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The Continued Saga of High Capacity Well Regulation in Wisconsin

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The long, winding road of high capacity well regulation in Wisconsin took another unexpected left turn when Attorney General Joshua L. Kaul issued DNR Secretary Preston Cole a letter on May 1, 2020. The letter formally withdrew an Attorney General Opinion issued by Kaul's predecessor in 2016, throwing Wisconsin's high capacity well permit program back to a state of uncertainty while the regulated community awaits the Wisconsin Supreme Court's action on the matter.

The May 10, 2016 Attorney General Opinion (OAG-01-16) was authored by former Attorney General Brad Schimel in response to a request from The Hon. Robin Vos, Chair of the Assembly Committee on Organization. Voss sought the Attorney General's opinion concerning the application of Section 227.10(2m) Wis. Stats. -- enacted by 2011 Wisconsin Act 21 (Act 21)-- to the issuance of high capacity well permits by the Wisconsin Department of Natural Resources (WDNR). The request asked the Attorney General to opine on whether WDNR had the authority to consider "cumulative impacts" from a proposed high capacity well, coupled with existing wells, as WDNR processed well applications.

The request stemmed from a conflict between the implied duties of environmental protection articulated in a 2011 decision of the Wisconsin Supreme Court in the case *Lake Beulah Management District v. DNR*, 2011 WI 54 and a legislative enactment adopted just prior to issuance of that decision. During the pendency of that case and after the matter had been fully briefed and argued before the Court, the Wisconsin Legislature adopted administrative reforms in Act 21 which removed implied authority to regulate and instead required that administrative agencies must derive authority explicitly from a legislative requirement or grant of authority.

Act 21 states in relevant part:

"No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of

any license issued by the agency, unless that standard, requirement or threshold is explicitly required or explicitly permitted by statute or by a rule that has promulgated in accordance with this subchapter…"

The Lake Beulah Court held that the WDNR has a general duty to consider whether a proposed well may harm waters of the State and in the course of exercising that duty, the WDNR must consider the environmental impact of a high capacity well when presented with "sufficient, concrete, scientific evidence of potential harm to waters of the State." The Court indicated that the WDNR should discharge this duty by relying both on its expertise in water resource management and it's "discretion to determine whether its duty as a trustee of public trust resources" is implicated by a proposed well. The Court further concluded that what evidence and under what circumstances the duty is triggered is a "highly fact specific matter that depends on the information submitted by the well owner in the well permit application and any other information submitted to the WDNR decision makers while they are reviewing that application."

The 2016 Attorney General's Opinion concluded that the enactment of Act 21 specifically constitutes a legislative restriction on implied agency powers and therefore restricts WDNR's ability in processing a high capacity well permit to the processes explicitly provided for in Section 281.34, Wis. Stats. and Chapters 812 and 820 of the Wisconsin Administrative Code. Those provisions define the limits of WDNR's authority to consider other environmental impacts in processing such well applications.

In withdrawing the 2016 opinion, the Attorney General cited a Dane County Circuit Court decision (*Clean Wis., Inc. v. DNR,* No. 16-CV-2817) --which is now pending before the Wisconsin Supreme Court and presents the very issue that was addressed in the 2016 AG Opinion-- and what the Attorney General concludes the Wisconsin Court of Appeals "strongly implied" in upon its certification of the question to the Wisconsin Supreme Court. See, *Clean Wisconsin, Inc. v. DNR*, 2018 AP 59. The Attorney General's letter makes no mention of an Outagamie County Circuit Court decision which agreed with the withdrawn AG opinion. *See, New Chester Dairy v. DNR,* No. 14-CV-1055. Additionally, the Attorney General's May 1st letter rescinding OAG-01-16 has been criticized as running counter to a prior Attorney General's opinion (and long-standing policy of the office) whereby the AG restrains from offering an opinion on a question that is pending before the Wisconsin Supreme Court.

WDNR wasted little time reacting to the letter from AG Kaul. WDNR issued a news release in early June announcing it had revised its high capacity well application review process and would no longer follow the withdrawn AG Opinion which required it to limit its application review to the governing statutes and adopted regulations. Instead, the WDNR announced it would supplement that review by undertaking the environmental review it asserts is required by the outcome of the *Lake Beulah* Supreme Court decision, winding the clock back more than two years' time. Additionally, WDNR Secretary Cole was recently quoted as indicating that, in implementing this new old approach to processing high capacity well applications, WDNR planned to "pay very close attention" to the science and that the science has to be indisputable in terms of impacts to justify a permit denial or conditions. The regulated community will no doubt hope actions on permit applications follow that directive.

What's next? Well, as noted above the issue is presented in the *Clean Wis.* case pending before the Wisconsin Supreme Court for resolution. In the Court's recently decided case invalidating the Wisconsin Department of Health Services Secretary-Designee Andrea Palm's Emergency Order #28 attempting to extend the so-called "Safer at Home" orders, the Court wrote the following:

"In opposition to Palm's claims, the Legislature raised legislatively-imposed directives that courts are to follow when interpreting the scope of agency authority. To place this contention in context, the reader

should note that there is history underlying how courts have interpreted administrative agency powers. Formerly, court decisions permitted Wisconsin administrative agency powers to be implied. However, the Legislature concluded that this theory did not match reality. Therefore, under 2011 Wis. Act 21, the Legislature significantly altered our administrative law jurisprudence by imposing an "explicit authority requirement" on our interpretations of agency powers….The explicit authority requirement is, in effect, a legislatively-imposed canon of construction that requires us to narrowly construe imprecise delegations of power to administrative agencies." (citations omitted)….As Wis. Stat. § 227.10(2m) directs, unless a rule has been promulgated pursuant to ch. 227 or the DHS action is "explicitly required or explicitly permitted by statute" DHS has no power to implement or enforce its directives."

Additionally, another recently decided case from the Supreme Court also suggests that WDNR should properly proceed through rulemaking to enact its newly declared policy of statewide application. *See, Lamar Central Outdoor, LLC et al. v. State Div. of Hearings & Appeals, et al.* 2019 WI 109.

We have been active on this issue for our industrial, agricultural and food processor clients for more than a decade and will continue to keep you abreast of developments as we await the Wisconsin Supreme Court's action.

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