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July 18, 2006

HAND DELIVERED

Ms. Cornelia G. Clark, Clerk
Wisconsin Court of Appeals
110 East Main Street, #215
Madison, Wisconsin 53701-1688

Re: *Lake Beulah Management District, et al. v. State of Wisconsin Department of Natural Resources, et al.*
Appeal No. 2005AP002230
Appeal No. 2005AP002231
Walworth County Case No. 04-CV-683
Walworth County Case No. 04-CV-687

Dear Ms. Clark:

Enclosed for filing please find the original and four (4) copies of a Motion For Reconsideration Of June 28, 2006, Opinion and Order of Petitioner-Appellant Lake Beulah Lake Management District and Intervenor-Co-Appellant Lake Beulah Protective Improvement Association of the above-referenced matters. All counsel of record are being served with a copy of the same under cover of this letter.

Sincerely,

DEWITT ROSS & STEVENS S.C.

David V. Meany

DVM:lmi

Enclosures

cc: Paul Kent, Esq. (w/encl.)
Dennis Fisher, Esq. (w/encl.)
Judy Ohm, Esq. (w/encl.)

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Lake Beulah Management District,
Petitioner-Appellant,
and
Lake Beulah Protective and
Improvement Association,
Intervenor-Co-Appellant

vs.

Appeal No.: 2005AP002230
2005AP002231
Circuit Court Case No: 2004CV000683

State of Wisconsin Department of
Natural Resources,
and
Village of East Troy,
Respondents-Respondents.

**MOTION FOR RECONSIDERATION OF JUNE 28, 2006, OPINION AND
ORDER OF PETITIONER-APPELLANT LAKE BEULAH LAKE
MANAGEMENT DISTRICT AND INTERVENOR-CO-APPELLANT LAKE
BEULAH PROTECTIVE IMPROVEMENT ASSOCIATION**

On Appeal from A Final Order Entered
In the Circuit Court of Walworth County,
Honorable James L. Carlson

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INTRODUCTION

Appellants Lake Beulah Management District and Lake Beulah Protective and Improvement Association (“Appellants”) move the Court, pursuant to Wis. Stat. § 809.24, for reconsideration of the June 28, 2006, summary dismissal of this appeal (the “Order”). The Order erroneously concluded as a matter of fact and law that the Appellants’ appeal was moot because the DNR’s explicit *extension* of East Troy’s well permit was actually a new permit. The Court therefore did not reach the merits, which raise important issues under the Wisconsin Constitution and statutes, and relating to the DNR’s protection of navigable waters in this State.

This motion is based on simple premise. This appeal is not moot because DNR cannot subsequently assert that it issued a new permit when: 1) the permit holder requested an extension of its permit for two years, prior to its expiration; 2) there was no new permit application; 3) DNR granted an extension of the original permit for the requested two years; 4) the explicit extension period resulted in *no lapse of the initial permit*, and, 5) no new permit was ever issued. For the reasons set forth below, the Court should reconsider the Order, and decide this appeal on the merits.

ARGUMENT

THIS APPEAL IS NOT MOOT

I. The Court’s determination that the DNR issued a new permit conflicts with undisputed facts.

The Order is premised on the mistaken conclusion that the original permit expired on September 4, 2005, when construction had to begin. East Troy, the permit, holder, requested in an August 3, 2005, letter to the DNR a “modification of the existing permit

to extend the date for two years to allow the appeals to be completed” on August 3, 2005. East Troy R.App. 39. Moreover, East Troy’s counsel stated to the DNR that it had “the authority to modify a prior approval granted under Wis. Stat § 281.17(1) (2001) if the well cannot be installed in conformance with the original conditions. See, Wis. Stat. § 281.34(7). Here, the original date of construction cannot be met, and a modification is both necessary and appropriate. *It should not be necessary to request a new approval.*” East Troy R. App. 40, emphasis added. East Troy never filed an application for a new permit.

In a *letter* dated September 6, the DNR approved the requested extension of the original permit. “DNR approves the request for an extension of the original approval, for a period of two years. *Thus, the original approval is valid until September 4, 2007,* subject to the conditions listed in the original approval...” R. App. 41 (emphasis added).

Since the original approval was extended for two years from the expiration date of September 4, 2005, the original permit never expired as the Court mistakenly concluded. Simply put, an explicit two-year extension of a permit, with no gap in its effective period, cannot be later construed as the issuance of a new permit when a new permit was never sought or granted.

The Order mistakenly concluded this appeal was moot because it failed to recognize the timing of the permit extension granted by the DNR. Even though the extension was granted on September 6, 2005, it was clearly effective as of September 4, 2005, because it was granted for a period of two years from that date. Thus, there was no *gap* to support a mootness claim.

The Order cites language from the initial permit approval that actually undercuts its conclusion that the DNR issued a new permit. The initial approval provided that if construction “has not commenced within two years the approval shall become void and a new application must be made and approval obtained prior to commencing construction...” The DNR contemplated a new application if the permit became void, but there was no new permit application by East Troy. Thus, the Court cannot conclude that DNR issued or intended to issue a new permit.

II. The Order mistakenly permits the DNR to misrepresent the nature of an official action and precludes the consideration of important constitutional and statutory issues.

The Order does not address the Appellants’ reasonable reliance on the DNR’s September 6, 2005, stated extension of East Troy’s well permit, nor the practical result of the DNR’s actions. The Court’s Order unfortunately approves the DNR’s apparent “hide-the-ball” approach for permit extensions. Under these circumstances, DNR is estopped from claiming it issued a new permit. *See, Wis. Dept. of Revenue v. Moebius Printing Company*, 89 Wis. 2d 610, 639 (1979) (estoppel available as defense against the government if the conduct would work a serious injustice and public’s interest not unduly harmed).

Appellants reasonably relied on DNR’s statements in its September 6, 2005, letter approving an extension of the permit. First, the subject line of September 6th letter references East Troy’s “Request for Extension of High Capacity Well Approval.”¹ Second, the DNR explicitly approved East Troy’s request for an extension of the original

¹ The September 4, 2003, permit is titled: “SUBJECT: WATER SYSTEM FACILITIES PLAN AND SPECIFICATION APPROVAL.”

permit approval. Third, the time period for the granted extension of the original permit resulted in a two-year continuation, *without any interruption*, of the original permit. Fourth, the DNR explicitly stated that the “original approval is valid until September 4, 2007.”

The Court failed to consider the doctrine of estoppel to the mootness claim by DNR and East Troy. A party must be able to reasonably rely on the explicit representations of an agency of State government as to the nature of its actions. Here, DNR consistently described its action as an extension of the permit. It was four months later, in the midst of this appeal, when DNR first advanced the argument that the extension “could” be viewed as the issuance of a new permit. The Court is entitled to take judicial notice that had DNR actually taken the position in September, 2005, that it had granted a new permit to East Troy, it could have moved in October, 2005, to dismiss this appeal as moot and saved the parties the necessity of initially briefing the merits of the appeal.

III. DNR cannot assert that it granted a new permit on September 6, 2005, because it did not follow the statutory requirements for a new high capacity well permit application.

It is undisputed that East Troy did not apply for a new permit. The owner of a proposed high capacity well must apply to DNR for approval before construction, pursuant to Wis. Stat. § 281.34(2). East Troy obtained the September 4, 2003, well permit by submitting an application. Since East Troy never filed another application for a new permit, DNR’s modification of the existing permit cannot be deemed a new permit after the fact. DNR’s position is also contrary to the regulatory scheme of Chapter NR 812, which regulates well construction in Wisconsin. Specifically, NR 812.09

contemplates that DNR shall review an actual written application for the issuance of a new permit for a high capacity well.

IV. Appellants are entitled to equitable relief if the Court deems the appeal moot.

At the minimum, the factual circumstances of DNR's mootness argument raise an issue of equitable estoppel regarding the time period for requesting a contested case hearing or filing a petition for judicial review of the new permit. Appellants therefore request the Court in the alternative to order DNR to permit Appellants to seek a new contested case hearing or petition for judicial review of the September 6, 2005, permit action as an equitable remedy to DNR's course of conduct regarding the disputed permit.

CONCLUSION

For the foregoing reasons, Appellants request the Court to reconsider the Order, decide this appeal is not moot, and proceed to consider the substantial merits briefed by the parties.

Dated this 18th day of July, 2006.

Respectfully submitted,

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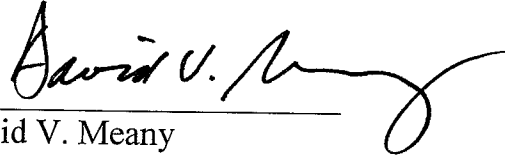
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional font. The length of this brief is 1,069 words.



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CERTIFICATE OF SERVICE

I, David V. Meany, an attorney, hereby certify that I caused a true and correct copy of this Motion For Reconsideration of June 28, 2006, Opinion and Order of Petitioner-Appellant Lake Beulah Lake Management District And Intervenor-Co-Appellant Lake Beulah Protective Improvement Association to be served on counsel for the Respondents:

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This 18th day of July, 2006, via hand delivery.

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