05. There was prior approval but they got a new one on 9/6/05, and then the approval was granted only after a long history of resistance from some of the property owners around Lake Beulah and resistance from Lake Beulah Management District, who primarily during the preceding cases acted as sort of a second foil. Party plaintiff in the cases but allowing the homeowners association to take the main laboring oar.

Both in the years before September 6, '05 and in the years thereafter, the opponents of the well No. 7 filed a number of related cases that attacked the grounds for an initial DNR approval in September of '03 and the subsequent September '05 approval of well No. 7, as well as subsequent DNR approvals of requested modifications after September of '05.

The summary essence of the attacks were that the proposal -- was that the proposed well would

detrimentally affect the Lake Beulah water shed and water quality. The attached never provided, in the opinion of the Court -- and not in the opinion, obviously, of the Lake Beulah Management District or of the property owners association, they don't agree with me; but I felt that the attacks never provided any actual evidence that the proposed well would adversely affect the waters of Lake Beulah.

There were contested and -- as well as requests for contested hearings before the DNR in these matters, and there were numerous cases before judge James Carlson and this present judge; and there was even an appellate proceeding, all of which resulted in the approval of the well by the DNR being again and again upheld. And you can see for a detailed history of those matters, and I really think any appellate court looking at this, should actually see the decisions and materials on those cases because that history and involved history is really necessary.

One of the reasons I give the decision I'm giving is because I'm fortunately very familiar with them because I handled a number of them and indirectly handled the earlier ones by having to review them extensively and given my decisions on the later ones. Those files were 4-CV-683 and 687, 6-CV-172 and 673,

and 7-CV-674, and then finally the present case that I'm dealing with, 8-CV-915.

In all of these cases, except the last, that is this one, the Lake Beulah Protective and Improvement Association was one of the plaintiffs. The plaintiff in the present case, Lake Beulah Lake Management District, was also a plaintiff in 4-CV-683, 6-CV-172 and 673, and 6-CV-674. I might add I took a look at these brief print-outs in the computer and I'm not at all sure that maybe the Management District wasn't a party in one of the other ones I've skipped here but it wasn't mentioned on the print-out.

The DNR was a defendant in 4-CV-683 and 687, and in 6-CV-182 and 673. That, of course, is the Department of Natural Resources. The Village of East Troy was a defendant in all of these cases. In all of these cases up to the present one, the plaintiffs took the position that the DNR was obligated, by the Public Trust Doctrine, to protect the waters of the State of Wisconsin; and that the DNR, in its various decisions -- its various and successive decisions to approve well No. 7, had violated that obligation. The plaintiffs claimed that well No. 7 would seriously detrimentally affect the Lake Beulah water shed and lake quality.

In all of these prior cases, the DNR ruled and the Court upheld the DNR findings that the plaintiffs had not provided any significant evidence that well No. 7 would adversely affect the waters of Lake Beulah and/or its water shed.

The present plaintiff, which is the Lake Beulah Management District, and I'll refer to it usually as District, has now again attempted to block the Village use of well No. 7 but this time with a different tactic. I might add that they would argue that -- I think they would say: We're not trying to block well No. 7. We're doing something else which we're entitled to do under our authority as the lake district. I'll come back to that.

The District itself is an inland lake district created under the authority of Chapter 33 of the Wisconsin Statutes. The District's boundaries do not include the location of well No. 7 within it, although it is almost certainly drawing water from it or at least one of the same sources that supply the water shed of Lake Beulah. At least the plaintiffs in prior cases have so argued and defendants have never actually contested that claim.

On 12/11/06, the District adopted ordinance number 2006-03 which asserts that any person diverting

or transferring groundwater out of the Lake Beulah groundwater basin must obtain a permit from the District. Furthermore, the ordinance disallows the granting of any permit unless at least 95 percent of said water is returned to that basin by the user.

However, this ordinance effectively appears to be a shutdown of well No. 7, since the well serves the Village of East Troy, whose wastewater is discharged outside and away from the Lake Beulah basin. By the way, there is nothing in the opposing brief suggesting what it would take the Village in costs to modify its wastewater discharge system to divert it into the Beulah basin, but presumably the cost would be significant enough to make well No. 7 too much of a burden and in that -- in that case for the Village.

For instance, although I do not know this, it seems reasonable to surmise that they'd literally have to pump their wastewater uphill or dig tunnels through intervening hill or high country so that the water could eventually be pumped through -- under those hills or over those hills so it would then enter the Lake Beulah basin and then flow down to Lake Beulah in order for them to have their wastewater, which would largely be coming from the well, end up

95 percent back in the basin, at least the District's basin.

I might add that it seems likely that the well water that's coming out of that basin is being pumped, probably to some extent, uphill. I don't know for sure of that but it's being pumped and sent to the Village, which apparently is not in that basin.

On 7/22/08, the District filed the present complaint alleging that the District had learned that the Village intended to begin operating well No. 7 in August of '08. The District alleges that they advised the Village of ordinance 2006-03, which I'll refer to as ordinance or the ordinance, but the Village indicated it would not comply with it. Therefore, the District has asked this Court to declare a declaratory judgment that the Village is required to comply with the District ordinance. That's what they're asking for in essence.

The Village answered denying that the District had the authority to enact the ordinance. Further, that the District could exercise such powers outside its own -- could not, sorry, exercise such powers outside its own boundaries and within the boundaries of the Village; and admittedly, well No. 7 is not within the District's territorial service

boundaries and is within the Village's territorial service boundaries.

The Village also pointed out that the Village would operate well No. 7 based on its authority to do so from the approval or permit granted by the DNA that I have talked about before in this history, and that the District was estopped to collaterally attack the DNR permit except through a Chapter 227 procedures. In other words, attacking the DNR's decision, which methods they've already tried and failed. The prior cases, as I say, had involved Chapter 227 attacks by those plaintiffs on the DNR decision itself.

The Village answers also raised other affirmative defenses. After the answer was filed, there was some procedural discussions culminating in the defendant Village filing its brief in support of its motion for summary judgment on 2/25/09 and the District filing its brief in opposition in March and the Village filing its reply brief on 4/22/09.

Some of that procedural delay, by the way, was caused as this Court, I think, was wrestling with in deciding one and then a couple more of those other cases I have cited. And I might add that a number of them appear to be up on appeal right now.

This matter is now ripe for decision on the motion for summary judgment.

This Court starts with a discussion of the Village's initial 2/25/09 brief. The Village raises numerous grounds to support its claim that the District's ordinance does not apply or bind the Village. The Village starts at Page 5 with the fact that the DNR has opined, in regard to the District's ordinance, that said ordinance is invalid. Just a minute. And that is found on Exhibit No. 17 to their brief, which is a 12/18/08 DNR letter. Bear with me a second.

That letter says: Dear Mr. Kent, obviously referring to the attorney for the Village. You recently informed the Department of Natural Resources by letter that the Lake Beulah Management District has created an ordinance with the intent of regulating wells and water use within an area around Lake Beulah, including the Village of East Troy. You provided me with a copy of the ordinance, etcetera. You indicated that you advised the District that there is no authority for the District to enact the ordinance and asked the DNR for its position regarding whether the ordinance is pre-emptory. I have reviewed the ordinance upon your request.

By the way, I'm not reading this verbatim. I occasionally change the wording for my convenience but I do not change the meaning. Anybody claims I do, interrupt me and tell me.

The second paragraph goes on to say: The ordinance regulating water use is pre-empted and invalid under state law. Under Sec. 280.11(1) and 281.11 Wisconsin Statutes, the DNR has general supervision and control of all methods of obtaining groundwater for human consumption, shall do any act necessary for the safeguarding of public health and serves 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.

The Wisconsin Supreme Court stated that issues involving water supply and the promotion and protection of public health are matters of state-wide concern. And they cite City of Fond du Lac v. Empire, 273 Wisconsin 333, a 1956 case. An ordinance passed by the Town of Empire regulating the drilling of wells in the town was ruled invalid because the Supreme Court said the town had no authority to adopt the ordinance.

Now, I want to add here that this is not in

the letter; but subsequent to that time, towns were given some authority on wells but only if the DNR approved it, at least according to the statutory language. I'll come back to that and I may not dwell on that to any great degree though because it's not really important in this decision.

The next paragraph said: The DNR's authority to supervise the quality and management of the waters of the state has been reaffirmed recently by the legislature. 2003 Act 310 grants the DNR expanded authority to protect against adverse environmental impacts when considering whether to issue high capacity well approvals.

And I have that act and that act does do that and that's my aside. That's not in the letter.

They also went on to say: 2007 Act 227, which the Court also got and read, at least in applicable part and then I -- back to the letter, establishes a DNR permit process to regulate withdrawals of surface water and groundwater from the Great Lakes basins. These legislative enactments make it clear that DNR -- the DNR is the entity charged with regulation of the quality and management of the waters of the state.

Now, the above letter is a powerful argument

itself but the Village then left that argument, which was an extremely powerful one, and they left it for the latter part of their brief and changed direction. What they did is they switched to a brief discussion of the summary judgment methodology at that point, which was sufficient for purposes of this motion; and then they started with Roman Numeral I with the assertion that the District does not have the authority to enact this said ordinance.

The Village set forth numerous grounds for that proposition and they follow. They used a subparagraph capital A and said that the District cannot exercise any authority within the Village's territorial boundary. Now, we stop here. It's an established fact that this well is, surface-wise, not in the District's boundaries. It's only in the Village's boundaries.

The Village goes on to point out that Safe Way Motor Coach v. Two Rivers, 256 Wisconsin 35 at Page 43, 1949, held that cities -- that the authority of cities and their jurisdiction are limited to within their boundaries unless there is express legislative authority to the contrary. The Village argues by analogy that the same rule applies to all villages, districts, etcetera. The Village argues that nothing

in Chapter 33, which deals with lake districts -- that is Chapter 33 statutes -- provides a District with express statutory authority to regulate matters beyond their own boundaries.

The Village also cites various subsections of Chapter 33 and discussion of District powers in Donaldson v. Board of Commissioners, 272 Wis. 2d 146, 2004 in support of the above assertion. The District's position is not convincing in opposition to this. The District answers this at Pages 10 to 12 of its March 30, '09 brief. The District relies on cases where the legislature expressly authorized extraterritorial power. No such extraterritorial power appears to be granted in Chapter 33. All the District can do is argue that implicitly the District's power must cover the whole Beulah water shed, including beyond its boundaries.

Now, before I go on, I had a major practical problem with that. There are many areas of the state where they share -- one area will share a water shed with another area that might be a hundred miles or 200 miles away, or 50 miles away or 25 miles away, or might be 35 miles north and 14 miles west, depending on the undersurface geography.

Now, theoretically, according to the

District's position, let's say the Lake Beulah District's waters were shared with a township that was 75 miles away but it just so happened the underground water percolates through that area and eventually reaches Lake Beulah; or even better, maybe the water from Lake Beulah goes and percolates that way. And if you take water away from there, you'll increase the water flow out of Lake Beulah to the other area. It could happen either way.

Theoretically, under the District's position, the District could pass an ordinance that said that this distant municipality or town cannot take that water unless it returns 95 percent of it back to the Lake Beulah basin. That's the kind of logic that I found unconvincing, and I say it with respect, but that opens a huge Pandora's box about the extraterritorial effect of a District attempting to go beyond its surface territorial boundaries and enforce its arm beyond there.

I then return to the Village's brief and the Village, as a second point, argued that even if the well No. 7 were within the District's boundaries, the District could not regulate it if it were within the Village's boundaries. They point to Sec. 33.22(4) which states -- bear with me a second. I've got to

have that. Actually, it's cited on Page 8 of the defendant's brief. I'll just use that. Here it is. That says: Districts shall not exercise the town sanitary district powers authorized under sub (3) within the boundaries of an incorporated municipality unless the governing body of the municipality consents.

In addition, districts shall not exercise town sanitary district powers in any territory included in an existing -- in an existing town sanitary district except by contract under Sec. 66.031 or unless the sanitary district merges under 33.235(3). Of course, note, they're are talking about districts and towns, not districts and villages but nevertheless, seems in principal.

They then go on to say that when a city or village annexes an area that overlaps the district territory, there are other restrictions upon the District's power; and they refer to Sec. 33.36(2) and (2)(a). And there it says: Whenever any territory containing less than an entire district is incorporated as a city or village, consolidated with a city or village or is annexed to a city or village, the district shall survive, and the district shall continue to operate under this chapter subject to the

following modifications: Sub (a), the district shall exercise only those powers granted under this chapter. Sanitary district powers shall not be exercised unless consent for such exercise is obtained in advance from the governing body of the city or village.

Of course, they are referring to sanitary powers. And that leaves one wondering exactly what sanitary powers are as compared to water supply but it is instructive to suggest that the legislature is pointing out that districts can't do things inside a city or perhaps a village without their consent.

The Village points out that clearly the Village has not consented. The District does not really rebut this argument. And therefore, in my opinion on this issue, the Court rules that the District's ordinance has no effect outside its boundaries; and even if the District had the power to enact the ordinance, the District cannot require the Village to submit to it.

That does not mean I end my discussion. Probably the attorneys would wish I would and they could get home; but they discuss so many other things, and I'm aware that appellate courts sometimes disagree with trial courts and I feel I better discuss the other issues. On that issue alone I would have

granted the summary judgment because I would have believed that the ordinance would have no extraterritorial effect and could not be imposed upon an adjoining municipal unit.

Well, the Village goes on, though, in their next argument by -- they call that category capital B. They then assert that the ordinance is invalid because it is an exercise of general regulatory authority which the District does not have. The Village points to case law that the districts have, quote, only the powers set forth, quote, by statute. And they refer to Haug, H-A-U-G, v. Wallace Lake Sanitary District, 130 Wis. 2d 347 at 351, which is Court of Appeals 1986.

The Village then argues that Sec. 33.22 outlines the limits of lake district powers, and they cite that language on Page 9 of their brief where they say -- and this is quoting from the Donaldson case: A lake district's powers are set out in Wisconsin Statute 33.22. They include the power to sue and be sued, make contracts, purchase, lease or otherwise acquire property, disburse money, contract debt -- and this is key language -- and do other acts necessary to carry out a program of lake protection and rehabilitation. Wisconsin Statute Sec. 33.22(1).

The Donaldson court went on to say, continuing its quote: The District may also create, operate and maintain a water safety patrol and so on. Oh. It also assumes sanitary district powers and they refer to the sections of Chapter 33 which I'll omit.

The Village claims that Sec. 33.22(1) does not include express legislative authority to regulate wells. For the first time I find myself seriously in disagreement with the Village. The Village does not cite any statutory language or case law that says a district can only exercise expressly stated power. You should not confuse that with the need to express -- to express extraterritorial power that we talked about before.

The Village downplays the, quote, other acts necessary, quote, language in 33.22(1) and the Village tries to argue that subsection (6) of 33.22, which they also cite on Page 9, narrows the other acts necessary, quote, language but that ignores, quote, any other necessary measures found under program -- the definition of program in No. 6.

Suffice it to say that the Court does not really buy the Village's arguments set forth in B-1 of their brief. However, I do note the Village does make a good ejusdem generis -- for the court reporter,

that's E-J-U-S-D-E-M, generis, G-E-N-E-R-I-S -- argument and in pari, P-A-R-I, materia, M-A-T-E-R-I-A, argument as reasons the District's authority to require well permits are barred but the arguments are not overwhelming in my mind.

Note on Pages 5 through 10 of the District's 3/30/09 brief, the District specifically points to the, quote, do any other acts, quote, language as authority for such an ordinance and does provide a solid counter-argument to the Village in this regard.

Under a category called B-2, the Village argues in its brief that if Chapter 33 is ambiguous, which they don't think it is, then legislative history shows that the District's authority does not include well regulation nor does it permit the enacting of ordinances about the same.

I'm going to by-pass this particular argument for the same reason above. First of all, I'm not convinced that it's ambiguous but I'm also not absolutely convinced that it means what the Village says. But even if it were ambiguous, I don't find the argument thoroughly enough developed -- in the legislative history thoroughly enough developed to demonstrate that they did not mean to allow a lake district to put in such an ordinance.

The Village then, starting at Page 12 of their brief, finally comes back to what I think is its strongest argument. Note, I've already ruled in favor of the Village on a prior argument but I still think this is the strongest argument. And they, of course, briefly refer to it on Page 5 of their brief, which I started out by discussing and their reference to Exhibit 17, which was the DNR 12/18/08 letter.

They entitle this argument Roman numeral No. II, and they argue that the ordinance is pre-empted and conflicts with state law. Now, a partial excuse for the Court's delay in getting at this matter is when I first reviewed the briefs, I also had the benefit of Mr. Kent filing an interesting additional brief in a different case in which there was an argument over DNR authority. And he had cited a case which I'm going to discuss shortly that the Supreme Court had ruled on and I felt his argument was going to be substantially the same.

But he ended up arguing somewhat differently in this particular brief although, he did cite that significant case. As I say, I'll come back to it.

Returning now to Roman No. II of the plaintiff's argument, I go to sub argument capital A there. There the Village argues the State has

expressly pre-empted local regulation of ground water resources, and the District files its response to that on its Page 13 of its brief.

The victim (sic) points out that the regulation of the public water supply is subject to Chapter 280 Statutes. I might add that I find that the regulation of wells is subject to Chapter 281 Statutes.

Now, in Chapter 280, the DNR, in the opinion of the Court, is clearly given primary control over obtaining -- or the obtaining of pure drinking water for public consumption and is also given that same -- that power in connection therewith in regard to well construction. Sec. 280.11(1) says it well enough. Hold on. That section says, 280.11(1): The Department shall, after a public hearing, prescribe, publish and enforce minimum reasonable standards and rules and regulations for methods to be pursued in obtaining of pure drinking water for human consumption and establishing of all safeguards deemed necessary in protecting the public health against the hazards of polluted sources of impure water supplies intended or used for human consumption, including minimum reasonable standards for the construction of well pits.

It shall have general supervision and control of all methods of obtaining groundwater for human consumption, including sanitary conditions surrounding the same, the construction or reconstruction of wells, and generally to prescribe -- prescribe, amend, modify or repeal any rule or regulation thereto prescribed and shall do and perform any act deemed necessary for the safeguarding of public health.

And I might add that they enacted two NR regulation chapters, which I believe are 811 and 812. 811 dealing with the drinking water, 812 dealing with well construction, which are rather extensive, and I reviewed that as well and have the book here.

So continuing on, it appears to this Court that the only role of local government in regard to the public water supply is reserved to towns. I'm going to change that slightly, as the legislature is rather confusing. The way they wrote Chapter 280, it looked like they were going to limit it to towns but even the towns could only act to the extent that they were authorized by the DNR to act. See Sec. 280.21 which reads: The Department may authorize counties to adopt ordinances under 59.70(6)(b) and (c) relating to the enforcement of this chapter and rules of the

Department under this chapter. The Department shall establish by rules, standards or approval of ordinances and enforcement programs, etcetera, etcetera.

I might add that -- Hold on a second. Well, I'll just read that language as it is. It did indicate that towns would have this kind of authority. However, then I looked at Chapter 59 and specifically Sec. 59.70(6) and noted that that does authorize counties also to enact private well and well construction ordinances but only, again, if authorized by the DNR.

Furthermore, Sec. 59.70(6)(e) strictly limited such well authority and any municipality's authority by prohibiting them from enacting or enforcing any ordinance, quote... regulating matters covered by Chapter 280 or by the Department -- that obviously means the Department of Natural Resources -- rules under Chapter 280. See also, for instance, in the same regards, the same effect NR 845.03, which is the regulation basically going right along with the statute.

The Village goes on to demonstrate that well No. 7 was approved by the DNR pursuant to Chapter 280 and NR 811 and also, obviously, NR 812. And there is

a note on NR 811.01 on -- and Exhibit 1 to the Village's brief, which I instructed in that regard. Hold on a second. That note at the end of 811 of NR says: The authority to promulgate and enforce these rules is contained in Chapters 280 and 281 Statutes. Pursuant to Sec. 299.97 Statutes, any person who violates -- and then they go on with the potential violation and forfeiture.

So the DNR itself is taking the position that its right to enforce these statutes come from Chapter 280.

One should also take a look at NR 812. Just to refresh everybody's memory, that's the extensive language about well construction and pump installation under the DNR's authority, which also comes from Chapter 280.

The Village's brief appears to clearly demonstrate that the State made its administrative agency, the DNR, the prime director of methods of clean water supply to the public, including the permitting, regulation and operation of wells, which are one of the methods of supplying such water.

Having established this point, the Village then cites DeRosso Landfill Company v. City of Oak Creek, 200 Wis. 2d 642 at Page 641, 1996 to, the

effect that -- Just a second. Off the record.
(Discussion off the record.)
THE COURT: And that says as follows: Nevertheless, a municipality's ability to regulate matters of state-wide concern is limited. As the Court stated six decades ago, quote, municipality's may enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with but rather compliment the State's legislature. Citing Fox v. Racine, 225 Wis. 542 at 546, 1937, which in turn was quoting Milwaukee v. Child's Company, 195 Wis. 148 at 151 (1928).
Therefore, wrote the Fox court where -- this is another single quote -- the State has entered the field of regulation, municipalities may not make regulation inconsistent therewith, single quote, because, single quote, a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required -- or authorize what the legislature has expressly forbidden. And then they give a further citation to the Fox case and another case.
And then they say: The principle announced in Fox has been the rule in Wisconsin and still is,

quote, the rule when addressing the question of whether State legislation pre-empts a municipal ordinance. By the way, that last quote was actually a single quote. And then they cite some other cases.

The Court having now read that, also notes that -- and here I look to the defendant's brief on Page 15 and 16 and 14, I should say. I'm going to actually quote from the plaintiff's brief -- not the plaintiff's. I'm sorry. The defendant's Village's brief to the effect that: The Wisconsin Supreme Court has long acknowledged that the regulation of groundwater is a matter of statewide concern that pre-empts local regulation. They cite in the City of Fond du Lac v. Town of Empire, 273 Wis. 333 at 334. They said 34 but it's at 334, 1956.

They point out the Court struck down a Town of Empire ordinance that attempted to regulate a municipal well in the City of Fond du Lac. The ordinance adopted by the Town prohibited the drilling of a well in the Town of Empire with casing in excess of six inches in diameter except by permission of the town board upon a finding that the well would not adversely affect private wells in the town.

The Court in Town of Empire noted the regulation of groundwater was a statewide concern and

stated, quote, we can find no authority, even under the home-rule amendment or under Chapter 61 Statutes, that would authorize the Town of Empire to adopt the ordinance under attack, end of quote. And that can be found at Pages 338 to 339 of the Empire decision.

The Village goes on to say: Thus, even a municipal well ordinance by a general purpose local government was deemed pre-empted.

The next paragraph they say: Although the test for preemption has become more exacting over the years, the holding of Town of Empire remains valid. Town of Empire has been relied upon by the DNR to oppose local well ordinances. In addition, in 81 opinion of Attorney General 56 at Page 62, 1993, the Attorney General cited Town of Empire as authority in a formal opinion for the proposition that the legislative determination that water resources management required statewide regulation and control was entitled to, quote, great weight, period.

I might add there's more to that Attorney General's decision and I'll come back to it because defense cited it in rather depth.

They go on to say: If anything, the rationale of Town of Empire has become even more compelling today than it was in 1956 because of the

expansion of state law regulating groundwater. In Town of Empire, the Court noted that the legislature, quote, has done very little to regulate the use of groundwater. Of groundwater is in brackets, end quotes. And they're citing to Page 338.

They go on to say: Since 1956, the State has greatly expanded it's regulatory role over groundwater and high capacity wells. And they then refer to the 1985 Wisconsin Act 60. I won't state everything they said about it but they have correctly cited it here. It is clearly an indication that the State is putting that authority and duties on the DNR.

And then they go on to say in the next paragraph the reference to the comprehensive statewide scheme for regulating high capacity wells with the criteria that are needed, which they cite; and then they point out that since 1956, the legislature and the DNR have adopted numerous other provisions regulating groundwater which include -- and they go through a list of those ones, including the 1984 Wisconsin Statute Chapter 160, and the DNR adopted NR 140 which establishes groundwater qualities and etcetera, etcetera.

And then they say: If the State interest was significant enough to preclude the Town of Empire

from enacting its ordinance in 1956, it certainly is sufficient now to preclude the District from enacting its ordinance. The District's enactment of ordinance 2006-03 interferes with the State's regulatory scheme for high capacity wells and is pre-empted no less than the Town of Empire ordinance.

Now I return basically to my own decision but I found that language very compelling and I've quoted it substantially.

Then the Village, in its next argument, pointed out that not only is the District pre-empted but the District's proposed ordinance would undo the DNR approvals because the ordinance would effectively bar the use of well No. 7 despite the DNR approval. That's my words, not the Village's words; but in essence, that's what they were saying.

I asked myself as a court: How can a lake management district impose restrictions on the public water supply that totally undo a DNR approval for supplying the same water to the public. The Village inferentially poses this question and then answers it not only by the preemption argument above but by the conflict argument that they also make.

The victim -- excuse me. I keep saying the victim. The Village points to a parallel case where

the DNR had been given control of the regulation of chemical treatment of aquatic nuisances. I might add this is the very case I mentioned earlier that I expected to be a major part of the Village's argument in the first place.

This case was Wisconsin Environmental Decade, Inc. v. DNR, 85 Wis. 2d, 518, 1978. In that case the City of Madison -- and this is a rough translation of what happened. There are a lot more facts in that case but this is a rough, shortened version. In that case, the City of Madison did not agree with the DNR's decision to permit three groups to chemically treat weeds in designated areas of Lake Mendota and Monona. In fact, the City had a few years before passed an ordinance that objected to the DNR granting any such permits.

The City and Wisconsin Environmental Decade, Inc., which is why the case is named that, jointly filed a petition for review of the validity of the DNR's permit. The Supreme Court first pointed out that the State had empowered the DNR to control the regulation of chemical treatment of aquatic nuisances. The DNR statutory authority, which the Supreme Court discussed, does not need to be discussed here. This is a parallel case. But suffice it to say that the

statutory authority of the DNR re: the chemicals was similar to the statutory authority of the DNR to regulate water supplies in wells found in the present case.

The Supreme Court went on to point out that to the extent Madison had power to control chemical treatment of aquatic weeds, that power was granted by the legislature. I might add that the Court made it clear that the Madison, by its general powers and the language of its granted powers, did have the power to do something like this.

But the Court then stated at 85 Wis. 2d, 518 Page 534 -- bear with me: We believe that the power to prohibit chemical treatment of aquatic nuisances in the waters of Lake Mendota and Monona is one which the legislature could confer on Madison and therefore is one which the City now passes -- possesses under Sec. 62.11(5) Stats. unless as prescribed in Sec. 62.11(5) itself there is an express language elsewhere in the statutes restricting or revoking it.

This Court has added a further limit on municipalities' exercise of authority pursuant to the legislature's broad grant of power in Sec. 62.11(5) Statutes; i.e., ordinances may not infringe the spirit of state law or general policy of the state. Citing

Fox v. Racine again at Page 545.

We approve of the rule as set forth in Solheim, Conflicts Between State Statute and Local Ordinances in Wisconsin, 1975 Wisconsin Law Review, 840 at Page 848 where it stated -- and that's my language, quote, 2, if a municipality acts within the legislative grant of power but not within the constitutional initiative, the State may withdraw the power to act; so if there is logically conflicting legislation, or an express withdrawal of power, the local ordinance falls. Furthermore, if the State legislation does not logically conflict, or does not expressly withdraw power, it is possible that the local ordinance nevertheless must fall if an intent that such an ordinance not be made can be inferred from the fact that it defeats the purpose or goes against the spirit of the state legislation.

They then went on to say: If Resolution 21.527 -- by the way that is the resolution that Madison had passed establishing their control over chemical -- chemicals in the lake to control weeds, they said: If Resolution 21.527 establishes a city policy to effectively prevent the use of herbicides or chemical treatment in Madison lakes, we conclude that the resolution must fall. The statutes reveal no

express withdrawal of power. However, the broad grant of power to the DNR to supervise chemical treatment of waters under Sec. 144.025(2)(i) Statutes, is logically inconsistent with the existence of power in the city to prevent chemical treatment of Madison lakes entirely. The city's policy conflicts with the DNR's program under Sec. 144.025(2)(i) involving limited chemical treatment by individuals or groups operating by permit and under the supervision of the Department. The city contends that Resolution 21.527 and Sec. 144.025(2)(i) Statutes are not logically inconsistent.

I might add -- and this is an aside here -- that's the same argument that the lake district is using here; that the ordinance and the DNR's authority are not inconsistent.

I go on with the Supreme Court's quote. The Supreme Court said: We do not believe this contention is sound. The city has not moved in the same direction farther but not counter to the DNR, citing Fox v. Racine. The resolution and the statute as implemented by the DNR are diametrically opposed. City's reliance on Fox v. Racine and LaCrosse Rendering v. LaCrosse, 231 Wis. 438, 1939, where this Court upheld municipal ordinances which are not in logical conflict with the state statute, is

inappropriate in the light of the facts in this case.

The Village cites a few more cases to support its assertion that even if the District had the authority to enact its disputed ordinance, that ordinance cannot stand because the DNR has express legislative control in the area of human water supply, including wells for that purpose, and the said ordinance is logically inconsistent with the DNR's authority in that area, especially since the ordinance conflicts with the DNR's decision to allow the well to be used and to pump. And if the ordinance were enforced, it would set the DNR's decision at naught. It would be useless. It would be a meaningless set of words. Or in other words, the ordinance conflicts with state law and thus is invalid.

The District's counter-argument relies heavily on an opinion by the Attorney General quoted extensively on Pages 13 and 14 and again Pages 15 and 16 of their brief. And it's a good argument except -- and by the way, I'm saying that the Attorney General made a good argument and counsel for the plaintiff was well advised to adopt the argument. But in the opinion of the Court, although it's a good argument, it really applies when ordinance and DNR decisions don't conflict. If the AG opinion really concerned a

situation where the municipal government and the DNR actions, in the opinion of the Attorney General writing the decision, did not actually conflict and actually complimented each other. You can see Tab B -- and by the way, it's Tab B, not Tab 2. Counsel for the defense actually called it Tab 2; but in his tabs, he had A and B and it's B.

In any case, if you see that tab to the brief, Page 1 Paragraph 3, here it points out that the ordinance -- it talks about the fact that if the ordinance clearly interferes with the well, then it conflicts with state law. I'm sorry. That's my comment. But I guess I'm going to go to that particular Attorney General's brief. Bear with me a second. Not brief but opinion.

On Page 1 of that Attorney General's decision, it says in about the middle of the page: Local laws that conflict or interfere with state laws and programs for the protection and management of state waters are pre-empted by state law and are subject to legitimate legal challenge in a court of law. Furthermore -- I'm getting ahead of myself.

The second paragraph after that says: The Town of Richfield ordinance does -- and there there's a misprint in the opinion because the word not should

be between the word does and conflict, in order for that sentence to make sense.

So the sentence really should read: The Town of Richfield ordinance does not conflict with or interfere with provisions in Wisconsin Statutes Chapter 281 for regulating high capacity wells and the DNR does not make such a claim or showing. In other words, the case that the Attorney General was handling involved a case where there was no conflict and the DNR wasn't claiming any conflict. The DNR was just simply saying: You're out of the ballpark. You can't do this. You can't make this decision. You can't pass this law, even though it does not conflict with anything that we are doing.

As I say, in the present case that I am handling, the ordinance clearly interferes with the well -- excuse me. Here the ordinance clearly interferes as well as conflicts with the state law. Besides, the AG opinion concerned a local town zoning ordinance controlling matters within the town itself. They weren't controlling matters outside the town.

Also the AG opinion points out that the town ordinance did not conflict with or interfere, as I said, with the DNR duties under Chapter 281 to regulate high capacity wells. You can see that at

Page 1, Paragraph 5 of the AG opinion. And I've already read that.

Here the ordinance itself -- again, back to our case, the ordinance itself conflicts and interferes with the DNR powers under Chapter 281 and 280, as well as various NR regulations. If allowed to stand and apply to the Village, it will totally vitiate the DNR actions in regard to Chapter 280 and 281 reference well No. 7 and the Village's, that is, the public's water supply.

A lake district action of this type is pre-empted, in the opinion of this Court, and also is void, even if not pre-empted, because it conflicts with the DNR regulation of the public water supply and well regulation. I find the same basic argument that the Supreme Court used in the Wisconsin Environmental Decade case to apply here, although we are not talking about chemical application to aquatic weeds.

The District also argues -- and for that I'll turn to Page 7 of their brief -- 17, I'm sorry, that a determination of such legislative intent is necessary in order to determine whether one state law pre-empts the effect of another. And they cite to the DeRosso case, which I've already mentioned, and they cite to In Re: The Finding of Contempt in Interest of

J.S. and M.S. v. Racine County, 137 Wis. 2d, 217 at 224, Court of Appeals 1987.

They go on to say -- and I'm again, quoting from the defendant's -- the plaintiff's brief here, the District's brief. They say: A local governmental entity's ordinance is pre-empted if, but only if: 1, the legislature has withdrawn the entity's power to act. I stop here. I don't think they've withdrawn the power to act. I don't. And there's no problem there.

But then the next two, three and four are a problem because the defense goes on to admit that the case law says that the entity, the governmental entity's ordinance is pre-empted if two, the ordinance and issue logically conflicts with state legislation. I find it clearly does. It basically regulates and prevents a well from being operated because a local government says -- sets restrictions upon that well use; and even though the DNR has held hearings and done its job to okay the well, everything the DNR did was useless. It has conflicted with state legislation, which meant to grant to the DNR this job about supplying public water and constructing and using wells for that purpose.

Three, the ordinance is pre-empted if the

ordinance defeats the purpose of state legislation. I find that's clearly what it does here. The ordinance defeats the purpose of giving the DNR the job of providing this public water, of overlooking the safety of the public water, and construction and use of wells for that purpose.

And finally, four, the ordinance is pre-empted if the ordinance violates the spirit of state legislation. Again, there's a citation to DeRosso and some other cases, but I clearly find in this case the ordinance is violating the spirit of state legislation because the spirit of state legislation is to give the primary preeminent job to the DNR to oversee the water supply of the public and the construction and use of wells as part of that purpose.

The essence, then, of the District's argument is that the District can, by ordinance, prohibit the use of a well authorized by the DNR because the District says the water is being drawn from the well, although the well is outside the District's surface territorial boundaries and is water which would eventually -- or is water which would eventually flow into the subsurface or surface areas within the District's boundaries or be drawn from

those areas within the District's boundaries.

As I said before earlier on in this decision, under that theory, a lake district could effectively veto wells a hundred miles from their territory as long as they could show an interconnection of their water -- their underground waters with the area 100 miles away. What happens if the Village passes an ordinance that the District can't use any water that comes from the subsurface area under the victim's (sic) territory.

The City -- the Village, there is legislation on the books that clearly indicate the Village had authority to pass various ordinances for various reasons to protect their citizens. What's to prevent, if the District can do what they're doing, the Village to correspondingly come back and pass their own ordinance that prohibits any of the Lake Beulah from keeping any of the water that happened to be temporarily under the Village's boundaries but might eventually flow into Lake Beulah? I can't see any way they can do that but if you accept -- if this Court adopts the argument of the District, then the Village can do that, just as well as the District can do it.

The end result of my decision, and I agree

it is a -- as I say klutzy decision because I had to put it together fast, is that with great respect for both sides' arguments, this Court finds that the ordinance is invalid as applied to the Village. The ordinance is invalid generally because it conflicts with the obligations, duties and powers of the DNR, and for all the various other reasons that I have said.

And therefore, I declare that the ordinance is void and unenforceable in this particular case, certainly as to the Village of East Troy but I think it's void and unenforceable, period, even within its own boundaries under the circumstances; and that is the way the Court rules.

I will request that the prevailing party on the summary judgment prepare an order that simply says the motion for summary judgment is granted for the reasons stated on the record. I sincerely hope a higher court, which will no doubt see this case under the circumstances, can figure out what I was saying and either agree with it or point to me why not.

And with that, is there anything else that the parties need from me at this time? Plaintiff?

MR. LAING: No, Your Honor.

THE COURT: Defense?

MR. KENT: No, Your Honor. Thank you.

THE COURT: Thank you very much and thank you for your patience, people.

MR. KENT: Thank you, Your Honor.

THE COURT: All right.

(Proceedings concluded.)

STATE OF WISCONSIN)
)
COUNTY OF RACINE)

I, Margaret A. Techert, a Court Reporter for Racine County, certify that the above and foregoing is a true and correct transcript of the hearing in the above entitled matter as contained in my stenographic notes taken on said hearing.

Dated at Racine, Wisconsin this day 29th of May, 2009.

Margaret A. Techert

COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2010

A. John Voelker
Acting 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. 2009AP2021 Cir. Ct. No. 2008CV915

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

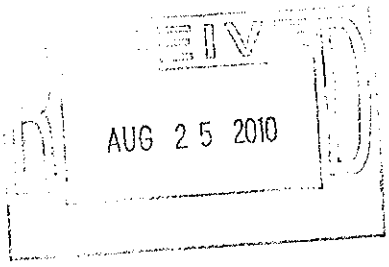
LAKE BEULAH MANAGEMENT DISTRICT,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF EAST TROY,

DEFENDANT-RESPONDENT.



APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 ANDERSON, J. The Lake Beulah Management District (the District) appeals from an order granting summary judgment to the Village of East Troy (the Village) invalidating the District's 2006 ordinance regulating the withdrawal of groundwater. The state legislature's explicit grant of authority to

the Wisconsin Department of Natural Resources (DNR) preempts the District's ordinance. We affirm the circuit court on this ground.

¶2 This case represents the latest chapter in ongoing litigation stemming from Well #7. We cite a recently released companion case, ***Lake Beulah Management District v. DNR***, 2010 WI App 85, ¶14, No. 2008AP3170, for relevant background information. In 2000, the Village began searching for a new well site in order to provide an adequate water supply to its citizens. The site chosen was approximately 1400 feet from Lake Beulah, an 834-acre lake in Walworth county. ***Id.***, ¶3. This site was subsequently annexed into the Village in August 2003.

¶3 In June 2003, the DNR approved a permit for the construction of the well, dubbed Well #7. Based on the opinion of a consultant hired by the Village, the DNR concluded the well "would avoid any serious disruption of groundwater discharge to Lake Beulah." ***Id.*** After a swarm of litigation delayed construction, an "extension" of the DNR's permit was granted in September 2005. In the companion case we held that this extension operated as a new permit, thus avoiding any conflict with the expiration date of the 2003 permit. *See* ***id.***, ¶14. Construction ultimately began in 2006 and the well was operational by August 1, 2008. It is estimated that Well #7 has a pumping capacity of up to 1,440,000 gallons per day. *See* ***id.***, ¶3. In ***Lake Beulah*** we held that the DNR had the authority to review the public trust implications of Well #7, and we remanded to the DNR to reconsider its approval of Well #7 in light of evidence suggesting a more adverse environmental impact than previously believed. ***Id.***, ¶39.

¶4 The instant case concerns the District's attempt to circumvent the DNR's approval of Well #7 by passing an ordinance preventing operation of the

well. In 1968, the town of East Troy[1] formed the Lake Beulah Sanitary District pursuant to WIS. STAT. §§ 60.77 and 60.78 (2007-08).[2] The sanitary district was empowered as a "body corporate with the powers of a municipal corporation." Sec. 60.77(2). In 1995, the town of East Troy converted the sanitary district into the Lake Beulah Lake Management District under WIS. STAT. § 33.235(1m). The converted District retained its previous responsibilities while also obtaining the powers of a lake district under WIS. STAT. § 33.22(1). *See* § 33.22(3)(b)1. This empowered the District to "select a name for the district, sue and be sued, make contracts, accept gifts, purchase, lease, devise or otherwise acquire, hold, maintain or dispose of property, disburse money, contract debt and do any other acts necessary to carry out a program of lake protection and rehabilitation." Sec. 33.22(1).

¶5 On December 11, 2006, the District adopted Ordinance No. 2006-03 (the Ordinance), entitled An Ordinance Prohibiting the Net Transfer of Groundwater and Surface Water from Lake District Hydrologic Basin. The Ordinance prohibited the transfer or diversion of surface water or groundwater out of the District's jurisdiction without a permit:

> Section 2. PROHIBITED ACTS. It shall be unlawful and prohibited by this Ordinance for any person or entity to do any of the following unless such acts are authorized in advance by and performed in conformance with a valid permit issued by the District pursuant to this Ordinance:
>
> A. Divert or transfer surface water out of the Lake Beulah Surface Water Drainage Basin.

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[1] The town of East Troy is not to be confused with the *Village* of East Troy, the respondent in the instant case.

[2] All references to the Wisconsin Statutes are to the 2007-08 version, unless otherwise noted.

> B. Divert, transfer, or induce the diversion or transfer of groundwater out of the Lake Beulah Groundwater Basin.
>
> E. Withdraw groundwater from within the Lake Beulah Groundwater Basin and then divert or transfer said water out of the Lake Beulah Groundwater Basin.

¶6 Notably, the Ordinance applies regardless of whether acts causing water withdrawal occur inside or outside the District's boundaries. Moreover, the Ordinance states that no permit will be issued "unless a volume of water equal to at least 95% of the water actually diverted or transferred is returned to the Hydrologic Basin at the location(s) where the adverse effects of the proposed use, action, diversion or transfer will be mitigated."

¶7 This Ordinance clearly implicates the proposed use of Well #7, which the District alleges would "intercept and remove groundwater that would otherwise sustain Lake Beulah." While the well is not located within the District's physical boundaries, the District has included the well site within the Lake's "groundwater basin." Under a separate DNR permit, the water used by the Village is ultimately discharged into a different body of water, so ninety-five percent of the water removed by the well would not be returned to the basin as the Ordinance purports to require.

¶8 It quickly became clear that the Village had no intention to comply with the Ordinance. Soon after the Ordinance was adopted, the Village wrote a letter to the District asserting that the District had no legal authority to pass it. In May 2007, the District requested records describing how the Village intended to "physically transport[] water back into the Lake Beulah Hydrologic Basin after water from Well #7 has been transported outside of said Basin," presumably in enforcement of the Ordinance. In response, the Village asked for "the District's purported basis of authority to enact and enforce" the Ordinance. When the

District insisted upon "a 'yes' or 'no' answer," the Village relayed its belief that its legal obligations did not include the Ordinance.

¶9 On July 22, 2008, the District brought an action for declaratory judgment upholding the Ordinance. The Village moved for summary judgment, arguing, inter alia, that the Ordinance was preempted by and conflicted with state law.[3] The circuit court granted summary judgment and found the Ordinance "void and unenforceable in that it conflicts with state law, and ... invalid as applied to the Village." The District appeals.[4]

¶10 We review a grant of summary judgment de novo. *See* ***Umansky v. ABC Ins. Co.***, 2009 WI 82, ¶8, 319 Wis. 2d 622, 769 N.W.2d 1. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. 802.08(2). Whether the Ordinance is preempted as a matter of law is a question we review independently, while benefiting from the analysis of the circuit court. *See* ***DeRosso Landfill Co. v. City of Oak Creek***, 200 Wis. 2d 642, 652, 547 N.W.2d 770 (1996).

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[3] The parties also sparred over whether the District had any general regulatory authority to enact the Ordinance and whether the District had "extraterritorial" authority to enforce the Ordinance on the Village. However, our analysis is limited to the preemption issue, which is dispositive. Therefore, while these arguments were made again on appeal, we do not address them here. *See* ***Walgreen Co. v. City of Madison***, 2008 WI 80, ¶2, 311 Wis. 2d 158, 752 N.W.2d 687 (noting that when resolution of one issue is dispositive, we need not reach other issues raised by the parties).

[4] The Village also moves to strike a portion of the District's reply brief on appeal, arguing that a portion of that brief raised a new issue for the first time on appeal. In January, we issued an order holding the motion in abeyance. We deny the motion. The disputed portion of the brief concerned the District's extraterritorial authority, and the wholly separate issue of preemption is dispositive. *See* ***Walgreen Co.***, 311 Wis. 2d, ¶2 (noting that when resolution of one issue is dispositive, we need not reach other issues raised by the parties).

¶11 The District operates "with the powers of a municipal corporation" under WIS. STAT. § 60.77(2), and "municipality" in this context is explicitly inclusive of lake protection and rehabilitation districts. WIS. STAT. § 281.01(6). Therefore, the District "may pass ordinances which, while addressed to local issues, concomitantly regulate matters of statewide concern." *See* ***DeRosso***, 200 Wis. 2d at 650. This is to say that the District's ordinances are not presumed invalid simply because they invoke a matter of statewide concern, such as the drilling of high-capacity drinking water wells. However, the long-standing rule is that a municipal ordinance may not conflict with state legislation; otherwise, the ordinance is preempted. *See* ***Fox v. City of Racine***, 225 Wis. 542, 546, 275 N.W. 513 (1937). Generally, a municipal ordinance is preempted if "(1) the legislature has expressly withdrawn the power of municipalities to act; (2) it logically conflicts with state legislation; (3) it defeats the purpose of state legislation; or (4) it violates the spirit of state legislation." ***DeRosso***, 200 Wis. 2d at 651-52. If any one of these tests is met, the municipal ordinance is void. *See* ***id.*** at 652.

¶12 The DNR's authority is found in WIS. STAT. chs. 280 and 281. Section 280.11(1) provides:

> The department shall, after a public hearing, prescribe, publish and enforce minimum reasonable standards and rules and regulations for *methods to be pursued in the obtaining of pure drinking water for human consumption* and the establishing of all safeguards deemed necessary in protecting the public health against the hazards of polluted sources of impure water supplies intended or used for human consumption, *including minimum reasonable standards for the construction of well pits.* It shall have *general supervision and control of all methods of obtaining groundwater for human consumption* including sanitary conditions surrounding the same, *the construction or reconstruction of wells* and generally to prescribe, amend, modify or repeal any rule or regulation theretofore prescribed and shall do and perform any act deemed

> necessary for the safeguarding of public health. (Emphasis added.)

¶13 These statutes expressly seek to create a "comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private." WIS. STAT. § 281.11. Further, the legislature explicitly states that the DNR's powers "shall be liberally construed." *Id.*; *see also* ***Wisconsin's Envtl. Decade, Inc. v. DNR***, 85 Wis. 2d 518, 528-29, 271 N.W.2d 69 (1978). WISCONSIN STAT. § 281.34 specifically deals with "groundwater withdrawals," and provides that any proposed well with a capacity of greater than 100,000 gallons per day—this then includes Well #7—must obtain approval from the DNR before construction can take place. *See* § 281.34(2). The Village twice obtained approval from the DNR to construct Well #7.

¶14 Conversely, the District's authority stems from aforementioned WIS. STAT. § 33.22(1), which authorizes the District to, inter alia, "do any other acts necessary to carry out a program of lake protection and rehabilitation." The District argues that such language is an express grant of "extremely broad powers to protect the quality of public inland lakes," and allows for the District to pass Ordinances setting standards for the construction of wells. Moreover, the District contends that the DNR's mandate only speaks to "how" groundwater may be withdrawn, while the Ordinance regulates "whether and how much" of the groundwater may be taken. In support, the District relies heavily upon a thirty-nine-page memorandum sent within the office of former Wisconsin Attorney General Peggy A. Lautenschlager, which addressed an ordinance passed by the

town of Richfield in 2005.[5] As the memorandum's conclusion endorsed Richfield's ordinance, the District urges us to afford it great weight. However, "while attorney general opinions may be considered persuasive authority, they are not precedent for any court." ***FAS, LLC v. Town of Bass Lake***, 2007 WI 73, ¶18, 301 Wis. 2d 321, 733 N.W.2d 287. Therefore, it is up to us to decide how much persuasive power we will accord this memorandum.

¶15 The circuit court reasoned that, while the legislature had not expressly withdrawn the District's ability to act, the Ordinance logically conflicted with, defeated the purpose of, and violated the spirit of the state's delegation of authority in this sphere to the DNR. In essence, the court determined that the Ordinance violated the second, third, and fourth tests articulated in ***DeRosso***. *See* ***DeRosso***, 200 Wis. 2d at 651-52.

¶16 We agree with the circuit court's conclusion. The legislature has explicitly delegated to the DNR the authority to permit the construction of certain wells, and has directed that such authority be construed liberally. *See* WIS. STAT. §§ 280.11(1), 281.11. The Ordinance creates a loophole whereby a DNR-approved well, like Well #7, is prevented from operating in lieu of another localized permit. In essence, the Ordinance casts the District and the DNR as "locomotives on a collision course," in direct conflict with one another. *See* ***State ex rel. Michalek v. LeGrand***, 77 Wis. 2d 520, 530, 253 N.W.2d 505 (1977).

¶17 We hold that the Ordinance logically conflicts with, defeats the purpose of, and violates the spirit of the legislature's delegation of authority to the

[5] This is not a "formal opinion" from the Attorney General, as the District claims. The first page of the document makes clear that it is a memorandum from the then-assistant attorney general to the then-attorney general. It is not among the attorney general's published opinions.

DNR.[6] The state intended to create a "comprehensive program" for well construction supervision through the DNR. *See* WIS. STAT. § 281.11. Under a liberal construction of its powers, the DNR cannot be limited simply to regulating "how" groundwater is obtained, as the District claims. If a municipal body could make well construction contingent upon its own permit, based on its own standards, a DNR permit would be wholly insignificant, and the legislature's stated goal of creating a uniform scheme to supervise the extraction of groundwater would be eviscerated. Therefore, the Ordinance conflicts with the general laws of the state and is preempted by the state's delegation of authority to the DNR. *See* ***City of Fond du Lac v. Town of Empire***, 273 Wis. 333, 341, 77 N.W.2d 699 (1956). This reflects the view that, ultimately, "the state must maintain pre-eminence in the control of navigable waters in this state." ***DNR v. City of Clintonville***, 53 Wis. 2d 1, 4, 191 N.W.2d 866 (1971) (*citing* ***Muench v. Public Serv. Comm'n***, 261 Wis. 492, 53 N.W.2d 514, 55 N.W.2d 40 (1952)).

¶18 Furthermore, even if given great deference, the assistant attorney general's memorandum does not advance the District's arguments. It not only refers to a factually distinct situation involving a different ordinance, but it reaches a limited conclusion—that ordinances directed at the preservation of groundwater are not *presumptively* invalid. If anything, the memorandum serves to weaken the District's position given its suggestion that "under conflict-preemption analysis, a

[6] The Village has moved for attorney fees and costs on grounds that this appeal is frivolous pursuant to WIS. STAT. § 809.25(3)(c)2. We deny the motion. To be frivolous, the appeal must be without any basis in law. ***Black v. Metro Title, Inc.***, 2006 WI App 52, ¶15 n.3, 290 Wis. 2d 213, 712 N.W.2d 395. Given the presumption of validity with respect to municipal ordinances and the fact that the legislature has not explicitly withdrawn the District's power to pass the Ordinance, we find that the District's appeal, though unsuccessful, is not frivolous. *See* ***State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee***, 105 Wis. 2d 203, 208, 313 N.W.2d 805 (1982) ("It is a basic maxim of statutory construction that ordinances, like statutes, enjoy a presumption of validity.").

local regulation that would interfere with a DNR groundwater protection measure taken under Chapter 280 would be invalid." That is precisely what has occurred in the instant case.

¶19 State law explicitly delegated the authority over high-capacity well permits to the DNR, and the Ordinance is clearly in direct conflict with that authority. Therefore, we hold that the Ordinance is preempted under the ***DeRosso*** tests and rendered unenforceable. Accordingly, we affirm the circuit court's order granting summary judgment to the Village of East Troy.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.

ORDINANCE NO. 2006-03

AN ORDINANCE PROHIBITING THE NET TRANSFER OF GROUNDWATER AND SURFACE WATER FROM LAKE DISTRICT HYDROLOGIC BASIN

WHEREAS, Lake Beulah Management District (the "District") is a municipal entity existing pursuant to Wisconsin Statutes, Section 33.235 with powers of a town sanitary district as provided therein, and the powers of an inland lake protection and rehabilitation district as provided in Wisconsin Statutes, Section 33.22; and

WHEREAS, the District exists for the purposes of undertaking a program of lake protection and rehabilitation and promoting the public health, comfort, convenience and welfare of the District, and also serves as a local unit of government as described in Wisconsin Statutes, Section 281.11 to further state policy to mobilize resources to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private, and accomplish the greatest result for the people of the state as a whole; and

WHEREAS, the District finds it necessary to protect the entire local water resource, both groundwater and surface water, both water quality and water quantity, to achieve its purposes of protecting and rehabilitating Lake Beulah and promoting the public health, comfort, convenience, and welfare of the District; and

WHEREAS, the District finds that waters vital to the existence, well being and quality of Lake Beulah are limited to those that fall naturally to the land surface within the Lake Beulah Surface Water Drainage Basin or flow into Lake Beulah from the Lake Beulah Groundwater Basin; and

WHEREAS, the District finds that Lake Beulah is a complex ecosystem, in which the biological and physical components and constituents are interrelated such that whatever effects one will affect the others, the sustainability of which depends on adequate supplies of groundwater and surface water; and

WHEREAS, the District finds that it is harmful to Lake Beulah and contrary to the purposes of the District to allow the surface or groundwater within the Lake Beulah drainage basin or groundwater basin to be despoiled, depleted or diverted or transferred out of said regions; and

WHEREAS, the District seeks to assure that Lake Beulah is protected, that the public health, comfort, convenience and welfare of the District are promoted, and that until such time that the District installs a single enterprise water distribution and sewerage system, the electors of the District will be able to produce from their own lands adequate supplies of clean groundwater for drinking, while still utilizing customary private septic systems for disposal of septic waste; and

WHEREAS, the District finds it necessary to encourage conservation of groundwater and surface water resources within the District and protect those resources from despoliation and over consumption in order to protect Lake Beulah and promote the public health, comfort, convenience or welfare of the District; and

WHEREAS, the District finds that the state legislature has empowered the District to undertake any act necessary to carryout a program of lake protection and rehabilitation and undertake specific and general acts for the promotion of public health, comfort, convenience or welfare of the District; and

WHEREAS, the District finds that it is consistent with its legislatively prescribed duties to prohibit the net transfer of waters out of the region upon which Lake Beulah, this District and its electors depend for a source of water necessary to maintain and improve the quality of Lake Beulah and provide potable supply to the electors.

NOW THEREFORE, the Commissioners of the Lake Beulah Management District do ordain as follows:

Section 1. DEFINTIONS.

A. **Lake Beulah Hydrologic Basin.** The term "Lake Beulah Hydrologic Basin" or "Hydrologic Basin" shall mean: the geographic region or territory whose boundaries include all of the Lake Beulah Surface Water Drainage Basin and all of the Lake Beulah Groundwater Basin.

B. **Lake Beulah Surface Water Drainage Basin.** The term "Lake Beulah Surface Water Drainage Basin" or "Drainage Basin" shall mean: The geographic region or territory whose boundaries include all those lands and waters on which water deposited at the ground surface would, if prevented from infiltrating into the soil, flow by gravity to a point where it would enter into Lake Beulah.

C. **Lake Beulah Groundwater Basin.** The term "Lake Beulah Groundwater Basin" or "Groundwater Basin" shall mean: The three dimensional region whose boundaries encompass that portion of the aquifer known variously as the shallow, unconsolidated, or sand and gravel aquifer, within which the groundwater, if it were unaffected by pumping or other artificial inducement, would flow into, beneath or within the Lake Beulah Surface Water Drainage Basin.

D. **De Minimis.** The term "de minimis" as applied to use, diversion or transfer of water shall mean: Any use, diversion or transfer ("UDT") that is of such character or quantity that its effect upon Lake Beulah or the Lake Beulah ecosystem, when considered singly or in the aggregate along with all other UDTs in or from the Hydrologic Basin, including UTDs declared exempt under this Ordinance, cannot to a reasonable degree of

scientific certainty be found to cause, result in or bring about an adverse effect or impact on Lake Beulah, the Lake Beulah ecosystem, the shallow, unconsolidated aquifer within the Groundwater Basin, potable water supplies within the District or the public health, comfort, convenience or welfare of the District.

NOTE: As demand for water increases or available water decreases, the application of this definition of "*de minimis*" will result in a lowering of the upper threshold of the quantity of water found to be *de minimis*. The District intends to protect Lake Beulah and sustain the Lake Beulah ecosystem by allowing previously granted *de minimis* determinations to remain in effect, while subjecting new determinations to those limitations established by environmental conditions existing at the time of the new determination.

Section 2. PROHIBITED ACTS. It shall be unlawful and prohibited by this Ordinance for any person or entity to do any of the following unless such acts are authorized in advance by and performed in conformance with a valid permit issued by the District pursuant to this Ordinance:

A. Divert or transfer surface water out of the Lake Beulah Surface Water Drainage Basin.

B. Divert, transfer, or induce the diversion or transfer of groundwater out of the Lake Beulah Groundwater Basin.

E. Withdraw groundwater from within the Lake Beulah Groundwater Basin and then divert or transfer said water out of the Lake Beulah Groundwater Basin.

Section 3. LIABILITY AND PENALTY. Any person or entity found in violation may be assessed a penalty in accordance with this section. Any person that violates this Ordinance, except as provided for in Section 5, shall be liable to the Lake Beulah Management District for the cost of enforcing this Ordinance and the cost of replacing, to the District's satisfaction, any water that is diverted away from or transferred out of the Lake Beulah Hydrologic Basin in violation of this Ordinance, said replacement to consist of bringing into and discharging within the District, in a manner approved by the District, water in equal quantity and quality as that water which was diverted or transferred out of the Lake Beulah Hydrologic Basin, the Lake Beulah Surface Water Drainage Basin, or the Lake Beulah Groundwater Basin in violation of this Ordinance. For the purposes of this Ordinance the "cost of enforcement" shall include, without limitation, the following:

- administrative costs
- expert and consultant fees
- attorney's fees
- court costs

Section 4. PERMIT PROCESS. No use or action may be initiated, undertaken or continued that would be in violation of this Ordinance except in accordance with a permit issued by the District. A request for a permit for such use or action must be submitted to the Board of Commissioners for approval. The petition, together with any documents or records that support the petition, must clearly state the grounds upon which the petitioner requests the permit including, at minimum, a concise statement of the purpose of the request, the annual volume of water to which the request applies and the number of years the petitioner seeks for the approval or permit to remain in effect. In addition, said petition must include a thorough environmental study of the proposed use or action with emphasis on the potential impacts of such use or action on the following: Lake Beulah; groundwater and surface water contributing to Lake Beulah; wetlands adjacent to Lake Beulah or any surface water tributary to Lake Beulah; private wells in the District; and groundwater supplying any private well in the District. Petitioner may request an opportunity to testify and present evidence at a hearing conducted by the Board of Commissioners. The permit shall be granted only upon the majority decision of the Board of Commissioners based upon the following procedure:

A. *Review.* The Board of Commissioners shall review the petition, proposed site drainage, sewerage and water systems, the proposed water diversion or transfer operation and any study commissioned or required by the District with respect to any potential impact upon Lake Beulah, the Lake Beulah ecosystem, the surface water resources of the Lake Beulah Surface Water Drainage Basin or the groundwater resources of the Lake Beulah Groundwater Basin.

B. *Determination.* After study and review of the necessary data, the Board of Commissioners shall hold a public hearing on the petition. The Board of Commissioners shall render its decision in writing no later than 90 days from the date of the public hearing. Any further consideration of the petition beyond the 90 day period shall be preceded by another public hearing on the petition.

C. *Factors and Standards to be Considered.* The Board of Commissioners shall apply each of the following factors and standards in making its determination and shall not grant any permit or approval that if the net effect would be adverse to Lake Beulah or the public health, comfort, convenience, and welfare of the District:

1. Health, safety and welfare of the District;

2. Water supply, sanitation, and utilities in the District;

3. Impact on property values within the District;

4. The amount of water that will be diverted or transferred from the Hydrologic Basin and not returned to and discharged within the Hydrologic Basin;

5. Impact on Lake Beulah, the Lake Beulah ecosystem, or the water supply necessary or advisable for protecting, maintaining or improving the quality of Lake Beulah;

6. Impact on any well, water supply or septic system of any elector of the District, and

7. That such grant is not contrary to the public interest where, owing to special conditions, a literal enforcement of the terms of this ordinance will result in practical difficulty or unnecessary hardship, so that the spirit of the ordinance will be observed, public safety and welfare secured, and substantial justice done.

8. In considering the preceding factors, the Board of Commissioners shall apply each of the following standards in making its determination:

   a. No proposed use, diversion or transfer shall be permitted unless a volume of water equal to at least 95% of the water actually diverted or transferred is returned to the Hydrologic Basin at the location(s) where the adverse effects of the proposed use, action, diversion or transfer will be mitigated.

   b. Any return flows allowed as part of a permit granted pursuant to this Ordinance must be discharged so as to mitigate the adverse effects of the proposed use, action, diversion or transfer to the satisfaction of the District.

   c. Any return flows allowed as part of a permit granted pursuant to this Ordinance must be of water quality equal or superior to the water diverted or transferred from the Hydrologic Basin.

D. *Fees*. Such petitioner shall be liable for, and one or more processing fees shall be charged to reimburse, the District's reasonable costs of reviewing, processing and hearing such petition, including any of the District's costs of any studies reasonably necessary to determine the impact of the proposed action and the costs of any appeals that petitioner may choose to

bring of any decision of the District regarding the petition. Additionally, a one time or annual fee shall be charged for granting any approval or permit, such fee being sufficient to cover on-going environmental monitoring, water replacement, water treatment and permit administration as the District may deem appropriate. The petitioner will be provided an itemized invoice for the fees, and said fees are due within 30 days. Non-payment of any fee charged shall be cause for revocation of any permit or approval granted under this Ordinance and any amount of non-payment may be assessed as a special assessment or special charge and shall lienable against any property of the petitioner.

E. *Review and Appeal of Determinations.* The procedures set forth in Wisconsin Statute Chapter 68 shall apply to any request for review, administrative appeal or judicial review of any District determination, action or inaction pursuant to this Ordinance.

Section 5. EXCEPTIONS.

A. The penalty provisions of this Ordinance shall not apply to any uses, diversions or transfers of water that occur in accordance with a permit issued by the District.

B. The permit and penalty provisions of this Ordinance shall not apply to any uses, diversions or transfers of water that are declared by the District to be exempt, provided such use, diversion or transfer is first registered with the District upon forms provided by the District, the estimated quantity of such use, diversion or transfer, and the points of water acquisition and discharge, are annually reported to the District, and the use, diversion or transfer does not change such that the District finds it is no longer exempt. The following shall be exempt from the penalty provisions of this Ordinance as provided above:

1. *De Minimis* Use, Diversion or Transfer.

2. Single-Family Residential Use, Diversion or Transfer for Customary Residential Purposes.

3. Existing Small Volume Use, Diversion or Transfer. This category shall apply only to those uses, diversions or transfers that do not exceed 1000 gallons per day and that actually exist on the effective date of this Ordinance.

Section 6. ADMINISTRATIVE CONVENIENCE. The District may develop, adopt and require the use of forms and other materials consistent with and useful for the administration of this Ordinance. The boundaries of the Hydrologic Basin, Drainage

Basin and Groundwater Basin shall be portrayed on one or more maps approved by the District in accordance with available data, and said maps may be revised from time to time in accordance with newly available data.

Section 7. SEVERABILITY. If any part of this ordinance is held void, such part shall be deemed severable and the invalidity thereof shall not affect any remaining part of this ordinance.

Section 8. EFFECTIVE DATE. This Ordinance shall become effective on the first day after the Ordinance has been adopted by the Board of Commissioners and duly published.

Dated this 11 day of December 2006.

LAKE BEULAH MANAGEMENT DISTRICT

_____, Commissioner

ATTEST:

_____, Clerk-Treasurer

Date Adopted 12-11-06
Date Published _____
Effective Date _____

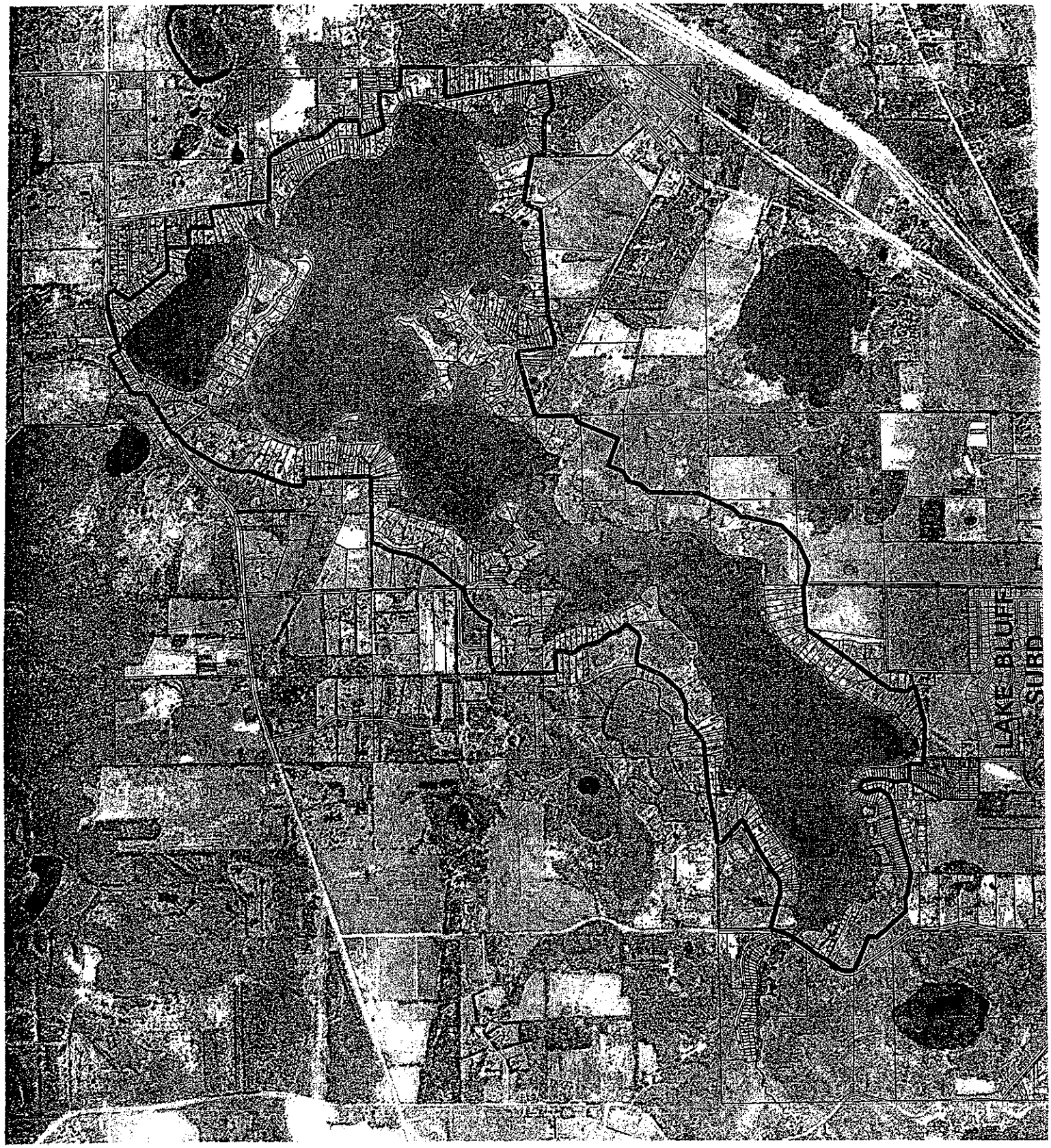
LAKE BLUFF
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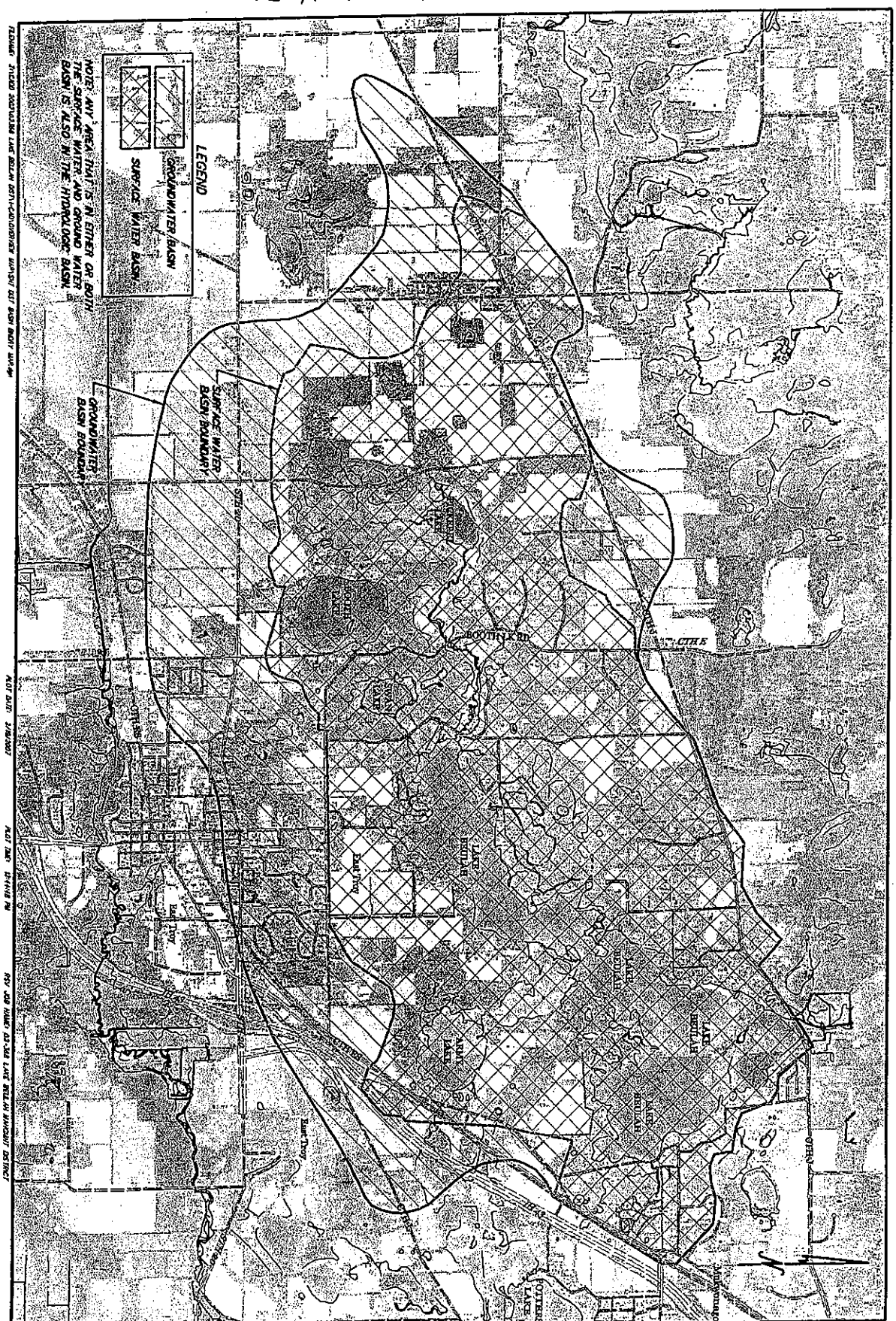
Exhibit A



1 OF 1	LAKE BEULAH MANAGEMENT DISTRICT BASIN BOUNDARY MAP As authorized by Ordinance 2006-03 TOWN OF TROY AND TOWN OF EAST TROY, WALWORTH COUNTY, WISCONSIN	NO. REVISIONS BY DATE	RSV ENGINEERING, INC. 146 E. MILWAUKEE ST. JEFFERSON, WI 53549 (920) 674-3411
SHEET NO.			
RSV PROJECT NO. 02-368			
0 0.25mi SCALE			
DESIGNED DRAWN CHECKED	INITIALS DATE CLE 03/19/07		

R-App. 64

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Matthew J. Frank, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711

December 18, 2008

Paul Kent
Anderson & Kent
1 N. Pinckney Street, Suite 200
Madison, WI 53703

Subject: Lake Beulah Management District Ordinance regulating wells and water use

Dear Mr. Kent:

You recently informed the Department of Natural Resources ("DNR") by letter that the Lake Beulah Management District ("District") has created an ordinance with the intent of regulating wells and water use within an area around Lake Beulah, including the Village of East Troy. You provided me with a copy of the ordinance (Ordinance No. 2006-03, hereafter referred to as "the Ordinance"). You indicated that you advised the District that there is no authority for the District to enact the Ordinance and asked DNR for its position regarding whether the Ordinance is preempted. I have reviewed the Ordinance upon your request.

The Ordinance regulating water use is preempted and invalid under state law. Under ss. 280.11(1) and 281.11 Wis. Stats., DNR has general supervision and control of all methods of obtaining groundwater for human consumption, shall do any act necessary for the safeguarding of public health, and serves 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. The Wisconsin Supreme Court stated that issues involving water supply and the promotion and protection of public health are matters of statewide concern. City of Fond du Lac v. Empire, 273 Wis. 333 (1956). An ordinance passed by the town of Empire, regulating the drilling of wells in the town, was ruled invalid because the Supreme Court said the town had no authority to adopt the ordinance.

DNR's authority to supervise the quality and management of the waters of the state has been reaffirmed recently by the Legislature. 2003 Act 310 grants DNR expanded authority to protect against adverse environmental impacts when considering whether to issue high capacity well approvals. 2007 Act 227 establishes a DNR permit process to regulate withdrawals of surface water and groundwater from the Great Lakes Basins. These legislative enactments make clear that DNR is the entity charged with regulation of the quality and management of the waters of the state.

Sincerely,

Judy Mills Ohm

Judy Mills Ohm
Attorney, Bureau of Legal Services
(608)266-9972

c: Dean Laing, Attorney for Lake Beulah Management District
Rhonda Volz—SER
Jill Jonas—DG/5

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary
Gloria L. McCutcheon, Regional Director

Southeast Region Headquarters
2300 N. Dr. Martin Luther King, Jr. Drive
PO Box 12436
Milwaukee, Wisconsin 53212-0436
Telephone 414-263-8749
FAX 414-263-8483
TTY 414-263-8713

September 4, 2003

MS JUDY WETER
VILLAGE OF EAST TROY
PO BOX 166
EAST TROY WI 53120

Project Number:	W-2003-0665
PWSID#:	26501233
DNR Region:	SE
County:	WALWORTH

SUBJECT: WATER SYSTEM FACILITIES PLAN AND SPECIFICATION APPROVAL

Dear Ms. Weter:

The Wisconsin Department of Natural Resources, Division of Water, Bureau of Drinking Water and Groundwater, is conditionally approving plans and specifications for the following project. The project submittal included an engineering report or information of sufficient detail to meet the requirements of NR 811.13(3).

Water system name: Village of East Troy
Date received: 6/20/03
Length of time extension: none
Design firm: Crispell-Snyder, Inc.
Project Designer: Kelly L. Zylstra
Regional DNR Contact: Petwara Toyingtrakoon – Southeast Region Plymouth Service Center
Project description: Site Investigation and Proposed Construction for Well No. 7

The proposed project involves the conversion of the existing NR 812 (sand & gravel) test well into a production well. Well No. 7 will be located in the SW1/4 of the SW1/4 of Section 17, T4N, R18E, Town of East Troy, Walworth County, Wisconsin. The Village will purchase the site pending consolidation/annexation approval for the proposed subdivision where the well will be located.

The nearest sand and gravel well serving a utility is approximately 6 miles to the northeast. It is not believed that the proposed well will have an adverse effect on any nearby wells owned by another water utility. If there is an actual adverse effect caused by the proposed well to nearby utility wells, or any other wells, the injured party may seek relief under the reasonableness of use tests set forth in State of Wisconsin v. Michels Pipeline Construction, Inc., 63, Wis. 2nd, 278 (1974).

If rotary methods and an outer casing is used, the Well No. 7 will be constructed (within the same drillhole as the test well) with the following specifications:

Outer Drillhole:	27 inch - drilled to a depth of 312 feet
Optional Outer Casing:	24 inch; installed in the 27 inch drillhole from the surface to a depth of 312 feet; completely withdrawn, or withdrawn to a maximum allowable depth of 239 feet if permanent installation
Screen:	As connected to 16 inch casing; installed from 262 feet to 312 feet; stainless steel; continuous slot; wire wrap; #30 slot size
Filter Pack:	To be installed from a depth of 312 feet to 242 feet; Colorado Silica Sand, Inc. 10-20 filter media (see also Part 2.5 of Section 0215)
Sand/Bentonite Seal:	Two foot sand seal installed from a depth of 242 feet to 240 feet One foot sand seal installed from a depth of 240 to 239 feet

2. Erosion control methods shall be used to prevent siltation to lands and waterways adjoining the construction area. These methods shall include but not be limited to the following:

   a. siltation fences,
   b. trench stabilization,
   c. immediate mulching and seeding, and
   d. the use of dewatering settling basins

3. A chlorine residual shall be maintained in the well throughout the drilling operation.

4. The owner, or the owners agent, shall provide Petwara Toyingtrakoon of the Department's Plymouth Service Center, phone number 920-892-8756 extension 3034, telefax number 920-892-6638, written notification of the intent to grout the well at least 2 working days prior to grouting. The notification shall include the name and telephone number of the resident project representative, the proposed method of grouting, the method for determining grout density, and the casing thickness and manufacturer's markings.

5. The resident project representative shall have documentation at the well site at the time of grouting to indicate a thorough knowledge and understanding of the approval, method of grouting, and WAC NR 811 requirements. This documentation shall include a copy of the DNR approval and any approved modifications, a copy of the plans and specifications, a drawing of the well as constructed, a method of determining the grout density, the calculations of the annular space volume, the calculations showing the volume of grout required, the volume of grout ordered, a copy of the letter notifying the DNR of the resident project representative, and a copy of WAC NR 811.

6. The well shall be test pumped for a minimum of 12 consecutive hours. The pump test shall include pumping at minimum of 4 hours - at a rate equal to the anticipated capacity of the final well pump.

7. Any sanitary sewer within a 200 foot radius of Well No. 7 shall be constructed using water main pipe and installation standards.

8. A wellhead protection plan shall be approved before Well No. 7 is placed into service. In addition to the wellhead protection plan, the required Form 3300-215 [PUBLIC WATER SUPPLY POTENITIAL CONTAMINANT USE INVENTORY] shall also be submitted.

9. The construction of the pumphouse, pump discharge piping, connecting water main and the installation of the well pump are not being approved at this time. Plans and specifications for these improvements shall be submitted to the Department for review and approval following the construction and test pumping of the well. The well construction reports, test pumping data, plumbness and alignment data, water quality data and the contaminant use inventory must be submitted to this office prior to or with the submission of the plans and specifications.

Approval conditions related to other Department requirements: None

Approval constraints: This approval is valid for two years from the date of approval and is subject to the conditions listed above. If construction or installation of the improvements has not commenced within two years the approval shall become void and a new application must be made and approval obtained prior to commencing construction or installation.

This approval is based upon the representation that the plans submitted to the Department are complete and accurately represent the project being approved. Any approval of plans that do not fairly represent the project because they are incomplete, inaccurate, or of insufficient scope and detail is voidable at the option of the Department.

Appeal rights: The project was reviewed in accordance with s. 281.41, Statutes for compliance with Chapters NR 108 and NR 811 Wis. Adm. Code and is hereby approved in accordance with s. 281.41, Statutes subject to the

conditions listed above. If you believe you have a right to appeal this decision, you may file a written request for a contested case hearing pursuant to s. 227.42, Wis. Stats., or file for judicial review under s. 227.52 and 227.53, Statutes. You have 30 days after this approval is mailed to file your written request for hearing or file and serve your petition for judicial review. Your request for hearing or petition for judicial review must name the Secretary of the Department as respondent. This notice is provided pursuant to s. 227.48, Statutes.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
For the Secretary

Francis G. Fuja, P.E.
DG Plan Review Engineer

cc: Tom Rossmiller - Water Supt.
Kelly Zylstra – Crispell-Snyder, Inc.
Bob Nauta – RSV Engineering, Inc., 112 S. Main St., Jefferson, WI 53549
David Skotarzak – Lake Beulah Management District, P.O. Box 71, East Troy, WI 53120-0071
Paul Didier – Lake Beulah Protective & Improvement Association, 1019 Rooster Run, Middleton, WI 53562
Dan Peplinski – Layne Geosciences, W229 N5005 Duplainville Rd., Pewaukee, WI 53072
Petwara Toyingtrakoon – SER Plymouth Service Center
Heidi Bunk – SER Waukesha Service Center
Jim D'Antuono – SER Waukesha Service Center
Randy Shumacher – SER Waukesha Service Center
Lee Boushon – DG/2
Fuja - DG Reviewer at SER Milwaukee
Kenneth Bradbury - WG&NHS
USGS
PSC

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711

September 6, 2005

Judy Weter
East Troy Village Administrator
P.O. Box 166
East Troy, WI 53120-0166

Re: Request for Extension of High Capacity Well Approval; Village of East Troy; Project Number W-2003-0665A

Dear Ms. Weter:

The Village of East Troy has requested an extension of the Department of Natural Resources (DNR) Water System Facilities Plan and Specification Approval (for Well #7), dated September 4, 2003. Your request has been assigned Project Number W-2003-0665A. Paul Kent, an attorney representing the Village in this matter, requested this extension by a letter to DNR attorney Judy M. Ohm, dated August 3, 2005. A follow up letter was sent to me from Kelly L. Zylstra, of Crispell-Snyder, Inc. and Daniel Peplinski, of Layne-Northwest, consultants for the Village, dated August 30, 2005.

Mr. Kent's letter indicated that the Village has been precluded from commencing construction of Well #7 because of litigation concerning the DNR approval (DNR has been a party to this litigation) and litigation regarding annexation of the well location into the Village. The letter from Mr. Zylstra and Mr. Peplinski indicates that there have been no changes in the physical circumstances upon which the application was based.

DNR has considered the Village's request under the standards set forth in 2003 Wisconsin Act 310, which became effective on May 7, 2004. This law was enacted after the original DNR approval was issued (September 4, 2003), but before the request for an extension was received. Under s. 281.34(4) and (5), Wis. Stats., DNR approves the request for an extension of the original approval, for a period of two years. Thus, the original approval is valid until September 4, 2007, subject to the conditions listed in the original approval (attached).

As a result of the ongoing litigation regarding the original approval, DNR is aware that the Lake Beulah Management District and the Lake Beulah Protective and Improvement Association are interested parties. Therefore, DNR is providing a copy of this approval to their attorneys.

Appeal Rights

If you believe that you have a right to challenge this decision, you should know that the Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed. For judicial review of a decision pursuant to sections 227.52 and 227.53, Wis. Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to file your

petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review must name the Department of Natural Resources as the respondent.

To request a contested case hearing pursuant to section 227.42, Wis. Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for hearing on the Secretary of the Department of Natural Resources. All requests for contested case hearings must be made in accordance with section NR 2.05(5), Wis. Adm. Code, and served on the Secretary in accordance with section NR 2.03, Wis. Adm. Code. The filing of a request for a contested case hearing is not a prerequisite for judicial review and does not extend the 30 day period for filing a petition for judicial review.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
For the Secretary

Lee H. Boushon, P.E., Chief
Public Water Supply Section

Attachment

c: Kelly L. Zylstra
Crispell-Snyder

Paul Kent
Anderson & Kent
Attorney for Village

Dennis L. Fisher
Meissner Tierney Fisher & Nichols
Attorney for Lake Beulah Management District

Daniel Peplinski
Layne-Northwest

Judy M. Ohm
DNR—LS/5

David V. Meany
DeWitt Ross & Stevens
Attorney for Lake Beulah Protective and Improvement Association

(b) Planning lake rehabilitation projects;

(c) Contacting and attempting to secure the cooperation of officials of units of general purpose government in the area for the

from implementing all or part of an approved plan.

(2) Applications rejected shall be returned to the district with a concise statement of the reasons for rejection, but may be resubmitted at a future time.

NOTE: Makes clear that applications approved for funding but unfunded because of a lack of money will remain under consideration. Also, a provision is created to inform districts receiving a rejection of their application of the reason therefor, so that any faults can be remedied.

SUBCHAPTER IV

PUBLIC INLAND LAKE PROTECTION AND REHABILITATION DISTRICTS

33.21 PUBLIC INLAND LAKE PROTECTION AND REHABILITATION DISTRICTS; PURPOSES. Public inland lake protection and rehabilitation districts may be created for the purpose of undertaking a program of protection and rehabilitation of a lake or lakes or parts thereof within the district.

NOTE: Allows the creation of a vehicle to undertake lake protection and rehabilitation projects.

33.22 DISTRICT; POWERS. Any district organized under this chapter may sue and be sued, make contracts, accept gifts, purchase, lease, devise or otherwise acquire, hold or dispose of real or personal property, disburse money, contract debt and do such other acts as are necessary to carry out a program of lake rehabilitation. All contracts for the performance of any work or the purchase of any materials, exceeding $500, shall be let by the commissioners to the lowest responsible bidder in such manner as they shall prescribe.

NOTE: Sets out the general powers of the district. Since the district will have only those powers specifically granted, a full enumeration is necessary.

district board shall hold an organizational meeting, shall select officers to serve until the first annual meeting, and may commence conducting the affairs of the district.

serve as commissioners until the first annual meeting of the district, and shall also ~~appoint a member of the county board as~~ (make the appointment required) under s. 33.16 (2).

(2) Within 30 days following the county board's order establishing the district, the governing body of the town, city or village having the largest portion by valuation within the district shall appoint one of its members to the district board under s. 33.16 (2).

(3) Within the 60 days following the expiration of time for appeal to the circuit court, or following the final judgment in any appeal, the district board shall hold an organizational meeting, shall select officers to serve until the first annual meeting, and may commence conducting the affairs of the district.

~~INSERT 9~~

~~33.15 DISTRICT; POWERS.~~ Any district organized under this chapter may sue and be sued, make contracts, accept gifts, purchase, condemn, lease, devise or otherwise acquire, hold or dispose of real or personal property, disburse money, contract debt and do such other acts as are necessary to carry out a program of lake rehabilitation. All contracts for the performance of any work or the purchase of any materials, exceeding $500, shall be let by the commissioners to the lowest responsible bidder in such manner as they shall prescribe.

~~INSERT 10~~

~~33.16 DISTRICT BOARD OF COMMISSIONERS.~~ (1) Management of the affairs of the district shall be delegated to a board of commissioners.

rehabilitation council consisting of:

(a) Four public members nominated by the governor, and with the advice and consent of the senate appointed, for staggered 4-year terms;

(b) The director of the university of Wisconsin water resources center (or his designated representative)

Insert 10
1c

Insert 10, to p. 11 after line 22

NOTE: Sets out the general powers of the district. Since the district will have only those powers specifically granted, a full enumeration is necessary.

STATE OF WISCONSIN
SUPREME COURT

LAKE BEULAH MANAGEMENT DISTRICT,

Plaintiff-Appellant-Petitioner,

v. **Appeal No. 2009AP2021**

VILLAGE OF EAST TROY,

Defendant-Respondent.

PLAINTIFF-APPELLANT-PETITIONER'S REPLY BRIEF

APPEAL OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, DATED AUGUST 25, 2010, AFFIRMING A JUDGMENT OF THE WALWORTH COUNTY CIRCUIT COURT ENTERED ON MAY 7, 2009, THE HONORABLE ROBERT J. KENNEDY, PRESIDING, IN WALWORTH COUNTY CASE NO. 08-CV-915

Dean P. Laing
State Bar No. 1000032
O'Neil, Cannon, Hollman, DeJong & Laing S.C.
111 East Wisconsin Avenue, Suite 1400
Milwaukee, Wisconsin 53202-4870
(414) 276-5000
Attorneys for Plaintiff-Appellant-Petitioner

January 6, 2011

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INTRODUCTION

Had the DNR been of the view in 2005, as it is now, that it has the authority to analyze Public Trust Doctrine concerns in connection with its review of applications for high capacity wells with capacities of less than 2 million gpd, this litigation would not exist. The DNR would have reviewed the information it had in its possession -- which report, affidavit, letter and e-mail all unanimously conclude that Well No. 7 will harm Lake Beulah -- and presumably would not have issued a permit to the Village for that well. But because the DNR's position at the time was that it had no authority to analyze such concerns -- a position it has since abandoned and the Court of Appeals has held is legally incorrect -- the Lake District enacted Ordinance No. 2006-03 and this litigation has taken on a life of its own.

In Appeal No. 2008AP3170, the Village argues that the DNR's current position and the Court of Appeals' decision are legally incorrect, since the DNR does not have the authority to analyze Public Trust Doctrine concerns in connection with its review of applications for high capacity wells with capacities of less than 2 million gpd. In Appeal No. 2009AP2021, the Village argues that despite the fact that the DNR has

no such authority, the Lake District is not entitled to regulate that matter because any such regulation (1) would be in conflict with and thus be preempted by the DNR's authority, which the Village argues is nonexistent, and (2) is an impermissible extraterritorial exercise of authority. The Village is wrong on both counts.[1]

LEGAL ARGUMENT

I. THE LAKE DISTRICT HAD THE AUTHORITY TO ENACT ORDINANCE NO. 2006-03.

A. THE POWERS OF THE LAKE DISTRICT.

The Lake District has the powers of both a sanitary district and a lake district. Those powers include the following:

- "[T]he powers of a municipal corporation." Wis. Stat. §§ 33.22(3)(b)1., 60.77(2).[2]
- The power to "enact and enforce ordinances." Wis. Stat. §§ 33.22(3)(b)1., 60.77(5m).
- The power to perform "work in the lake or its

[1] The Village's argument that the Lake District enacted Ordinance 2006-03 "to prevent the Village . . . from utilizing a municipal well . . . that is needed to provide an adequate public water supply to its residents," *Village's Brief* at 3, is a mischaracterization of what this case is about. The Lake District enacted the ordinance not to hinder the Village's efforts to obtain an adequate public water supply for its residents; it enacted the ordinance in an attempt to carry out a program of lake protection so that Lake Beulah is not harmed by the ***means used*** by the Village to obtain that water supply. The Lake District's beef is not with Well No. 7, it is with the well's location.

[2] Section 281.01(6), Wis. Stats., expressly defines a "municipality" as including a "town sanitary district" and a "lake protection and rehabilitation district."

watershed." Wis. Stat. § 33.15(4).[3]

- The power to "do ***any*** other acts necessary to carry out a program of lake protection." Wis. Stat. § 33.22(1) (emphasis added).

These express grants of authority are extremely broad.

Accordingly, the Lake District has the express statutory authority to "enact ordinances" and to "do any acts necessary to carry out a program of lake protection."[4] That is precisely what the Lake District did

[3] The Village correctly points out that the Lake District first cited section 33.15(4), Wis. Stats., in its reply brief in the Court of Appeals, but then incorrectly argues that the Lake District has waived that "argument" by not raising it in the trial court. *Village's Brief* at 20-21. The Village misunderstands the rule of waiver, confusing new "arguments" with new "authority" or new "issues" in support of a previously raised argument. *See, e.g., State v. Weber*, 164 Wis. 2d 788, 789-90, 476 N.W.2d 867 (1981) ("Defendant confuses legal issues with legal arguments. We write to clarify that the issues before the court are the issues presented in the petition for review and not discrete arguments that may be made, pro or con, in the disposition of an issue either by counsel or by the court."); *State v. Holland Plastics Co.*, 111 Wis. 2d 497, 505, 331 N.W.2d 320 (1983) ("This is merely an additional argument on issues already raised by the defendants and the general rule against raising issues for the first time on appeal does not prevent the state from making its argument in this court."); *State v. Markwardt*, 2007 WI App 242, ¶ 33, 306 Wis. 2d 420, 438, 742 N.W.2d 546 ("The State's citation for the first time on appeal to *Davis* and *Ross* is not a new argument; it is simply citation to additional authority. Citation to additional authority and legal analysis on appeal does not constitute 'new argument' or advancement of a new theory on appeal.").

[4] The Village's argument that section 33.15(4), Wis. Stats., applies solely to authority of a lake district involving state aid projects misses the point of the Lake District's argument regarding that statute. That statute acknowledges that lake districts are permitted to perform "work in the lake or its watershed." As this Court has acknowledged, a lake's watershed generally "extends well beyond the established boundary of the Lake District." *Donaldson v. Board of Comm'rs of Rock-Koshkonong Lake Dist.*, 2004 WI 67, ¶ 10, 272 Wis. 2d 146, 156, 680 N.W.2d 762. Accordingly, the fact that this statute applies to state aid projects is irrelevant. What is relevant is that the statute demonstrates that the legislature specifically intended that a lake district have the power to perform work in its watershed which, by definition, includes areas located both inside and outside of the lake district's geographical boundaries.

when it enacted Ordinance No. 2006-03 -- an ordinance designed to protect Lake Beulah. As the ordinance states:

> **WHEREAS**, the District finds it necessary to protect the entire local water resource, both groundwater and surface water, both water quality and water quantity, to achieve its purposes of protecting and rehabilitating Lake Beulah and promoting the public health, comfort, convenience, and welfare of the District; and
>
> . . .
>
> **WHEREAS**, the District finds that it is harmful to Lake Beulah and contrary to the purposes of the District to allow the surface or groundwater within the Lake Beulah drainage basin or groundwater basin to be despoiled, depleted or diverted or transferred out of said regions. . . .

Because Ordinance No. 2006-03 was enacted pursuant to express statutory grants of authority, it carries a presumption of validity:

> When a municipal body enacts regulations pursuant to authority expressly granted, all presumptions are in favor of its validity and any person attacking the ordinance must make the fact of its invalidity clearly appear. The function of a reviewing court is solely for the purpose of determining whether legislative action under the power delegated to the municipality passed the boundaries of its limitations or exceeded the boundaries of reason. The delegation to the municipality of this power by the legislature implies a field of legislative discretion within which its acts are not subject to judicial review. It is only when the bounds of that field are clearly exceeded that courts will deny validity to the ordinance.

Town of Yorkville v. Fonk, 3 Wis. 2d 371, 375, 88 N.W.2d 319 (1958). *See also Dyer v. City Council of City of Beloit*, 250 Wis. 613, 616, 27 N.W.2d 733 (1947) ("Courts will not interfere with the exercise of police power by

a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations.").

B. THE AUTHORITY OF THE LAKE DISTRICT TO REGULATE EXTRATERRITORIAL ACTIVITIES.

The Village argues that a lake district, like a municipality, has no extraterritorial powers, unless expressly granted by statute, and therefore cannot regulate conduct occurring outside its geographical boundaries, even when necessary to protect the health or property of its citizens. Not true. "Court[s] recognized long ago that municipalities may exercise certain extraterritorial powers when the possession and exercise of such powers are essential to the proper conduct of the affairs of the municipality." *Amaral v. Cintas Corp. No. 2*, 78 Cal. Rptr. 3d 572, 585 (Ct. App. 2008) (citations omitted). Thus, case law "establish[es] a narrow exception to the general rule against extraterritorial powers when the possession and exercise of such powers are essential to the proper conduct of the affairs of the municipality." *Great W. Shows, Inc. v. Los Angeles Cnty.*, 229 F.3d 1258, 1264 (9th Cir. 2000).

As one court explained:

> [M]unicipalities may exercise certain extraterritorial powers when the possession and exercise of such powers are essential to the proper conduct of the affairs of the municipality. As, for example, this court has held that a municipality has power to construct and maintain a system of waterworks outside of its boundaries for the supply of its inhabitants with water, and that it might even go to the extent of supplying water to persons living without the limits of such municipality. ***So, also, it has been held that a city, in order to protect the health and property of its citizens from the effects of overflowing of a stream passing through such city, might go beyond the corporate limits and construct a ditch for the diversion of such overflow waters***. . . .

Ex parte Blois, 176 P. 449, 451 (Cal. 1918) (emphasis added) (citations omitted).

This is precisely what the Lake District has done here, although with opposite effect. In the example cited in *Blois*, the municipality went outside its geographical boundaries to construct a ditch to divert the flow of surface water away from its boundaries. Here, the Lake District enacted an ordinance to prevent activity outside its geographical boundaries which would direct the flow of groundwater away from its boundaries. Both conduct is extraterritorial; one is intended to ***stop*** water flow from going into its geographical boundaries, while the other is intended to ***allow*** water flow into its geographical boundaries.

Lake Beulah obtains its water supply from two sources: (1) water that falls naturally to the land surface which flows by gravity to a

point where it enters into Lake Beulah, and (2) groundwater that flows into Lake Beulah. If the Village, or anyone else, prevents the natural flow of groundwater into Lake Beulah, Lake Beulah will be harmed. Protecting that harm is precisely why lake districts were created.

If a municipality is unable to regulate conduct occurring outside its geographical boundaries, when that conduct causes harm within its geographical boundaries, the result would lead to regulatory loopholes. As pointed out in the Lake District's initial brief, if a municipality has a "no deer hunting" ordinance, would anyone seriously argue that a person can stand just outside the geographical boundaries of the municipality and fire shots at a deer located inside the municipality's geographical boundaries? Of course not, which is why the case law provides that municipalities may exercise extraterritorial powers when the exercise of such powers are essential to the proper conduct of the affairs of the municipality. Not surprisingly, the Village has not responded to this argument.[5]

[5] The Lake District notes that the Village had an additional 1,864 words to use in its brief (its brief is 9,136 words), but chose not to use them to respond to the scenarios set forth on pages 25-26 of the Lake District's initial brief. Obviously, it has no response.

II. THE ORDINANCE DOES NOT CONFLICT WITH THE DNR'S AUTHORITY IF, AS THE VILLAGE ARGUES, IT HAS NO AUTHORITY.

The Village, in Appeal No. 2008AP3170, argues that the DNR has no authority to analyze Public Trust Doctrine concerns in connection with its review of applications for high capacity wells with capacities of less than 2 million gpd. Yet in this case, the Village argues that the Lake District's ordinance conflicts with the DNR's authority to regulate high capacity wells. The Village cannot have it both ways. Either the DNR has such authority, or it does not. If it has such authority, there is a conflict. If it does not have such authority, there is no conflict. For a "conflict" to be created, two things must be incompatible, or in opposition.

As this Court has held:

> As a general rule, additional regulation to that of the state law does not constitute a conflict therewith. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescriptions.

Fox v. City of Racine, 225 Wis. 542, 546, 275 N.W. 513 (1937) (citation omitted).

If the Village is correct in its legal position that the DNR does not have the authority to analyze Public Trust Doctrine concerns in the

permitting process for high capacity wells with capacities of less than 2 million gpd, then the Lake District's ordinance, which does just that, is merely additional (but not conflicting) regulation to that granted to the DNR. It bears repeating once again that under the Village's position, the DNR is duty-bound to issue a permit for a high capacity well with a capacity of less than 2 million gpd even if it is an absolute certainty, acknowledged by everyone, that the well will destroy one of this State's lakes, yet neither the Lake District, nor anyone else, has the authority to regulate that issue on the front end. The Village's only response to this argument is that, if a high capacity well destroys a lake, the DNR and the private citizens affected thereby have remedies through enforcement proceedings or nuisance suits. But by then the damage has already been done, and any such remedies are clearly "too little, too late."

To be clear, the Lake District does not agree with the Village's argument that the DNR does not have the authority to analyze Public Trust Doctrine concerns in connection with the permitting process for high capacity wells with capacities of less than 2 million gpd. The Lake District believes that the Court of Appeals was legally correct when it held that the DNR not only has that authority, but has the duty to analyze those

concerns. But if this Court agrees with the Village's arguments in Appeal No. 2008AP3170, then there can be no conflict with the Lake District's ordinance.

CONCLUSION

A lake district has the express statutory power to enact ordinances to protect the lakes located within its geographical boundaries. The only way it can exercise that authority, and comply with its legal duty, is if it can regulate activity occurring inside, as well as outside, of its geographical boundaries, if that activity will harm a lake located within its geographical boundaries. Without such ability, a lake district's mandate to protect the lakes located within its geographical boundaries would be hollow. That just makes common sense, which is why case law provides that extraterritorial powers are permitted when necessary to protect property, here a lake, located within a municipality, here a lake district.

Additionally, the Lake District's ordinance is not preempted by powers granted to the DNR, because the DNR has no power to analyze Public Trust Doctrine concerns in the permitting process for a high capacity well with capacity of less than 2 million gpd, according to the Village (to which the Lake District totally disagrees), so no conflict exists.

Accordingly, if this Court reverses the Court of Appeals' decision in Appeal No. 2008AP3170, it should likewise reverse the Court of Appeals' decision in this case.

Dated this 6th day of January, 2011.

O'NEIL, CANNON, HOLLMAN, DEJONG & LAING S.C.
Attorneys for Plaintiff-Appellant-Petitioner

By: _____
Dean P. Laing
State Bar No. 1000032

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8)(b), (c)

I hereby certify that this reply brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this reply brief is 2,998 words.

Dated this 6th day of January, 2011.

Dean P. Laing
State Bar No. 1000032

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this reply brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that this electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date. A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

Dated this 6th day of January, 2011.

Dean P. Laing
State Bar No. 1000032