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CLERK OF WISCONSIN
SUPREME COURT

IN THE SUPREME COURT OF WISCONSIN
No. 2018AP59

CLEAN WISCONSIN, INC. and
PLEASANT LAKE MANAGEMENT
DISTRICT,

Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent-Appellant,

Circuit Court Case No.

2016CV002817, 2016CV002818,
2016CV002819, 2016CV002820,
2016CV002821, 2016CV002822,
2016CV002823, 2016CV002824

WISCONSIN MANUFACTURERS & COMMERCE,
DAIRY BUSINESS ASSOCIATION, MIDWEST FOOD
PROCESSORS ASSOCIATION, WISCONSIN POTATO &
VEGETABLE GROWERS ASSOCIATION, WISCONSIN
CHEESE MAKERS ASSOCIATION, WISCONSIN
FARM BUREAU FEDERATION, WISCONSIN PAPER
COUNCIL and WISCONSIN CORN GROWERS ASSOCIATION,
Intervenors-Co-Appellant,

WISCONSIN LEGISLATURE,
Intervenor.

On Certification from the Court of Appeals, District II, On appeal from
Dane County Circuit Court, Honorable Valerie L. Bailey-Rihn, Presiding

CENTRAL SANDS WATER ACTION COALITION
***AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS**

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INTRODUCTION

It is well established that the legislature delegated the State's constitutional duties under the Public Trust Doctrine to the Wisconsin Department of Natural Resources ("DNR") to protect navigable surface waters for this and future generations. *Lake Beulah Mgmt. Dist. v. State*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73; Wis. Const. art. IX, § 1. That delegation includes the authority and duty to consider and protect Public Trust resources in DNR's regulatory decisions, including approvals for high capacity wells. *Lake Beulah*, 2011 WI 54, ¶3. This appeal asks this Court to consider whether the legislature has revoked DNR's constitutional and statutory authority to consider and protect Public Trust resources when issuing high capacity well approvals. Specifically, the question presented is whether to affirm the Dane County Circuit Court's holding that Wis. Stat. §§ 227.10(2m) and 281.34(5m) do not abrogate DNR's authority and duty to restrict, condition, or

deny a high capacity well approval when DNR has evidence that the well will harm Public Trust waters.

STATEMENT OF INTEREST

The Central Sands Water Action Coalition (“CSWAC”) comprises 64 groups in Central Wisconsin working to protect surface and groundwater in the state’s unique Central Sands region. CSWAC advocates for fair use of water resources among diverse interests in the region. CSWAC also works to reinforce the indisputable facts that: (1) groundwater supply in the Central Sands is limited; and (2) surface and groundwater are connected, such that quantity and quality impacts upon each affect the other. CSWAC believes that smart, science-driven decision-making can guarantee safe and sufficient water for all users.

A restrictive interpretation of DNR’s authority and duty to protect Public Trust waters from impacts of high capacity wells threatens the interests of CSWAC’s members. Members rely on healthy lakes and streams to swim, fish, boat, and enjoy natural scenic beauty. Many own

property or businesses on lakes or rivers in the Central Sands. A failure to protect these surface waters threatens members' property values and riparian rights. Members also rely on groundwater for drinking and other potable uses. CSWAC writes as an *amicus curiae* due to the Coalition's specific interest in protecting Public Trust waters as a crucial resource for tourism, the economy, and diverse livelihoods in the Central Sands.

ARGUMENT

I. Groundwater overuse by the proliferation of high capacity wells leads to surface water declines and harms CSWAC's members.

CSWAC advocates for sustainable groundwater policies in the Central Sands region. The coalition formed due to the proliferation of high capacity wells and groundwater use in the Central Sands, and the resulting impact to lakes, streams, and wetlands. CSWAC believes DNR must play a lead role in managing groundwater use in Wisconsin. To do so, DNR must evaluate the success of its

management strategies and adapt accordingly to preserve Public Trust waters.

In the Central Sands, “the number of high capacity wells and reduced water levels in some areas has caused concerns about the potential impacts of groundwater withdrawals on water resources.”¹ A 2017 “state of the science” report on groundwater quantity in the Central Sands found that nothing other than high capacity well pumping could be causing observed drawdowns in surface and groundwater levels.² The report explains that “[g]roundwater and surface water are well connected and should be thought of as a single resource,” and “[g]roundwater controls lake levels.”³ “The additive effects of many wells can significantly impact lakes and streams.”⁴

¹ Wisconsin Groundwater Coordinating Council, Report to the Legislature Fiscal Year 2020, at 168 (Aug. 31, 2020), <https://dnr.wi.gov/topic/groundwater/documents/GCC/Report/FullReport.pdf>.

² Wisconsin Food, Land, and Water Groundwater Quantity Workgroup, Groundwater Quantity Fundamentals in Wisconsin’s central sands region (Mar. 13, 2017), https://wisconsinlandwater.org/files/pdf/Report_Central_Sands_Hydrogeology_key_points-final_version_3_13_17.pdf.

³ *Id.* at 2.

⁴ *Id.* at 3.

The report also addresses long-term trends in groundwater levels (referring to 70 years of data) that show “declines in water levels near areas of multiple irrigation wells.”⁵ The report discussed other possible causes of “stressed groundwater and surface water conditions in the central sands” and explained that “[n]o mechanism other than groundwater pumping has been shown to align well with the locations, magnitude, and timing of observed changes in groundwater levels and surface-water flows.”⁶

Within public comments on DNR’s 2014 strategic analysis of water use issues in the Central Sands,⁷ Wisconsin residents raised concerns that represent those of many CSWAC members. Commenters noted:

Many bodies of water, such as lakes and streams, are the main source of attraction to purchase homes and attract tourists to the area. If these lakes and streams dry up or become contaminated, tourism and real estate values will decrease. This will cause a domino effect; businesses will leave the area, causing job loss,

⁵ *Id.* at 4.

⁶ *Id.* at 6.

⁷ Wisconsin Department of Natural Resources, *Central Sands Strategic Analysis*, Nov. 23, 2015, <http://dnr.wi.gov/topic/eia/cssa.html> [<https://web.archive.org/web/20170801145833/http://dnr.wi.gov/topic/eia/cssa.html>].

causing loss of residency, causing loss of tax dollars, causing new businesses to seek other areas to put up shop, and eventually will have a detrimental impact on the entire Central Sands area if the cumulative effect of high capacity wells is not studied.

...

We have owned property on Lake Camelot, Town of Rome, since 1988, and over the years, we have seen a drastic decline in the quality and quantity of lake water. Understandably, agriculture is important to our economy, but the increase in water use for irrigation and cranberry bogs is severely limiting the amount and quality of water flowing into Lakes Camelot, Sherwood and Arrowhead...The lakes get so low and full of algae by mid-July that they are nearly unusable.

...

I own a home on Huron Lake...Since 1999, we have experienced a steady decline in the water level on our lake. We are currently down approximately 10 vertical feet of depth since 1999. Paralleling the decline has been a dramatic increase in the number of Hi-Cap wells in the immediate vicinity of the lake. Without some relief, our ability to use the lake for recreational and aesthetic purposes will continue to diminish. Further, our property value is negatively impacted due to the loss of water and uncertainty as to the future condition of the lake.⁸

CSWAC informally surveyed their collective personal impacts from agricultural high capacity wells when preparing to participate as an *amicus* in this case. One CSWAC partner and fourth-generation farmer in Adams County had at one time 75 high capacity wells operating

⁸ Wisconsin Department of Natural Resources, *Central Sands Strategic Analysis: Public scoping comments received between January 22 and February 28, 2014* (Exhibit A).

within four miles of his farm. This lowered water levels in his private drinking well, necessitating a new 75-foot-deep well at a personal cost of \$8,000.

A CSWAC member and lakefront property owner in Waushara County purchased his property based on its access to a trophy bass lake. Long Lake became completely dry, including during years with above-average precipitation. The lake now only has water given the rainfall dramatically above the long-term average (see Chart and discussion, *infra* at 9). This member tried to work, through the Long Lake District, with DNR and agricultural high capacity well users to improve lake levels, with no meaningful results. Failed efforts at cooperation leave CSWAC compelled to shoulder burdens of litigation and other costly potential remedies to protect Public Trust waters.

Water level data from the United States Geological Survey confirms dramatic declines in lake levels during

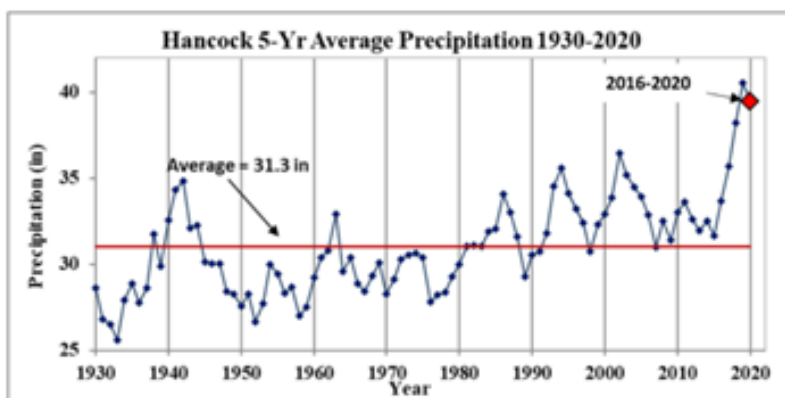
years when irrigation increases.⁹ For example, Huron Lake in Waushara County, the county with the third largest groundwater withdrawals in the state, experienced a three-foot water level decline during the growing season in 2012 when groundwater withdrawals by high capacity wells increased by 68%.¹⁰

Many severely pumping-impacted lakes and streams in the Central Sands are currently at healthy levels. It is well known that two factors control water levels and streamflows in the Central Sands, precipitation amounts, which cause levels and flows to fluctuate with wet and dry years, and groundwater pumping, which lowers the usual highs and lows. The last several years have seen record precipitation

⁹ It is worth noting that while irrigation water provides some groundwater recharge when applied to a field, in the Central Sands, averaged over the irrigated region, between 70-90% of the applied irrigation is lost from the area because it evaporates or is taken up by the crop. See *Groundwater Quantity Fundamentals*, *supra* n.2, at 3.

¹⁰ Wisconsin Department of Natural Resources, *Wisconsin Water Use: 2012 Expanded Withdrawal Summary* (Exhibit B); USGS, National Water Information System: Web Interface, USGS 05401063 Lake Huron Near Plainfield, WI (last visited Mar. 17, 2020), https://waterdata.usgs.gov/nwis/dv?cb_00065=on&format=gif_default&site_no=05401063&referred_module=sw&period=&begin_date=2012-01-01&end_date=2016-08-17.

amounts, which depress irrigation pumping and increase groundwater recharge. No wonder pumping impacts are masked. But unless precipitation remains above average forever, a return to low lakes and streamflows is inevitable. It is noteworthy that, after a historic peak wet period in the 1940s, multi-year precipitation amounts were low for the succeeding three decades.



The loss of our lakes and streams has economic impacts for individuals, businesses, and local governments in the Central Sands. A study by the UW-Extension Waushara County office found that property values along six lakes in the Town of Oasis dropped by 4.3% between

2004 and 2009.¹¹ That contrasts sharply with the 11.6% increase in property values elsewhere in Oasis during that same period.¹² When lakefront property values decline, property owners and local governments lose money. For example, property values on Long Lake in Oasis went down by a total of \$1,678,472.50 in 2007 after lake levels dropped between 2006 and 2007. As a result, the local tax district lost \$28,152.45 in revenue. The local tax district lost a total of \$225,219.60 in revenue from 2007 through 2015.¹³

II. DNR's approval of the high capacity wells at issue conflicts with established law and violates its duties under the Public Trust Doctrine.

Wisconsin maintains a long tradition of protecting water resources guaranteed to all people by the Public Trust Doctrine enshrined in our constitution. *See Lake Beulah,*

¹¹ Lee Bergquist, *War over water in the land of plenty: crops clash with lakes and streams in central Wisconsin*, Journal Sentinel (Sept. 3, 2016), <http://www.jsonline.com/story/news/local/wisconsin/2016/09/03/war-over-water-land-plenty/89481060/> (Exhibit C).

¹² Exhibit C.

¹³ Values determined based on county assessment rolls for Oasis.

2011 WI 54. As the Wisconsin Supreme Court explained over 100 years ago:

The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits. Navigable waters are public waters, and as such they should inure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing[.]

Diana Shooting Club v. Husting, 156 Wis. 261, 271, 145 N.W. 816 (1914). “The state’s responsibility in the area has long been acknowledged.” *Lake Beulah*, 2011 WI 54, ¶32 (quoting *Wis. ’s Env’tl. Decade v. DNR*, 85 Wis. 2d 518, 526, 271 N.W.2d 69 (1978) (internal citations omitted)).

Consistent with DNR’s role as our state environmental agency, the legislature delegated much of its Public Trust authority and duty to DNR.

While it is primarily the State’s duty to protect and preserve these resources...“the legislature has delegated substantial authority over water management matters to the DNR. The duties of the DNR are comprehensive, and its role in protecting state waters is clearly dominant.”

Id. ¶33 (quoting *Wis. 's Envtl. Decade*, 85 Wis. 2d at 527).

The statutory chapter governing DNR's high capacity well program begins by directing DNR "to protect, maintain and improve the quality and management of the waters of the state[.]" Wis. Stat. § 281.11. The legislature further grants DNR "general supervision and control over the waters of the state." Wis. Stat. § 281.12(1). In a unanimous decision, the Wisconsin Supreme Court explained the role of DNR in the state's protection of Public Trust resources in the context of DNR's administration of high capacity wells.

[T]hrough Wis. Stat. § 281.11 and § 281.12, the legislature has delegated the State's public trust duties to the DNR in the context of its regulation of high capacity wells and their potential effect on navigable waters[.]

Lake Beulah, 2011 WI 54, ¶34. Based on the statutory scheme governing high capacity wells along with Public Trust precedent, the Wisconsin Supreme Court concluded:

[T]hrough Wis. Stat. ch. 281,...for all proposed high capacity wells, the legislature has expressly granted the DNR the authority and a general duty to review all permit applications and to decide whether to issue the permit, to issue the permit with conditions, or to deny the application. The high capacity well permitting framework along with the DNR's authority and general duty to preserve waters of the state provides

the DNR with the discretion to undertake the review it deems necessary for all proposed high capacity wells, including the authority and a general duty to consider the environmental impact of a proposed high capacity well on waters of the state.

Id. ¶39 (internal footnotes and citations omitted). In addition, the Supreme Court held in *Lake Beulah* that “the legislature has explicitly provided the DNR with the broad authority and a general duty...to manage, protect, and maintain waters of the state.” *Id.*

This holding refutes the Legislative-Intervenor and WMC’s argument that DNR lacks the authority to consider individual and cumulative impacts of existing high capacity wells and groundwater use when deciding whether to issue a high capacity well approval. The Legislative-Intervenor and WMC’s position also conflicts with an administrative decision that DNR adopted as its own final decision following a contested case hearing. *In the Matter of a Conditional High Capacity Well Approval for Two Potable Wells to be Located in the Town of Richfield, Adams County Issued to Milk Source Holdings, LLC*, Case Nos. IH-12-03, *et al.* (September 3, 2014) (“*Richfield Dairy*”).

In *Richfield Dairy*, the ALJ concluded that when DNR is considering an application for a high capacity well, it “must consider cumulative impacts to prevent ‘potential harm to waters of the state’” pursuant to its obligations under Chapter 281 and DNR’s Public Trust duties. *Richfield Dairy* at 3. DNR did not petition for judicial review, thus adopting the ALJ decision as its final decision. Wis. Admin. Code § NR 2.155(1). DNR then began including cumulative impacts in its review of high capacity well applications to determine whether proposed wells would impact Public Trust resources.

The *Lake Beulah* decision was based on the Public Trust Doctrine and the legislature’s delegation of authority and duty to the DNR in Chapter 281. Legislative-Intervenor and WMC improperly dismiss Section 281.11 as merely a policy statement. Legis. Br. 31-32; WMC Br. 26. They attempt to dismiss this explicit statutory language by relying on another statutory provision in 2011 Wis. Act 21, Section 227.11(2)(a). Legis. Br. 32-33; WMC Br. 26. This reliance

is misplaced. Section 227.11(2)(a) provides only that agencies cannot derive rulemaking authority from general policy statements in statutes unless those statements expressly provide rulemaking authority, not that policy statements cannot grant the explicit authority required by Section 227.10(2m) to include conditions in permits. Further, the Legislative-Intervenor and WMC's attempt to characterize "explicit" and "general" as opposite and mutually exclusive is incorrect, as the antonym of "explicit" is in fact "implicit" or "implied." *Merriam-Webster* (last visited Mar. 12, 2021), <https://www.merriam-webster.com/thesaurus/explicit>. A general statement can explicitly grant authority.

The State's "active"¹⁴ constitutional duty—delegated to DNR—to protect Public Trust waters cannot be abrogated, despite the Legislative-Intervenor and WMC's flawed reasoning. This constitutional duty is paramount and

¹⁴ *Just v. Marinette County*, 56 Wis. 2d 7, 18, 201 N.W.2d 761 (1972).

must be carried out. Statutory authority and Supreme Court precedent continue to delegate Public Trust responsibility to DNR, thus DNR must protect waters of the state from quality and quantity injury due to high capacity well pumping.

III. CSWAC faces uncertain and limited legal options if DNR issues high capacity well approvals that do not protect Public Trust resources.

The eight challenged high capacity well approvals stand for more than eight defective pumping permits. Should this Court uphold those permits as issued, our State shifts toward dangerous uncertainty as to whether any agency is charged with protecting Public Trust waters. This result would have serious impacts on CSWAC members including individuals, lake districts, and property owner associations.

Lake districts such as Pleasant Lake Management District have authority to levy taxes in order to protect and improve water quality and quantity in their lakes. To

manage their budget and plan for the future, lake districts and other local units of government must know which regulatory powers the State will exercise, and which authorities remain at the local level. Abrupt changes in agency policy inconsistent with existing law and that reduce state-level protection of Public Trust waters shift a significant burden to lake districts, municipalities, local groups, and citizens to protect sensitive water resources such as exist in the Central Sands. Most significantly for CSWAC's members and member organizations, uncertainty of how and whether water resources are protected from depletion will have a chilling impact on investment in new or improved waterfront property.

Removing state-level permitting meant to protect Public Trust waters from the impacts of high capacity wells also endangers public health and defies logic. With insufficiently protective state permits, remedies remaining include local regulation and piecemeal legal actions, including nuisance actions between conflicting water users.

Individual legal action, particularly any nuisance actions against agricultural high capacity well users, will face legal hurdles such as Wisconsin's Right to Farm Law. *See* Wis. Stat. § 823.08(1). Neighbor-versus-neighbor legal actions stemming from unchecked high capacity well use would be an inefficient use of judicial resources and an inequitable assumption that citizens must step up to replace DNR to protect Wisconsin's water resources.

CONCLUSION

For each of the reasons stated herein, CSWAC requests that this Court affirm the Circuit Court's Order.

Dated this 19th day of March, 2021.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,981 words.

Dated: March 19, 2021.

Andrea Gelatt

**CERTIFICATE OF COMPLIANCE WITH WIS.
STAT. § (RULE) 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § (Rule) 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: March 19, 2021.

Andrea Gelatt

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, as a part of this brief, is a supplemental appendix that complies with § 809.19(2)(a).

I further certify that no portion of the record is required by law to be confidential.

Dated: March 19, 2021.

Andrea Gelatt