

## **FIRM OBTAINS FAVORABLE DECISION FROM WISCONSIN COURT OF APPEALS**

On June 16, 2010 the Wisconsin Court of Appeals issued a significant decision in a case of first impression being handled by our firm. The case has a long history. In 2005, the Wisconsin Department of Natural Resources (the "DNR") issued a permit to the Village of East Troy (the "Village") authorizing the Village to construct and operate a high capacity well approximately 1,400 feet from the shores of Lake Beulah, an 834-acre lake located in Walworth County, Wisconsin, with the capacity to withdraw 1,400,000 gallons of groundwater per day ("gpd"). The Village requested approval to construct and operate the well purportedly to eliminate current deficiencies and supplement for future growth.

The Lake Beulah Management District (the "District"), which consists mostly of residents owning frontage on the lake, objected to the issuance of the permit, contending that the proposed well would negatively impact the waters of the lake. The District contended that the DNR has a duty under the Public Trust Doctrine to determine whether a high capacity well, regardless of capacity, will negatively impact the waters of the State before issuing a permit to construct and operate such a well, and the DNR made no such determination in connection with the Village's permit application. The Public Trust Doctrine is a long-standing legal doctrine which requires the State to steadfastly preserve the State's waters for fishing, hunting, recreation and scenic beauty.

In 2006 the District filed a lawsuit in the circuit court challenging the issuance of the permit. In the lawsuit, the Village argued that the DNR has no authority to consider whether a high capacity well, with withdrawal capacity of less than 2 million gpd, will negatively impact the waters of the State in considering an application for such a well, because sections 281.34 and 281.35, Wis. Stats., only grant the DNR that authority for wells with withdrawal capacities of more than 2 million gpd. The DNR took a contrary position, arguing that while it has the authority to consider that issue for wells with withdrawal capacities of less than 2 million gpd, it had no duty to do so with respect to the Village's permit application because no scientific evidence was presented to it indicating that the proposed well would negatively impact the waters of Lake Beulah. The District countered by arguing that not only did the DNR have the authority to consider whether the proposed well will negatively impact the waters of Lake Beulah, it had the duty to do so because the DNR had an affidavit of a licensed geologist, prior to issuing the permit, indicating that the well "would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah."

The Wisconsin Court of Appeals agreed with the District. Initially, the court rejected the Village's argument that the DNR has no authority to consider whether high capacity wells with withdrawal capacities of less than 2 million gpd will negatively impact the waters of the State before issuing a permit for construction and operation of such a well, holding 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.**" (emphasis added)

The Court of Appeals further held that the geologist's affidavit was "certainly" sufficient to warrant "further, independent investigation," and remanded the case to the DNR to reconsider the Village's permit application in light of that affidavit.

The Court of Appeals' 25-page decision, issued by a unanimous 3-judge panel, will have far reaching impact on municipalities requesting high capacity well permits from the DNR, as the DNR must now consider the Public Trust Doctrine in connection with every application for such a permit, regardless of the well's capacity, whenever there is information suggesting that the proposed well may negatively impact the waters of the State.

The District was represented by [Dean P. Laing](#) of our firm in this case. A copy of the Court of Appeals' decision can be found [here](#).