

Regulation of Groundwater

November 10, 2016

Presented by:
Carl A. Sinderbrand
Axley Brynelson, LLP

Legal Framework for Water Regulation in Wisconsin

Public Trust Doctrine

“ . . . the river Mississippi and the navigable waters leading into the Mississippi and the 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.”

Wisconsin Constitution, Article IX, Section 1.

Public Trust Doctrine (cont.)

“riparian owners on navigable streams have only a qualified title to the beds thereof, which title is entirely subordinated to, and not inconsistent with, the rights of the state to secure and preserve to the people the full enjoyment of navigation and the rights incident thereto.”

Diana Shooting Club v. Hasting, 156 Wis. 261, 145 N.W. 816 (1914).

Public Trust Doctrine (cont.)

“the state holds the navigable waters of this state in trust for the public, and that such trust extends to the uses of such waters for fishing, hunting, and other recreational purposes, as well as for pure navigation.”

Muench v. Public Service Commission, 261 Wis. 492, 55 N.W.2d 40 (1952).

Public Trust Doctrine (cont.)

“The active public trust duty of the state of Wisconsin in respect to navigable waters **requires the state no only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty. To further this duty, the legislature may delegate authority to local units of government, which the state did by requiring counties to pass shoreland zoning ordinances.”**

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

Groundwater Regulation

Groundwater Protection Policy

§ 281.11:

... 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

Groundwater Protection Authority

§ 281.12

(1) The department [of natural resources] 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....

Groundwater Withdrawals

§ 281.34: High-capacity wells

- **No approval required for wells less than 100,000 gpd capacity: notification required**
- **Approval required for wells with greater than 100,000 gpd capacity: limited required environmental review**

§ 281.35: Largest wells

- **Environmental review for wells with greater than 2,000,000 gpd water loss**

§ 281.343-.346: Great Lakes basin

High Capacity Wells

§ 281.34

- **General approval criteria**
 - Does not impair public water supply
 - Required annual pumping report
- **Environmental review for sensitive resources (subsec. 4)**
 - Groundwater protection area (<1200' from EWR, OWR, trout stream)
 - Water loss greater than 95% (bottling)
 - Significant impact on a spring (≥ 1 cfs)

High Capacity Wells (cont.)

§ 281.34(5): potential conditions after environmental review

- **Location**
- **Depth**
- **Pumping capacity**
- **Rate of flow**
- **Ultimate use**

Large Water Loss Wells

§ 281.35

- **Focuses on water loss, not capacity**
- **Detailed application requirement**
- **Grounds for approval focus on:**
 - **Environment and ecosystem of Great Lakes and Upper Mississippi River basins**
 - **Public rights in navigable waters**
 - **Public health, safety welfare and public interest**
 - **Water quality and quantity in state**
 - **Inter-basin transfer impacts**



Axley
Attorneys Since 1885

New ideas, old values, hard work. SM

Case Law



AXLEY BRYNELSON, LLP

Lake Beulah Mgmt. Dist. v. DNR **(2011)**

- **2003: Village applies for and obtains high capacity well approval**
 - >100,000 gpd capacity
 - <2,000,000 gpd water loss
- **Challenge by lake management district, alleging surface water impact**
- **Village withholds construction pending lawsuits**

Lake Beulah: Key Issue

Whether DNR has authority to consider surface water impacts when acting on high capacity well applications

Lake Beulah: S.Ct. Decision

“We conclude that, pursuant to Wis. Stat. § 281.11, § 281.12, § 281.34, § 281.35 (2005-06), along with the legislature’s delegation of the State’s public trust duties, the DNR has the authority and general duty to consider whether a proposed high capacity well may harm waters of the state....

We further hold that to comply with this general duty, the **DNR must consider the environmental impact of a proposed high capacity well when presented with sufficient concrete, scientific evidence of potential harm to waters of the state....”**

Richfield Dairy (2014)

“The Department of Natural Resources took an unreasonably limited view of its authority ... to reach the conclusion that it lacks the authority to consider cumulative impacts As numerous experts on all sides testified ..., to properly consider the concrete scientific evidence one has to consider the cumulative impacts of groundwater withdrawals upon surface waters and springs consistent with the DNR’s clear legal duty to “protect, maintain and improve the quality and management of the waters of the State, ground and surface, public and private.”

Recent Legislation

2011 Act 21: creates § 227.10(2m):

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 been promulgated in accordance with this subchapter

....

Recent Legislation

2013 Act 20: creates § 281.34(5m):

CONSIDERATION OF CUMULATIVE IMPACTS. No person may challenge an approval, or an application for approval, of a high capacity well based on the lack of consideration of the cumulative environmental impacts of that high capacity well together with existing wells.

Attorney General's Opinion (2016)

“I have determined that the Supreme Court did not address the newly enacted Act 21 in Lake Beulah I further conclude that neither Wis. Stat. ch. 281, nor the public trust doctrine give DNR authority to impose any condition not explicitly allowed in state statute or rule....”

Attorney General's Opinion (cont.)

“Finally, the Assembly asks whether Wisconsin’s high capacity well regulatory structure ... explicitly require or explicitly permit monitoring wells or cumulative impact analysis as conditions for high capacity well permits.

I conclude that there is no explicitly authority... For DNR to impose these specific conditions on high capacity wells.”

Neighboring States

Minnesota

Multi-Agency, integrated approach (Minn. Stat. ch. 103A)

- **Dep't of Health**
- **Dep't of Agriculture**
- **Pollution Control Agency**
- **Dep't of Natural Resources**
- **Environmental Quality Board**
- **Board of Water and Soil Resources**
- **Metropolitan Council**

Integrated policies on wetlands,, groundwater, soil and water conservation, etc.

Single water information system

Minnesota (cont.)

- **Water Planning and Implementation (Minn. Stat. ch. 103B)**
 - **BWSR has primary authority for water and soil management policy; EQB for statewide planning and coordination**
 - **Planning and implementation focused at local level: water management districts, metropolitan counties**
 - **Specific authority for county water plans that include groundwater plan components based on 14 defined groundwater systems**
 - **Funding**

Minnesota (cont.)

- **Groundwater Protection Act (Minn. Stat. ch. 103H)**
 - **Focuses on groundwater quality**
 - **Provides for groundwater mapping and monitoring**
 - **Implementation activities, e.g., pesticides management, fertilizer BMPs, wellhead protection, remediation**
 - **Identification and protection of sensitive areas**
 - **Funding**

Minnesota (cont.)

- **Groundwater Withdrawal (MN. Admin. Rules ch. 6115)**
 - Administered by MN DNR
 - Application requires hydrologic test data or studies on capability of aquifer and impact on water resources and nearby wells
 - Additional testing or analysis for agricultural wells
 - DNR must consider effects on environmental resources
 - Specific authority to limit withdrawal based on impacts to surface waters
 - Must be consistent with statewide and local water use plans and designations

Michigan

Michigan Compiled Laws § 324.32701

- **Protection of streams based on baseline capacity and % of flow reductions due to g-water withdrawals.**
 - **Separate protections for cold and warm water streams and rivers**
 - **Michigan Water Withdrawal Assessment Process and Internet Screening Tool (MWWAP)**
- **Lakes/ponds \geq 5 acres: protection based on qualitative impacts**

Michigan (cont.)

Michigan Compiled Laws § 324.32705

- **DEQ registration required for withdrawals > 100,000 gpd**
- **Ag wells may be registered with Dep't of Ag rather than DEQ**
- **MWWAP analysis required as part of registration.**
§ 324.32706b
 - **Withdrawals exceeding impact standards not permitted**

Michigan (cont.)

Michigan Compiled Laws § 324.32723

- **Water withdrawal permits required for:**
 - **Withdrawals > 2 million gpd**
 - **Withdrawals > 1 million gpd in certain zones**
 - **Intrabasin transfers > 100,000 gpd**
- **Substantial application requirements**
- **Approval criteria include (among others) no “cumulative adverse resource impacts”**

QUESTIONS AND ANSWERS

Carl A. Sinderbrand
Axley Brynelson, LLP
2 East Mifflin Street, Suite 200
Madison, Wisconsin 53703
(608) 260-2472
csinderbrand@axley.com