Friends of the Central Sands

May 30, 2016

Via Email
Corrected from earlier version – insert missing word

Cathy Stepp, Secretary
Wisconsin Department of Natural Resources
101 S. Webster St.
Madison, WI 53703
DNRSecretary@wisconsin.gov

Re: Attorney General Opinion Regarding High Capacity Wells; OAG-0-16

Dear Secretary Stepp:

I am the board president of Friends of the Central Sands, a group dedicated to education and outreach about environmental resources in Wisconsin's Central Sands area. As you may know, we have been a party in recent cases concerning high-capacity well permits issued by DNR, including the *Richfield Dairy* matter decided in September 2014. This case confirmed DNR's obligation to consider scientific evidence regarding cumulative effects of high-capacity wells on surface waters when deciding to permit additional wells.

We are highly alarmed and disappointed by the recent opinion of the Attorney General, which claims that Wis. Stat. § 227.10(2m) limits the DNR's authority to permit high-capacity wells based on criteria in Wis. Stat. § 281.34. We write now to make you aware of legal and factual deficiencies in the Attorney General opinion, and to urge your Department to reject the opinion in exercising its permitting authority.

The Attorney General opinion neglects established precedent in reaching its conclusions. For example, case law has long held that while some environmental standards are broad by necessity, that does not make them non-existent or insufficiently explicit. *Lake Beulah Management District v. DNR*, 2011 WI 54, ¶ 43 & n.34, 335 Wis. 2d 47, 799 Wis. 2d 73. "Wisconsin courts recognize that the DNR is expected to utilize its expertise and experience to apply the general statutory framework to each proposal." *Id.* (citing cases). Even proponents of Wis. Stat. § 227.10(2m) argued it was simply a codification of this existing law. *See* OAG-0-16, ¶ 7. Nothing in the new statute indicates any intent to create a sea change in "the reality of how the DNR exercises its authority and complies with its duty within the statutory standards." *Lake Beulah*, 2011 WI 54, ¶ 43.

From a scientific perspective, the Attorney General "presumed" that "the Legislature, as trustee of the waters of the state, carefully considered the instances in which high capacity wells might impact those waters, and gave DNR the explicit tools for managing that impact." OAG-0-16, ¶ 42. In other words, the Attorney General assumed that the Legislature has found that protections are needed only in the specific scenarios listed in Wis. Stat. § 281.34(4) and (5). There is no evidence to support this statement, and courts have not accepted such logic. To the contrary, *Lake Beulah* demonstrates an instance where water impacts the DNR must consider—pumping-induced changes to lake levels and chemistry—are not listed in Wis. Stat. § 281.34(4) and (5).

The *Richfield Dairy* case illustrates another. There, numerous experts explained that it is scientifically unsupported, and impossible as a practical matter, to manage natural resources if cumulative impacts are not considered.[1] If the DNR lacks authority to consider the cumulative impacts because that term is not used in Wis. Stat. §§ 281.34(4) and (5), DNR witnesses conceded there would be "a gap in public trust enforcement." Hr'g Trp., 12/18/13, at 2830:12-23. The Attorney General opinion does not address any of this evidence or the scientific and natural resource management implications of its conclusion.

The opinion is also silent as to who will protect water resources from the effects of high-capacity well pumping if the Department cannot implement this public trust doctrine duty. As a practical matter, we believe this will lead to more lawsuits as citizens try to fill this gap—adding less predictability and certainty to the permitting process. This result is bad for permit applicants, neighbors, and the Department. Further, if the Department's authority to regulate waters is no longer "comprehensive" as the Wisconsin Supreme Court assumed in *Lake Beulah Management District v. Village of East Troy*, 2011 WI 55, ¶¶ 12-19, municipalities and other governmental entities will move in to protect resources within their jurisdiction.

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[1] *E.g.*, Richfield Dairy Hr'g Trp., 6/24/13, at 17:10-20 (ALJ citing prefiled testimony of Drs. Ehlinger, Kraft, and White, and Mr. Marshall and Mr. Wade that scientific principles required a consideration of cumulative impacts of high capacity well applications); *see also* Hr'g Trp., 12/19/13, at 3620:24-3621:11 (Carpenter). DNR staff offered similar testimony under oath. Hr'g Trp. at 3416:9-13, 3429:7-10 (Bolha agreeing that "as a biologist, is it fair to say [he'd] like to look at all of the impacts affecting a stream when . . . assessing a potential new project, like a high capacity well" and that it "unfortunate" to be unable to consider cumulative impacts); *id.* at 3320:9-17 (Bartz: "it would be best to look at cumulative effects when it comes to almost any type of environmental impact"); 3296:21-3297:2; Hr'g Trp., 12/18/13, at 3355:5-15 (Bergman testifying that as an aquatic biologist, she would want to consider cumulative impacts and existing impacts when assessing any particular project, and that otherwise, "you're not simulating real world conditions"); Hr'g Trp. at 2964:5-15 (Greve agreeing that as a scientist and a hydrologist, it's important to consider whether cumulative impacts from a variety of wells are affecting a particular water body); Hr'g Trp., 6/26/13, at 804:4-11 (Provost affirming that if one does not consider the cumulative impacts that have already occurred, like the 40% modeled reduction in base flow for Carter Creek, then one cannot protect the resource when considering additional withdrawals).

Since *Lake Beulah* and *Richfield Dairy*, the Department has been making a commendable and good-faith effort to consider impacts to surface and groundwater resources when permitting new wells. However, if the Department implements this opinion as written, the drawdown of wetlands, trout streams, lakes, and other waters of the state will surely result. Water resources in many areas of the state are already stressed by existing wells, and permitting new wells with virtually no regard to their impacts will make this problem worse. The opinion requires DNR staff to overlook scientific evidence of damages to these resources when issuing permits, even though *Lake Beulah* explicitly rejected this "head in the sand" approach. Of course, if the DNR lacks authority to impose reasonable conditions on pumping amounts and other factors, as the Attorney General opinion suggests, it will be forced to issue more outright permit denials.

In short, we strongly urge the DNR to reject the Attorney General opinion, and to continue its existing approach to permitting high capacity wells.

Please let us know if you need any further information, and thank you for your attention to this important matter.

Sincerely,

Bob Clarke, Board President
Friends of the Central Sands

cc: Christa Westerberg, Attorney