

STATE OF WISCONSIN
SUPREME COURT

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

vs.

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

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

PETITION FOR REVIEW

On Appeal from an Opinion and Order of the Court of Appeals, District II
dated June 28, 2006 and a Final Judgment Entered July 15, 2005 by the
Honorable James L. Carlson, Walworth County Circuit Court Judge,
Case Nos. 04-CV-683 and 04-CV-687

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ISSUES PRESENTED

Whether the Court of Appeals erred when it refused to apply the doctrine of estoppel to preclude the Wisconsin Department of Natural Resources from subsequently asserting that it issued a new permit for a high capacity well when it had responded to a request for an extension of the existing permit by explicitly granting an extension of the existing permit without any effective lapse of the existing permit?

Answered by the Trial Court: The issue was not raised in the Trial Court.

Answered by the Court of Appeals: No.

Whether an agency of Wisconsin government may explicitly misrepresent the nature of an official act and induce reliance on that misrepresentation to the detriment of an interested party?

Answered by the Trial Court: The issue was not raised in the Trial Court.

Answered by the Court of Appeals: Yes.

Whether a permit extension granted by the Wisconsin Department of Natural Resources, which resulted in no gap between the initial permit and the extended permit, could support a factual determination that the initial permit was void?

Answered by the Trial Court: The issue was not raised in the Trial Court.

Answered by the Court of Appeals: Yes.

STATEMENT OF CRITERIA FOR REVIEW

This Petition meets the criteria for review under Wis. Stat. §§ 809.62(1) (a), (c) (2) and (3).

This Court should review the Court of Appeals' June 28, 2006, Opinion and Order (the "Opinion") for several reasons. First, with respect to the Court of Appeals' determination that the appeal was moot, review of the Opinion will enable the Court to clarify the application of the doctrine of estoppel to situations where a state agency such as the Wisconsin Department of Natural Resources ("DNR") makes explicit representations that were reasonably and foreseeably relied upon by an interested party to its detriment. By granting a requested extension of a high capacity well permit, and then later asserting for the first time on appeal that the permit extension was instead the granting of a new permit, the DNR has raised a novel issue of potential statewide impact, in that parties with business before the DNR may, apparently, no longer justifiably rely on the DNR's explicit description of the nature of its permit decisions. Thus, by reviewing the Opinion, the Court can provide necessary guidance to the DNR, and to those parties who appear before the agency, regarding the ability of the DNR to recharacterize a permit extension after the fact, and with the effect of depriving a party of its rights to judicial review of the permit.

This Court's review would not necessarily be limited to the application of estoppel to the granting of permit extensions by the DNR. Rather, the Court would have the opportunity to clarify the general application of the estoppel doctrine to the duty of a state agency not to damage a party's rights by arbitrarily claiming that a prior act had a legal effect different from that explicitly represented by the agency.

Moreover, the Opinion has foreclosed the review by the Court of Appeals of the substantive issues raised by the Petitioners. The appeals required the Court of Appeals to determine the scope and application of Wisconsin's Public Trust doctrine, which arises from Article IX of the Wisconsin Constitution. Article IX provides that the State of Wisconsin has jurisdiction over the navigable waters of the state, and has been construed to give the State the power to protect those waters.

In the case below, Petitioners challenged the DNR's review of an application for a high capacity well permit because the DNR had failed to consider the application of the Public Trust doctrine in its review. Should this Court reverse the Opinion, the Court of Appeals and ultimately this Court will have the opportunity to clarify the scope and application of Article IX with respect to the broad duties of the DNR to protect navigable waters in Wisconsin. Although the statute governing the approval of a high capacity well does not specifically reference the DNR's authority to consider the Public Trust doctrine, Petitioners

have asserted that the DNR cannot ignore its Public Trust doctrine duties in the consideration of a high capacity well permit applications.

Finally, this Petition presents an extraordinary and compelling case for this Court's review of the incorrect factual determination of the Court of Appeals that the initial permit granted by the DNR to the Village became void. *See* Wis. Stat. § 809.62(1) (listed criteria in §809.62(1) do not fully measure the Court's discretion in deciding a Petition for Review). Petitioners recognize that it is not the usual role of this Court to correct factual errors made in the Court of Appeals. However, the mistaken factual conclusion below that the initial permit was void has precluded appellate consideration of an important issue arising under the Wisconsin Constitution. For that reason it should be reviewed.

STATEMENT OF THE CASE

These consolidated appeals (hereafter the “appeals”) involve a timely challenge by Petitioners Lake Beulah Management District (“LBMD”) and Lake Beulah Protective and Improvement Association (“LBPIA”) (collectively the “Petitioners”) to the September 4, 2003, high capacity well permit (the “2003 Permit”) (Pet. App. 5-8) issued by the DNR to the Village of East Troy (the “Village”) for the construction of a municipal well near Lake Beulah. In its Opinion dated June 28, 2006, the Court of Appeals summarily dismissed Petitioners’ appeals on the ground that they were moot, and did not reach the merits of the appeal (the Opinion is included in the Appendix of Petitioners, at Pet. App. 1-4). Specifically, the Court of Appeals concluded that the DNR’s explicit extension of the 2003 Permit on September 6, 2005, extending such permit for a period of two years, was actually the issuance of a new permit and the 2003 Permit was void. The Court of Appeals therefore reasoned that the Petitioners’ challenges to the 2003 Permit were moot. Although the DNR informed the parties that it was extending the 2003 Permit (which was the subject of pending litigation by Petitioners) and never disclosed that it was issuing a new permit to replace the 2003 Permit, the Court of Appeals refused to apply the doctrine of estoppel to reject the DNR’s mootness argument.

Petitioners will therefore first address the undisputed facts relating to Court of Appeals’ summary dismissal of the appeals as moot. Since the Opinion below has also precluded consideration of important issues arising under the Wisconsin

Constitution and statutes, and important public policies relating to the protection of Wisconsin's navigable waters, Petitioners will also address the facts relating to the substantive issues in this appeal.

1. The June 28, 2006, Opinion.

The relevant facts relating to the issue of mootness are straightforward and not in dispute; they arise from the request by the Village for an extension of the 2003 Permit. In a letter dated August 3, 2005, the Village informed DNR that the September 4, 2003 initial well approval (the 2003 Permit) required construction of the well to commence by September 4, 2005. Pet. App. 9-10. Since the 2003 Permit was being challenged by Petitioners in ongoing litigation, and construction had not begun, the Village informed DNR that it was "requesting a **modification** of the existing permit to extend the date for two years to allow the appeals to be completed." Pet. App. 9 (emphasis added).

In its August 3, 2005, request the Village asserted there was no need for a new permit application or new analysis:

the same standard that applied in the original review is still applicable to this well...Since neither the relevant law nor facts have changed since our last application, **we do not believe any additional analysis is required to allow the extension of the well approval.**

Pet. App. 9 (emphasis added). In addition, the Village asserted that it "**should not be necessary to request a new approval.**" Pet. App. 10 (emphasis added).

In a letter dated September 6, 2005 (the "September 6, 2005 letter"), the DNR explicitly 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...**” Pet. App. 11 (emphasis added). The September 6, 2005 letter extending the 2003 Permit is titled “Request for Extension of High Capacity Well Approval....,” whereas the 2003 Permit is titled “Water System Facilities Plan and Specification Approval.” Pet. App. 5,11.

Since the DNR’s September 6, 2005 letter extended the original approval of the 2003 Permit for two years from the expiration date of September 4, 2005, the 2003 Permit never expired because there was no gap in the time period for which the 2003 Permit was effective. The September 6, 2005 letter does not state that the 2003 Permit had expired, or that the DNR was issuing a new permit.

Petitioners, who were already pursuing the present appeals challenging the granting of the 2003 Permit, reasonably relied on the DNR’s representation that it was extending that permit and reasonably understood that no new permit had been issued. Petitioners therefore did not seek a contested case hearing or further judicial review of the DNR’s decision in the September 6, 2005 letter to extend the 2003 Permit.

In the appeals below, Petitioners filed their brief in chief seeking the reversal of the Circuit Court’s June 24, 2005 Decision and July 15, 2005, Judgment. It was only in January 2006, upon the filing of their Response Briefs, that the DNR and the Village for the first time raised the argument that the

September 6, 2005 letter extending the 2003 Permit was actually the granting of a new permit and that the appeals challenging the allegedly void 2003 Permit were therefore moot. The DNR admitted that its intent was to extend the 2003 Permit, but, even then, stated only that the September 6, 2005 letter “could” be viewed as the issuance of a new permit. R. 35.

Despite the undisputed facts pertaining to the extension of the 2003 Permit, the Court of Appeals concluded that the “appeals concern a permit that expired on September 5, 2005, after the circuit court rendered judgment in them...The original permit expired by its very terms, regardless of how the DNR denominated its successor permit.” Pet. App. 3. Thus, the Court of Appeals concluded that the appeals, which were directed to the 2003 permit, were moot, and it entered a summary dismissal of the appeals. Petitioners have moved the Court of Appeals for reconsideration of the Opinion but there has been no decision on that motion.

2. Petitioners’ challenge to the 2003 Permit.

The procedural history below for these appeals is extensive, but it is important because it highlights the substantial legal issues raised by the appeals and not addressed by the Court of Appeals. Those underlying issues arise from the DNR’s approval of a permit application by Village for the construction of a high capacity well. The appeals issues of statutory construction involving a paramount public policy in this State—the protection of our water resources through the Public Trust doctrine embodied in the Wisconsin Constitution.

Pursuant to Wis. Stat. § 281.17 (2001-02) the Village applied to the DNR on June 20, 2003, for a permit to construct a high capacity well (the “Application”). R. 28. The proposed well is located within ¼ mile of the southern end of Lake Beulah, a 834 acre navigable body of water situated northeast of the Village. R. 28.

The Application did not address the potential impact on Lake Beulah from the proposed withdrawal of substantial amounts of groundwater. R. 28. The DNR reviewed the Application, but did not undertake any analysis of whether the proposed well, to be installed in the groundwater aquifer that connects with nearby Lake Beulah, might adversely impact the lake or other environmental features properly protected by the Public Trust doctrine. The DNR approved the Application on September 4, 2003 (the 2003 Permit). R. 28.

LBMD petitioned the DNR for a contested case hearing on October 3, 2003, to challenge the 2003 Permit. R. 28. LBMD is a lake management district created pursuant to Chapter 33, Wis. Stat., with the statutory authority to protect Lake Beulah and its ecosystem for the benefit of the citizens of this state. LBMD asserted that the Application “involves a proposal to draw substantial amounts of groundwater that will affect the waters of Lake Beulah, including subsurface water sources feeding the lake, the groundwater aquifer in amounts affecting the lake and sensitive environmental areas and the overall ecosystem, and also will adversely impact nearby private wells.” R. 28, Petition p. 3.

The DNR initially denied LBMD's petition, stating that it lacked the statutory authority to deny the Application unless there was evidence the proposed well impacted a public water supply well. R. 28. But if the DNR reversed its position and granted the petition on January 13, 2004, after consultations with the offices of the Governor and the Wisconsin Attorney General. Pursuant to § 227.42, Wis. Stat., the DNR directed the Division of Hearings and Appeals to decide whether the "Department should have considered any potentially adverse effect to the waters of Lake Beulah, including subsurface water sources feeding the lake and sensitive environmental areas and the overall ecosystem, and nearby private wells, when the Department granted a conditional approval of the plans and specifications for proposed Municipal Well No. 7 in the Village of East Troy." R. 28.

A. Division of Hearings and Appeals Proceedings and Decision.

The Village filed a Motion for Summary Disposition in the Division of Hearing and Appeals. The Village asserted that the issue before the Administrative Law Judge ("ALJ") was a legal one that did not require an evidentiary hearing. R. 28, Respondent's Brief in Support of Summary Disposition at p. 2. The Village argued on statutory construction grounds that the DNR's authority under § 281.17 in reviewing the Application was limited to considering whether the proposed well impaired the water supply of a public utility. The Village further argued that the DNR was only empowered to consider other factors if the proposed well was regulated by §281.35, Wis. Stats., which

required a threshold pumping capacity of two million gallons per day. R. 28 at page 1. Finally, the Village contended that the DNR had consistently taken the position that its authority under § 281.17, to approve or deny an application for a high capacity well permit, was limited to the consideration of whether a public water supply was impacted by the proposed well and nothing more.

After the Village filed its motion, LBPIA intervened in the contested case hearing. LBPIA is a non-profit organization established in 1894 for the purpose, as stated in its current bylaws, of advancing “the general improvement and protection of Lake Beulah and the streams and waters adjacent thereto...and the promotion and taking of action tending to the general improvement and safe enjoyment of the Lake, its streams and the natural resources and habitat thereof.” R. 28, Brief of the Association in Opposition to the Motion for Summary Disposition at p. 1. The DNR did not file a brief in regard to the Village’s motion, nor did it take a position on the motion. R. 28.

LBMD and LBPIA opposed the Village’s Notice arguing that § 281.17 did not preclude the DNR from considering additional environmental factors in its review of a high capacity well permit application. Rather, Appellants argued that the DNR must determine whether a review of those factors was warranted since § 281.17 must be construed in conjunction with: 1) the broad authority granted to the DNR in §§ 281.11 and 281.12 to enhance and protect the groundwater and surface water of the State, both public and private, and 2) Wisconsin’s public trust doctrine embodied in Article IX of the Wisconsin Constitution. R. 28.

Without prior notice to the parties, the ALJ converted the Village's Motion for Summary Disposition into a motion for summary judgment. In a June 11, 2004, decision titled "Ruling on Motion for Summary Judgment," R. 28, the ALJ determined that the Village's motion was properly one for summary judgment since, in the view of the ALJ, at least two of the parties had submitted evidentiary materials outside the pleadings in conjunction with the motion. The ALJ then concluded that the Village was entitled to summary judgment on the grounds that there were no disputed facts concerning whether the Village and the DNR had complied with the statutory requirements for the issuance of the well permit under § 281.17, Wis. Stats. R. 28.

In his June 11, 2004 ruling the ALJ nonetheless recognized the potential impact of a high capacity well permit to the surrounding environment and the potential implication of the Public Trust doctrine:

As the grant of the hearing request indicates, it is not impossible to imagine a situation where the granting of a high capacity well permit results in secondary impacts to public trust waters. Hypothetically, this could implicate the Public Trust Doctrine or have a detrimental impact on another private well. The granting of a permit is inherently conditional and under certain demonstrable conditions may be subject to further considerations under public nuisance law and the Public Trust Doctrine.

R. 28. Thus the ALJ explicitly held that the DNR might consider, "under certain demonstrable conditions," the Public Trust doctrine in deciding whether to grant a high capacity well permit.

LBMD requested the ALJ reconsider the June 11 Ruling. R. 28, R. 14. The ALJ issued an Amended Ruling on Motion for Summary Disposition, dated

June 16, 2004, which further explained the ALJ's reasoning on the conversion of the motion, but did not change the substantive grounds for granting the Village's motion. R. 28.

On June 16, 2004, Petitioners again moved the ALJ for reconsideration, requesting additional time to respond with evidence supporting their contention that summary judgment was improper because factual disputes existed. R. 28. The ALJ responded on June 22, 2004, in an e-mail, stating that: "Any party supporting this motion should submit any supporting materials including any additional affidavits, or further briefing by Friday, June 25th." R. 28. Thus, the ALJ gave the Petitioners only three days to submit supporting evidentiary materials in opposition to the Village's converted summary judgment motion.

The ALJ denied the motion for reconsideration on July 16, 2004. R. 28. In that ruling, the ALJ stated again that no evidence had been submitted to dispute the Village's contention that the statutory requirements for a high capacity well permit had been met. Petitioners Appellants filed a Petition for Review of the Amended Ruling with the DNR Secretary on July 7, 2004, which was denied in a written decision dated July 19, 2004. R. 28.

B. The Circuit Court Decision

LBMD and LBPIA separately petitioned the Walworth County Circuit Court for review of the ALJ's June 11, 2004 Ruling and June 16, 2004 Amended Ruling on Motion for Summary Disposition. R. 1 and 29. Appellants requested

that the trial court reverse the ALJ's Amended Ruling, asserting that the ALJ had not afforded the Appellants sufficient time to respond to the Village's motion once it had been converted to one for summary judgment, and that the ALJ had improperly construed § 281.17 as a matter of law to limit the scope of the DNR's review of a high capacity well permit to the sole consideration of whether the proposed well impacted an existing public water supply. R. 29 and 30. The Village again argued that the DNR had properly issued the well permit based on the explicit statutory criteria. R. 32.

The DNR, which did not participate in front of the ALJ, filed a brief in the trial court. R. 31. Importantly, the DNR conceded in its brief that it has the authority to consider environmental factors in evaluating high capacity well permit applications.

WDNR agrees that it has the authority under certain circumstances to consider the Public Trust Doctrine in its analysis of high capacity well approvals. To the extent that the legal analysis in Section III.C. of LBPIA's Brief supports the position that WDNR has authority to condition or limit a high capacity well approval where operation of the well has negative impacts on public rights in navigable waters, WDNR agrees with that legal analysis.

R. 31, at p. 2. The WDNR argued, however, that Petitioners had not presented evidence that the proposed well would have negative impacts on Lake Beulah.

The trial court affirmed the grant of summary judgment to the Village in a decision dated June 24, 2005. R. 14, App. 20. The trial court held, *inter alia*, that the ALJ had properly treated the Village's Motion as one for summary judgment

and that the DNR was not required to consider additional environmental criteria in reviewing a high capacity well permit application. R. 14, at pages 10 and 11.

The trial court entered judgment on July 15, 2005, R. 16. Petitioners moved for reconsideration and relief from the judgment on August 4, 2005. R. 18. The trial court denied Petitioners' motion for reconsideration and relief from judgment on August 19, 2005. R. 37. Petitioners then commenced the appeals.

ARGUMENT

- I. **Review is warranted because the Court of Appeals' failure to estop the DNR from changing its position on the extension of a permit presents a broad issue of statewide impact and importance.**
 - A. **The doctrine of estoppel applies to the DNR and the Court of Appeals refusal to apply it in these appeals establishes a precedent contrary to Wisconsin law.**

The doctrine of equitable estoppel focuses on the conduct of the parties.

The elements of equitable estoppel are “(1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment.” *Milas v. Labor Association of Wisconsin, et al.*, 214 Wis. 2d 1, 11-12, 571 N.W. 2d 656 (1997). This Court has held that equitable estoppel may be applied against the government or an agency of the government. *Department of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 638-39, 279 N.W. 2d 213 (1979); *State v. City of Green Bay*, 96 Wis. 2d 195, 210-11, 291 N.W. 2d 508 (1980).

In *Moebius Printing*, the Court stated that “we have recognized that estoppel may be available as a defense against the government if the government’s conduct would work a serious injustice and if the public’s interest would not be unduly harmed by the imposition of estoppel.” 89 Wis. 2d at 638, 279 N.W. 2d at 225. That case involved the application of estoppel to bar the Wisconsin Department of Revenue from collecting a tax deficiency based on its prior

conduct. “We conclude that where a party seeks to estop the Department of Revenue and the elements of estoppel are clearly present, the estoppel doctrine is applicable where it would be unconscionable to allow the state to revise an earlier position.” *Id.*, at 641, 279 N.W. 2d at 226, citing *Libby, McNeil & Libby v. Dept. of Taxation*, 260 Wis. 551, 51 N.W.2d 796 (1952).

Likewise, in *State v. City of Green Bay*, this Court applied the estoppel doctrine to bar the Department of Natural Resources from collecting forfeitures from the city when the city reasonably relied on the state’s conduct. The DNR had led the city to believe that it would be able to continue to dispose of its waste in a county disposal site and that there was no need for the city to find an alternative site for interim use. 96 Wis. 2d at 210, 291 N.W. 2d at 515.

The doctrine of estoppel is applicable to the conduct of the DNR in the present appeals, but it was essentially ignored in the Court of Appeals’ Opinion. The Court of Appeals mentioned the Petitioners’ contention that the DNR was estopped from asserting that it had issued a new permit in the September 6, 2005, but did not discuss the elements of the doctrine or apply it to the DNR’s conduct. Pet. App. 3.

All of the elements of estoppel are met in this case. The Village requested a two year extension of the 2003 Permit, due to this pending litigation, prior to the expiration of the permit. The DNR clearly stated on September 6, 2005, that it was extending the 2003 Permit for a period of two years until September 4, 2007. The DNR has admitted that its intent was to grant an extension of the 2003 Permit.

That two year extension could only mean that the 2003 Permit was effective on September 5, 2005, and that it never expired or became void.

The Petitioners reasonably relied on the DNR's stated position, in its September 6, 2005 letter, that it was extending the 2003 Permit, and did not commence another legal challenge to the now-extended 2003 Permit. Petitioners had already challenged the DNR's decision to issue the 2003 Permit, and that challenge was already on appeal in the Court of Appeals at the time of the DNR's September 6, 2005 letter. The Opinion does not address the Appellants' reasonable reliance on the DNR's September 6, 2005, extension of the 2003 Permit.

The Petitioners' reasonable reliance on the DNR's stated extension of the 2003 Permit was ultimately to their detriment when, over four months later, the DNR and the Village asserted for the first time that the September 6, 2005, extension of the 2003 Permit was instead the issuance of a new permit, the 2003 Permit was void as of September 5, 2005, and that Petitioners had not challenged the new permit in these appeals. Thus the DNR and the Village argued that these appeals were moot. The Court of Appeals' Opinion ratified the DNR's conduct when it dismissed the appeals as moot.

There is another telling aspect to the DNR's argument that the Court of Appeals overlooked. Given the undisputed prior representations by the DNR, it still appears that it was somewhat reluctant to engage in the about-face position shift that its mootness argument required. In its brief below, the DNR made a half-

hearted attempt to support its argument, stating that “it **could** be argued that since the letter extending the approval to September 4, 2007 was not issued until September 6, 2005 the two day lapse had the practical effect of rendering the 2003 Approval void.” Pet. App. 35, (emphasis added). Similarly, DNR asserted that “[e]ven though DNR’s letter indicates that the approval was ‘an extension of the original approval,’ DNR’s decision on September 6, 2005 **could be viewed** under Wis. Admin. Code § NR 108.04(2)(d) as a new approval.” *Id.* at p. 36 (emphasis added). Of course the DNR chose to identify its action as an extension on September 6, 2005.

The Court should grant the Petition for Review because the DNR’s actions implicate the estoppel doctrine in connection with a core function of the DNR—the issuance of all types of permits to parties in this state. Under these circumstances, DNR is estopped from claiming it issued a new permit. Appellants reasonably relied on DNR’s statements in its September 6, 2005 letter approving an extension of the permit. First, the Village had applied for an extension of the 2003 Permit, and not for a new permit. Second, the subject line of September 6th letter references the Village’s “Request for Extension of High Capacity Well Approval.” Third, the DNR explicitly approved the Village’s request for an extension of the original permit approval. Fourth, the time period for the granted extension of the original permit resulted in a two-year continuation, without any gap or interruption in the effective period of the 2003 Permit, since the DNR explicitly stated that the “original approval is valid until September 4, 2007.”

Citizens must be able to reasonably rely on the explicit representations of state governmental agencies as to the nature of the agencies' actions. The Court of Appeals Opinion allows the DNR to recharacterize an "extension" of any DNR permit without constraint. The Court is entitled to take judicial notice that had the DNR actually believed in September, 2005 that it had granted a new permit to the Village, it could have moved in October, 2005 to dismiss these appeal as moot and saved the parties the necessity of initially briefing the merits of the appeal. The DNR, however, failed to take that action.

As this Court recognized in *Moebius Printing*, a court must balance the public interests at stake against the potential injustice in deciding whether to apply the estoppel doctrine to a state agency. Here, the public interest in permitting citizens to rely upon the explicit representation of the DNR about a permit extension cannot be denied. In addition, the injustice of allowing the DNR to preclude judicial review of the 2003 Permit through its subsequent characterization of a permit extension as a new permit is apparent. Review of the Opinion is necessary to clarify the application of estoppel to the DNR's ability to change a permit extension into a new permit.

B. DNR is further estopped from asserting 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 the Village 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). The Village obtained the 2003 Permit by submitting an application. Since the Village never filed another application for a new permit, DNR's modification of the 2003 Permit cannot be deemed a new permit after the fact. DNR's position is also contrary to the regulatory scheme of Chapter NR 812 of the Wisconsin Administrative Code, 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.

C. The application of the doctrine of estoppel to the DNR's approval of a permit extension presents an important legal issue that is likely to recur.

As stated above, one of the core functions of the DNR, and indeed other state agencies in Wisconsin, is the granting of permits and permit extensions. The DNR's after-the-fact claim that its extension of the 2003 Permit was instead the issuance of a new permit for the construction of a high capacity well, and the Court of Appeals' ratification of that claim, will have a likely impact on a wide variety of state agency decisions to extend existing permits throughout the state. For example, state agencies often utilize their power to retroactively approve a permit extension without any contention that the issuance of a new permit is involved. In light of the Court of Appeals' Opinion, there appears to be no obstacle to a state agency claiming at a later time, should it see a strategic advantage, that the permit extension was actually a new permit, and that interested parties are time-barred from challenging that new permit.

Moreover, this Court’s review of the Opinion below will serve the public interest by providing the DNR with guidance concerning the application of estoppel to its conduct. Based on its actions in these appeals, the DNR apparently believes that it faces no constraints on its ability to change the characterization of its action regarding a permit extension. This is clearly not the case in Wisconsin and requires renewal by this Court.

D. These appeals are not moot because Respondents concede that the issues raised in this appeal apply equally to the Village’s extended permit.

When an appeal concerns an issue of general public importance that is likely to recur, a court should decide the issue even though the immediate dispute might be moot. *State of Wisconsin v. Leitner*, 253 Wis. 2d 449, 459, 646 N.W.2d 341 (2002) (“this case falls within the exception that the issues presented are likely to rise again and should be resolved by this court to avoid future uncertainty”).

Regardless of the “mootness” argument, these appeals should go forward, because the Village has conceded that the same issues are presented by Wis. Stats. § 281.17 (2001-02) and its successor statute Wis. Stats. § 281.34(4) and (5). Pet. App. 9. Moreover, in its brief in the Court of Appeals, the Village argued that DNR’s authority to review proposed high capacity wells is limited under § 281.34(5) just as it is in the prior statute. Village Brief, pp. 15-16. In fact, the Village claims the Public Trust doctrine played no role in the matter: “Neither the old law nor the new law provides any express requirement or authority for DNR to

impose conditions on a high capacity well approval beyond those in the statute.”
Village Brief, at p. 16.

Neither the DNR nor the Village contends that the DNR must consider the Public Trust doctrine under Wis. Stats. § 281.34(5); they assert that such a review was not required under the old or new statute. The arguments relating to the Public Trust doctrine are the same under the old and new statutes. Given that no new factual record is necessary to construe the relationship between the Public Trust doctrine and Wis. Stats. § 281.34(5), this appeal is not moot.

II. The Court of Appeals’ failure to estop the DNR has precluded appellate consideration of a real and significant issue under Article IX of the Wisconsin Constitution.

The issue directly before the Court in this Petition for Review is the Court of Appeals’ conclusion that the appeals are moot. However, it cannot be overlooked that the effect of the Opinion below was to preclude the Court of Appeals, and potentially this Court, from considering a “real and significant” question of Wisconsin constitutional law. Wis. Stat. § 809.62(1)(a).

As discussed above in the Statement of the Case, Petitioners have challenged the DNR’s interpretation of its duties under Article IX of the Wisconsin Constitution and the Public Trust doctrine derived from that provision, as they relate to the consumption of groundwater by high capacity wells. The Public Trust doctrine requires the state of Wisconsin to protect navigable waters such as Lake Beulah. Petitioners challenged the high capacity well permit issued to the Village because the DNR had failed to consider, in its review of the

Village's permit application, the impact of the proposed well on groundwater feeding nearby Lake Beulah.

This Court and the Court of Appeals have not previously addressed the scope of the DNR's duties under the Public Trust doctrine when it is engaged in its statutory duty to consider specified environmental factors in the review of an application for a high capacity well. Granting this Petition would enable, if Petitioners prevailed in this Court, the Court of Appeals to provide important guidance on these issues.

III. This Petition presents a compelling case for the Supreme Court to correct a manifest error of fact by the Court of Appeals.

Petitioners recognize that this Court does not, as a matter of common practice, grant review in appeals where it is simply argued that the Court of Appeals reached a mistaken factual conclusion. However, as Wis. Stat. § 809.62 (1) recognizes, the Court has the inherent power to exercise its discretion to address an issue of public import. The Court should exercise that power in this case to review the Court of Appeals' erroneous factual determination that 2003 Permit expired on September 5, 2005, and that the DNR issued a new permit on September 6, 2005.

The Opinion is premised on the mistaken conclusion that the 2003 Permit expired on September 4, 2005, when construction had to begin. The Opinion mistakenly concluded the appeals were 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 when the 2003 Permit was not in effect. 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 nor granted.

The DNR's response demonstrates that it granted an extension of the Village's permit, as requested. The date of the extension, two days after the deadline for the commencement of well construction, does not change its character. The DNR obviously used its authority to retroactively extend the permit. The Village requested a two year extension of its permit, and the September 6, 2005 letter granted the request. As requested, the two year extension ran from September 4, 2005 to September 4, 2007. For DNR and the Village to assert now that a new permit was issued after the previous permit had become void conflicts with the undisputed facts.

The DNR stated in the September 6, 2005 letter that it had considered the request for the extension under the new statute and it was granting the request under the new statute. The existence of the new statute did not change the essence of DNR's specific action—extending the existing permit. There is no evidence that the DNR performed any additional analysis or investigation before issuing the permit extension.

The Opinion cites language from the 2003 Permit that actually undercuts the conclusion that the DNR issued a new permit. The 2003 Permit 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 the Village. Thus, the Court of Appeals could not reasonably conclude that the DNR issued or intended to issue a new permit.

For these reasons, the Petition for Review should be granted to provide this Court the opportunity to correct a critical error of fact that has precluded the consideration of the important underlying issues in these appeals.

CONCLUSION

For the foregoing reasons, Petitioners request the Court to grant the Petition for Review. This Court’s review of the Opinion below will provide meaningful guidance to government agencies in this state and to litigants who have challenged agency permit decisions.

Dated this 28th day of July, 2006.

Respectfully submitted,

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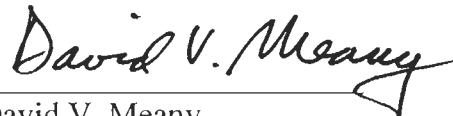
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CERTIFICATION

I hereby certify that this petition 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 6,407 words.



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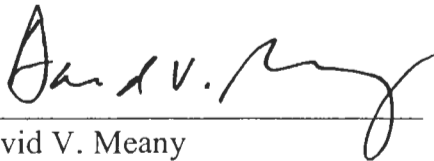
CERTIFICATE OF SERVICE

I, David V. Meany, an attorney, hereby certify that I caused three true and correct copies of this Brief of Petitioner-Appellant Lake Beulah Lake Management District and Intervenor-Co-Appellant Lake Beulah Protective Improvement to be served on counsel by placing them in United States Mail on this date:

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