

**STATE OF WISCONSIN      CIRCUIT COURT      COLUMBIA COUNTY**

**CONCERNED CITIZENS OF NEWPORT, INC.,  
DONALD NELSON and HIROSHI KANNO,**

**Petitioners,**

**vs.**

**Columbia County  
Case No. 00-CV-304**

**DEPARTMENT OF NATURAL RESOURCES,**

**Respondent,**

**and**

**GREAT SPRING WATERS OF AMERICA, INC.,**

**Intervening Respondent.**

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**HO-CHUNK NATION,**

**Petitioner,**

**vs.**

**Dane County  
Case No. 00-CV-2830**

**DEPARTMENT OF NATURAL RESOURCES,**

**Respondent,**

**and**

**GREAT SPRING WATERS OF AMERICA, INC.,**

**Intervening Respondent.**

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**BRIEF OF CCN PETITIONERS IN SUPPORT OF  
JUDICIAL REVIEW UNDER CHAPTER 227, WIS. STATS.**

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The Petitioners, Concerned Citizens of Newport, Inc. (“CCN”), Donald Nelson and Hiroshi Kanno (collectively “CCN Petitioners”), by their attorneys, Garvey & Stoddard, S.C., and Midwest Environmental Advocates, Inc., file this brief in support of their petition pursuant to Wis. Stat, § 227.52, *et seq.* for review of the final decisions of the Department of Natural Resources (“DNR”) in the following matters: 1) the DNR’s certified finding, dated September 18, 2000, that an Environmental Impact Statement (“EIS”) is not required under Wisconsin’s Environmental Policy Act (“WEPA”), Wis. Stat. § 1.11, and Wis. Admin. Code NR 150; 2) the DNR’s approval of the application for high capacity industrial water supply well(s) by Great Springs Waters of America, Inc., a subsidiary of the Perrier Group of America, Inc. (“Perrier”), in Adams County, Wisconsin, dated September 20, 2000 (“Permit”); and 3) the DNR’s agreement with Perrier, executed on September 28, 2000 (“Agreement”).

### **CCN PETITIONERS’ INTERESTS**

Petitioner CCN is a nonstock, not-for-profit corporation organized under Chapter 181 of the Wisconsin Statutes, whose purpose is to protect the state’s water resources and natural environment for the citizens of Wisconsin, and, in particular, to prevent the construction and operation of high capacity wells by Perrier in the Big Springs Area, including Big Springs Creek, Buckley’s Pond and Jensen’s Pond. (Kanno Aff.)

CCN is a membership organization with approximately 100 members in the Big Springs area. CCN’s mailing address is N9947 Thompson Drive, Wisconsin Dells, Wisconsin 53965. (Kanno Aff.)

Petitioner Donald Nelson is the president of CCN and the chairperson of the Town of Newport. He resides at W14297 Broadway Road, Wisconsin Dells, Wisconsin 53965. (Nelson Aff.)

Petitioner Hiroshi Kanno is the vice president of CCN and the clerk of the Town of Newport. He resides at N9947 Thompson Drive, Wisconsin Dells, Wisconsin 53965. (Kanno Aff.)

Pursuant to Wis. Stat. § 227.52(1), the CCN Petitioners are aggrieved by the following final decisions of the DNR: 1) by the DNR's certified finding that an EIS is not required, dated September 18, 2000; 2) the approval of Perrier's application for high capacity industrial water supply well(s), in Adams County, Wisconsin, dated September 20, 2000; and 3) the Agreement between Perrier and the DNR, executed on September 28, 2000. (Kanno Aff.; Nelson Aff.)

The CCN Petitioners enjoy the surface waters and have a substantial interest in the environmental quality of the area in which they live, work, and recreate. The environmental quality includes the protection and preservation of groundwater, surface water in the area, including trout streams and wetlands, wetland species of plants and wildlife, and the air. The environmental quality in the area in which the CCN Petitioners live, work, and recreate will be adversely impacted by Perrier's water extraction operations, including draw down of the ground water table and reduction in surface water flows. The DNR's decisions to allow this proposal to proceed without adequately analyzing and addressing the potential environmental impacts adversely affects Petitioners. (Kanno Aff.; Nelson Aff.)

The pumping of groundwater, the construction and operation of the proposed bottling plant facility, the construction of the pipeline, and the increased trucking traffic that will result from Perrier's proposed water extraction operations will adversely affect the CCN Petitioners' use and enjoyment of the environment. (Kanno Aff.; Nelson Aff.)

Mr. Nelson, Mr. Kanno and other members of CCN live within the same watershed as Perrier's proposed high capacity wells. The wetlands on the property owned by Mr. Nelson and Mr. Kanno in the areas where they reside are expected to be adversely affected by reductions of the groundwater and surface water levels. (Kanno Aff.; Nelson Aff.)

The CCN Petitioners use the streams connected to Big Springs for fishing and other recreational uses. (Kanno Aff.; Nelson Aff.)

Mr. Kanno and his wife have owned land near the proposed well sites and bottling plant for seven years. They are retired and have invested most of their savings in the farm. With the assistance of the DNR, the Kannos created a wetland and prairie on their land. In addition, they created bird habitat by planting wildflowers. The runoff from Perrier's proposed bottling plant will flow into their wetland and bird habitat. (Kanno Aff.)

Additionally, the extraction of groundwater by Perrier is expected to adversely impact the quality and quantity of water on and beneath Mr. Kanno's land. (Kanno Aff.)

As the Town Clerk for the Town of Newport and as a rural resident, the quality of Mr. Kanno's life will also be adversely affected by increased truck traffic and air pollution from the proposed project. (Kanno Aff.)

Mr. Nelson is a fourth generation farmer of land near Big Springs. He and his wife also own wetlands almost directly south of Perrier's proposed bottling plant and proposed well sites. The wetlands are the habitat of animals and vegetation that Mr. Nelson regularly enjoys viewing. (Nelson Aff.)

Mr. Nelson will be adversely affected by the runoff from the proposed plant and the water extraction by Perrier. His wetlands will be affected by any decrease in water level or pollution to the water. (Nelson Aff.)

As the Town Chair of the Town of Newport and as a resident, Mr. Nelson will also be adversely affected by the increased truck traffic and air pollution that will result from the proposed project. (Nelson Aff.)

The CCN Petitioners have demonstrated their continued interest in this matter ever since the first public announcement of the project. They have attended and provided public testimony at all public meetings and hearings held on Perrier's proposed project. (Kanno Aff.; Nelson Aff.)

On March 16, 2000, the DNR held a public information meeting in Wisconsin Dells, attended by about 250 people. Members of CCN, including Mr. Nelson and Mr. Kanno, provided public testimony at that meeting which opposed Perrier's proposal to extract water for bottling in Adams County and requested that the DNR proceed with a careful environmental analysis to determine the impacts the proposed water extraction would have on groundwater, surface water and the environment. (Kanno Aff.; Nelson Aff.)

On April 17, 2000, the DNR held a second public information meeting at Wisconsin Dells. Again, about 250 people attended the meeting. Members of CCN,

including Mr. Nelson and Mr. Kanno, presented oral testimony opposing Perrier's plans for water extraction and requested that the DNR prepare a full EIS. (Kanno Aff. and Nelson Aff.)

On August 1, 2000, members of CCN attended a public hearing, and Attorneys Ed Garvey and Peter McKeever provided oral testimony of behalf of CCN. Mr. Nelson and Mr. Kanno also provided their own oral testimony at this hearing. CCN, by its attorneys, and through Mr. Nelson and Mr. Kanno, commented on the DNR's insufficient data collection and analysis on which it had based its preliminary conclusion that an EIS was not required for Perrier's proposed project. About 300 people attended this hearing, and about 100 provided oral testimony. However, the public had no opportunity to question representatives of Perrier or DNR officials. (Kanno Aff.; Nelson Aff.)

On August 24, 2000, Attorney Glenn Stoddard filed written comments with the DNR on behalf of the CCN Petitioners to supplement the previous testimony presented by Attorneys Ed Garvey and Peter McKeever on behalf of CCN at the August 1, 2000 public hearing. (Stoddard Aff., Ex. 11)

The DNR's decisions to: (1) not require an EIS; (2) enter into an Agreement with Perrier; and (3) to issue a high capacity well permit, all adversely impact the CCN Petitioners' use of and interests in preserving and protecting navigable waters, maintaining the quality and quantity of groundwater in the area surrounding Big Springs Creek, and the Town of Newport, protecting the surrounding wetlands and wildlife, and preventing other environmentally damaging impacts from Perrier's proposed project. The decisions by the DNR also threaten the rural and agricultural character of the area which Petitioners seek to maintain. (Kanno Aff.; Nelson Aff.)

## **FACTUAL BACKGROUND**

In February 1999, officials with the Wisconsin Department of Commerce (“DOC”) sent Perrier a letter detailing Wisconsin’s “business friendly climate, including possible funding for transportation projects and the availability of tax incremental financing districts.” (Stoddard Aff., Ex. 4)

About a month later, DOC officials, “based on Perrier’s requirements, found 11 sites in central Wisconsin that met the company’s criteria for its Ice Mountain brand of spring water. The [DOC then] set up a meeting in July that included [DNR] regulators and Perrier.” Id.

After the meeting between DOC staff, DNR regulators and Perrier, DOC Secretary Brenda Blanchard sent Perrier a thank-you note that stated: “We are committed to being responsive, and our goal is to help you locate at one of our Wisconsin sites.” Id.

By the fall of 1999, “negotiations [between Perrier, DOC and the DNR] centered on Mekan Springs. Perrier explored leasing land from the state and drilled wells on private land nearby.” Id.

“That site, in retrospect couldn’t have been a worse choice,” because “[f]or years, the DNR had purchased land surrounding the headwaters of the Mekan River, a chilly, gin-clear stream that sustains brook and brown trout as it glides over a pale sand bottom between wooded banks.” Id.

“Nonetheless, a meeting had been called on Perrier’s behalf for Dec. 15[, 1999] in the office of Bob Wood, [former] Gov. Tommy G. Thompson’s chief of staff. [DOC Secretary Brenda] Blanchard and DNR Secretary George Meyer attended.” Id.

“When news of that meeting, and Perrier’s interest in leasing state land leaked out, anglers and local residents responded angrily.” “Eventually, Perrier backed away from Mekan Springs.” Id.

Despite criticism by a prominent state legislator of the process used by the DOC and DNR to lure Perrier and assist it in locating in Wisconsin, DOC Secretary Blanchard stated that it was “standard” for the DOC to work in a confidential manner and to involve other regulatory agencies like the DNR in such a process. Id.

After running into opposition with its proposed high capacity wells and bottling plant operation in the Mekan Springs area, Perrier “sent feelers to the community of Big Spring” during the week of February 13 to 19, 2000. (Stoddard Aff., Ex. 5)

The DNR began initial discussions and consideration of Perrier’s proposal to develop its bottling plant operations at the Big Springs Creek site in February of 2000. (Administrative Record or “AR” at AR 003263-003265) At the same time, Perrier’s consultants for the project, Dames & Moore, completed a “Work Plan for a groundwater study of the Big Springs area in Adams County, Wisconsin.” (AR 003044-003063) DNR staff subsequently held a special meeting on Perrier’s project in Wisconsin Rapids, Wisconsin, on March 3, 2000. (AR 003039)

Negotiations between Perrier and DNR staff on the permits that the DNR would require for the project were largely completed by about March 10, 2000, when the DNR sent its “Final Draft of permit requirement letter” to Perrier’s attorney. (AR 003266-003267) At this time, the DNR and Perrier began to develop the concept of what later became the Agreement between the DNR and Perrier. The DNR then referred to this as the “draft interactive permit..., including May 2000 – May 2001 surface and groundwater

monitoring plan.” (AR 003066) However, the draft Agreement was mentioned as such in a March 8, 2000 facsimile from a DNR attorney to Tom Jerow of the DNR’s staff. (AR 003102) The DNR did not describe the Agreement to the public until August 11, 2000, when Franc Fennessy of the DNR released it along with a press release “to coincide with [his] appearance [that] evening on WI Public TV’s “Weekend” program.” (AR 01182-01191) This announcement was after the August 1, 2000 public hearing held by the DNR in Wisconsin Dells on the draft EA.

On June 13, 2000, the Town of Newport, in the northern part of Columbia County and adjacent to Adams County, held an advisory referendum on Perrier’s proposed operation. The result of that referendum was that 114 Newport residents (81.4%) voted in opposition to the project while only 26 (18.6%) voted in favor. Shortly thereafter, on June 29, 2000, the Town of Newport passed a resolution opposing water extraction for commercial purposes where water is taken from the community. (Stoddard Aff., Ex. 6; AR 01051-01052)

On June 20, 2000, Perrier filed an application with the DNR for a high capacity well permit in the Big Springs area in a sand and gravel aquifer overlying sandstone. Perrier did not identify the exact location of the wells in its application to the DNR. (EA at 1; AR 00128)

Perrier planned to operate the wells 24 hours a day every day of the year. The wells would have the capacity to pump up to 500 gallons per minute. Id.

The DNR conducted the EA without knowing the exact location of the proposed wells. In the EA, the DNR stated that “[e]xact well locations are unknown pending completion of ongoing on-site groundwater studies and aquifer response modeling.” Id.

The DNR only told the public that the proposed wells would be in the area of Big Springs Creek, including Jensen's Pond and Buckley's Pond. Id.

Big Springs Creek and Jensen's and Buckley's Ponds are capable of supporting a recreational craft. (See EA at 11-12; AR 00138-00139) Big Springs Creek is classified as a class 1 trout stream and an "exceptional resource water," and supports a population of brook trout. (EA at 16; AR 00143)

Perrier has well developed plans to construct a nearby water bottling plant and pipeline to transport water from the well site to the bottling plant. Yet, the DNR limited the scope of the draft and final EA to Perrier's application for a high capacity well permit at the water source. (EA at 2; AR 00129)

The DNR separated the high capacity well application from the rest of the project. (EA at 2; AR 00129)

Perrier's proposed bottling site would be south of STH 23. (EA at 2; AR 00129) The proposed bottling plant will be one-million square feet, with a 25,000 square foot office area, a quarter mile of paved roads, one high capacity well pumping 250 gallons per minute, a 75,000 gallon per day wastewater treatment plant, a sanitary wastewater septic tank and the capacity to treat 2,000 gallons per day, and an above-ground water tank for fire suppression. The proposed bottling plant would have a total footprint of about 80 acres. A pipeline system would follow the CTH G right-of-way from the well sites to the bottling plant. Perrier is expected to use up to seven miles of pipeline to move water from the source to the bottling plant. (EA at 7; AR 00134)

Perrier would have to obtain a variety of permits from multiple governmental bodies to construct and operate its proposed bottling plant and pipeline. (EA at 3; AR 00130)

As early as March 13, 2000, three months before Perrier submitted its application for the high capacity well permits, the DNR informed Perrier that a variety of permits may be needed. (AR 003096-003101)

On July 25, 2000, the DNR released a draft EA on the high capacity wells proposed by Perrier. (EA at 48; AR 00175)

On August 1, 2000, the DNR held a hearing for citizens to give oral comments on the draft EA. Each person wishing to provide public testimony approached an audio recorder that taped their comments. The public did not have an opportunity to question representatives of Perrier or DNR officials. (Id.; Kanno Aff.; Nelson Aff.) Approximately 300 citizens attended, approximately 100 of whom provided oral testimony on the draft EA. Id.

During the time when the DNR was considering Perrier's proposed project, there was substantial media coverage of this issue and substantial public and editorial criticism of the DNR's handling of this matter. (See Stoddard Aff., Exs. 4 to 10, 13 to 15, 17 to 19) One newspaper even printed an editorial cartoon that called Perrier's bottled water "the official drink of the DNR." (Stoddard Aff., Ex. 9)

Perrier's president, Kim Jeffrey, even attempted to obtain former Governor Thompson's personal support for the siting of its proposed bottling plant by meeting with the governor requesting him to invest "political capital" to publicly help Perrier site its proposed bottling plant in the Big Springs area. (Stoddard Aff., Ex. 11)

In response to the public outcry against the Perrier project, on August 22, 2000, the Wisconsin State Senate's Agriculture, Environmental Resources and Campaign Finance Reform Committee, chaired by former State Senator Alice Clausung, held a public hearing on the DNR's role in the Perrier proposal. Approximately 150 people attended the hearing, about 50 of whom, including the CCN Petitioners, provided oral testimony opposing Perrier's application and/or the DNR's reluctance to perform sufficient environmental review of the applications. (Id.; Kanno Aff.; Nelson Aff.)

Additionally, the DNR received approximately 125 written comments from citizens opposing Perrier's application and/or the DNR's hesitancy to conduct a complete EIS. Id.

The DNR lacked basic information about the potential impacts of Perrier's proposed high capacity wells.

The DNR's analysis in the EA is based largely on limited pump tests run by Perrier of two test wells and ten observation wells. On April 3, 2000, and April 7, 2000, each well was tested for a very limited time of approximately eight hours. The groundwater withdrawal rates for these pump tests ranged between 50 to 212 gallons per minute. (EA at 25; AR 00152)

For example, at the request of the DNR, on August 3, 2000, Jim Krohelski of the United States Geological Survey ("USGS") filed comments with the DNR on the draft EA. Mr. Krohelski concluded that without a large-scale pump test and the development of a groundwater flow model "there is little substance in what anyone can say about the effects of pumping." (Stoddard Aff., Ex. 3; August 3, 2000, Krohelski letter to Bill Furbish.)

Mr. Krohelski noted that he agreed with the comments of Dr. George Kraft of the University of Wisconsin-Stevens Point, which were submitted to the DNR on August 2, 2000. (Stoddard Aff., Ex. 2) In response to the finding by Perrier that there would be little or no impacts to the adjacent wetlands, Dr. Kraft commented that “[t]here is no technical basis for this statement. This conclusion relies on flawed interpretation of aquifer testing, and neglects the significance of pumping in the headwaters.” Id.

Dr. Kraft’s comments indicate there could be significant impacts from Perrier’s proposal:

[t]he EA implies several times that few high capacity well projects have individually or in aggregate caused water resource impacts. This seems to be a case of mistaking an absence of evidence for evidence of the absence. (If one doesn’t look for a problem, it’s hard to find.)

.....

The discussion in the EA should be more forthright and state that we really don’t know to what degree pumping is affecting Wisconsin water resources, and that the very limited **data that are available has shown deleterious effects.**

Id. (Emphasis added)

The DNR conceded that . . . “[t]he initial pump tests were not designed to simulate potential impacts to stream flow.” (EA at 32; AR 00159)

The pump tests run by Perrier were not designed to measure changes to water levels in wetland areas, water table drawdowns, or pond level changes. (Stoddard Aff., Ex. 2)

The DNR concluded that “[t]he preliminary studies conducted by Perrier were not designed to evaluate or make conclusions regarding possible long-term impacts of the proposed production wells.” (EA at 6; AR 00133)

Additionally, the DNR even stated that it could not agree with Perrier's assertions that the project would not result in significant adverse impacts to groundwater:

Perrier has indicated in its Application that the wells, with pumping rates up to 500 gallons/minute, will not result in significant adverse impacts to groundwater (see Section 2, Environmental Assessment, page 20). As described above, **DNR does not feel sufficient information is available to make that conclusion.**

(Draft EA, at 24; Final EA, at 26; AR 00147 & AR 00153) (emphasis added)

Despite the conflicting and inadequate evidence, the DNR issued a negative EIS decision even though it lacked information about the potential adverse environmental impacts of the project. (AR 00128)

Due to this uncertainty, the DNR could not construct permit conditions to mitigate the potential impacts of this segment of Perrier's project, so the DNR sought voluntary commitments from Perrier. (EA at 4; AR 00131)

During the August 22, 2000, hearing before the Senate Committee on Agriculture, Environmental Resources and Campaign Finance Reform, former DNR Secretary George Meyer, testified that the EIS determination in this case was actually based on a separate agreement between the DNR and Perrier that "absolutely guarantees" that Perrier's proposed project "will not cause any significant adverse impacts." (Stoddard Aff., Ex 12 at 3)

The Agreement that former Secretary Meyer was referring to was the draft Agreement between Perrier and the DNR, which was later entered into on September 20, 2000, and executed on September 28, 2000. (AR 00201)

The CCN Petitioners first learned of the Agreement on or about August 11, 2000 when the DNR released it to the media with a press release. (AR 01182-01191) There is

no discussion of the Agreement in the draft EA, which the DNR issued prior to telling the public about the Agreement that it was negotiating with Perrier.

The Agreement provides that additional investigation to determine environmental impacts shall be left to Perrier. The additional investigation is to serve as the basis of any future conditions placed on Perrier's extraction of water. (EA at 38; AR 00165 and AR 00201-00207)

Under the Agreement, Perrier retains the right to challenge the DNR if it places any future restrictions on Perrier's operations. (Agreement at 6; AR 00206 & 00360)

Because of environmental concerns about Perrier's proposed project on September 19, 2000, Wisconsin's Attorney General, James E. Doyle, requested former DNR Secretary George Meyer to prepare a full EIS on Perrier's proposed project. In his letter, the Attorney General also threatened to take legal action to protect the public trust in the waters of the state should Perrier's project be permitted by the DNR and pose a serious threat to the environment. (Stoddard Aff., Exs. 15 and 16)

Attorney General Doyle's letter states, "In light of the uncertain effects of Perrier's proposed operation on critical resources of the State, I strongly urge you to proceed with an environmental impact statement for this project." (Stoddard Aff., Ex. 16)

After the approval of Perrier's Permit, the EA and the Agreement, Perrier reportedly conducted pump tests at the headwaters of Big Spring Creek in Adams County between November 10 and November 24, 2000. (Stoddard Aff., Ex. 18)

The pump tests reportedly caused a “drop in the level of a trout stream,” and were nearly stopped by the DNR for fear that the “dropping water levels in a tributary to Big Spring Creek would expose a trout spawning bed.” Id.

## **LAW AND ARGUMENT**

### **I. THE DNR’S DECISIONS IN THIS MATTER HAVE VIOLATED WISCONSIN’S ENVIRONMENTAL POLICY ACT (WEPA).**

Wisconsin’s Environmental Policy Act (WEPA), Wis. Stats. § 1.11, is modeled after a federal version of a similar law, the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347. These laws were the first attempts by the federal and state government to create a process that required administrative agencies to systematically incorporate environmental considerations into decision-making. The laws are intended to adjust the priorities of all government agencies to make protection of the environment an “essential” part of state policy. Wisconsin’s Environmental Decade v. Public Service Comm’n, 79 Wis.2d 409, 416, 256 N.W. 2d 149, 153 (1977) (hereinafter “WED III”).

The legislature designed the WEPA process to inform the public and other agencies about proposed projects. Wisconsin’s Env’tl. Decade, Inc. v. Wis. Dep’t of Natural Res., 94 Wis. 2d 263, 271, 288 N.W. 2d 168, 172 (Wis. Ct. App. 1979). The process established by WEPA has a critical timing component to it: the agency must conduct the WEPA analysis before an agency makes a final decision to issue a permit or approve a proposed project. This is to ensure that the agency assesses the environmental impacts prior to an irreversible and irretrievable commitment of resources. Wisconsin’s Env’tl. Decade, Inc. v. Wis. Dep’t of Natural Res., 94 Wis. 2d at 271, 288 N.W. 2d at 172.

WEPA requires state agencies to prepare an Environmental Impact Statement (“EIS”) if a proposed action is a major action significantly affecting the quality of the

human environment. Wis. Stat. § 1.11(2)(c) (2000). By contrast, the purpose of an Environmental Assessment (“EA”) is to determine if a permit decision is a major action resulting in significant impacts to the quality of the human environment. If the EA indicates that the project is a major action resulting in significant environmental impacts, the agency must conduct a more thorough evaluation of impacts through an EIS. State ex rel. Boehm v. Wisconsin Dept. of Natural Resources, 174 Wis. 2d 657, 676, 497 N.W. 2d 445, 453-454 (1993).

In reviewing Perrier’s proposed bottled water project, the DNR violated WEPA, § 1.11, Stats., by: A) dividing Perrier’s project into segments in order to avoid a full environmental review; B) issuing a negative EIS decision that is not reasonably supported by the record; and C) failing to mitigate potentially significant environmental impacts.

**A. The DNR Violated WEPA by Dividing Perrier’s Proposed Water Bottling Operations into Segments.**

The DNR impermissibly limited the scope of its environmental investigation when it decided not to prepare an EIS for Perrier’s bottled water project. The DNR based its decision not to prepare an EIS on an analysis of the environmental impacts of the high capacity wells alone. In making its threshold decision about whether to prepare an EIS, the DNR should have considered the entire bottled water project, not just the high capacity wells. See Wis. Stat. § 1.11(2)(c); Wis. Admin. Code, NR 150.20(2)(a) – (b) (2001). The DNR’s decision to limit its threshold analysis to the high capacity wells is unreasonable and should be reversed. See Wisconsin’s Env’tl. Decade, Inc. v. Dept. of Natural Res., 94 Wis. 2d at 278, 288 N.W. 2d at 175.

Perrier’s bottled water project, in its entirety, consists of several high capacity wells, up to seven miles of pipeline to transport the water to the bottling plant, and a

million square foot bottling plant. (EA at 2, AR 00129; EA at 6, AR 00133) By limiting its examination of the bottled water project to Perrier's application to pump spring water from high capacity wells, the DNR would have us think that Perrier is simply interested in pumping out 500 or more gallons of spring water every minute of every day of the year with no intention to bottle the water and deliver it to consumers. Perrier came to Wisconsin in search of a source of free spring water that it could extract from the public commons, deposit in small plastic bottles, and sell to consumers around the world, at a large profit. Without a bottling plant and way to get the water to consumers, the high capacity wells are useless to Perrier.

In the EA, the DNR is attempting to have it both ways: it gives a cursory review of the potential impacts of the bottling plant, but claims that the plant is too uncertain to review in combination with the high capacity well permits. The DNR even admits that it "would conduct **separate environmental reviews**" for any additional permits needed to complete Perrier's bottled water project. (EA at 23, AR 00150) (emphasis added). This process violates established law in this state. See Wis. Stat. § 1.11; Wis. Admin. Code, NR 150.20(2)(a) – (b); Wisconsin's Env'tl. Decade, Inc. v. Dept. of Natural Res., 94 Wis. 2d at 271, 2791-281, 288 N.W. 2d at 173, 176-77.

The DNR improperly concluded that Perrier's application was complete before it had received applications for all of the permits and approvals necessary for the pipeline and bottling plant. See Wis. Stat. § 1.11(2)(c); Wis. Admin. Code, NR 150.20(2)(a) – (b) (2001). WEPA requires one combined environmental review for the entire project. Wis. Stat. § 1.11(2)(c); Wis. Admin. Code, NR 150.20(2)(a) – (b) (2001). The purpose of WEPA is to review projects in their entirety to identify significant impacts, not to break

such projects up into small components that taken alone would have less significant impacts and merit less rigorous review by the agency.

When faced with a challenge to an agency's negative EIS decision, the court reviews the decision to determine if the agency acted reasonably and in good faith. State ex rel. Boehm, 174 Wis. 2d at 665-666, 497 N.W.2d at 449. The WED III inquiry is as follows:

First, has the agency developed a reviewable record reflecting a preliminary factual investigation covering the relevant areas of environmental concern in sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences of the action proposed; second, giving due regard to the agency's expertise where it appears actually to have been applied, does the agency's determination that the action is not a major action significantly affecting the quality of the human environment follow from the results of the agency's investigation in a manner consistent with the exercise of reasonable judgment by an agency committed to compliance with WEPA's obligations?

WED III, 79 Wis. 2d at 425, 256 N.W.2d at 158. This is a higher degree of scrutiny than the arbitrary and capricious standard of review. WED III, 79 Wis. 2d at 423-424, 256 N.W.2d at 157.

The first part of the analysis revolves around the adequacy of the record. City of New Richmond v. Wisconsin Dept. of Natural Resources, 145 Wis.2d 535, 543, 428 N.W.2d 279, 282 (Wis. Ct. App. 1988). The court must determine whether "the DNR has identified the environmental issues and the expected impact of the proposed action and considered available alternatives in a manner that provides a basis upon which a reasonable determination can be made as to whether an EIS is required." City of New Richmond, 145 Wis.2d 535, 543, 428 N.W.2d 279, 282 (Wis. Ct. App. 1988).

To aid the DNR in deciding the level of review to be accorded to various projects, the agency uses an "action type list" to determine the minimal procedural requirements

necessary to comply with WEPA. Wis. Stats. § 1.11, Wis. Admin. Code, NR 150.03 (2001). The action list shows which permit decisions require a full EIS and which initially require something less than an EIS. Id.

A permit application for a high capacity well, under section 281.17(1) of the Wisconsin Statutes, is listed as a Type IV action, an action that does not significantly affect the quality of the human environment. Wis. Stat. § 281.17(1); Wis. Admin. Code, NR § 150.03(8)(h)(1). However, in order for Perrier to develop its proposed bottled water project, it must obtain governmental approvals for much more than simply a high capacity well permit.

The DNR identified that the bottling plant may require a variety of permits including permits for air emissions from a plastic bottle molding line and vehicle parking facilities, waste water discharges, an industrial wastewater treatment facility, construction site storm water discharge, high capacity well at the bottling plant, and pipeline waterway crossings. (EA at 3, AR 00130) Perrier's proposed bottled water project would also require permits from other agencies and governmental bodies. (EA at 3, AR 00130) Perrier may need to get approval from the Wisconsin Department of Transportation for access to a plant site driveway, roadway improvements, and pipeline crossing of state/federal highways. (EA at 3, AR 00130) Perrier may need approval from the Wisconsin Department of Commerce for its building plans and a sanitary wastewater treatment system at the bottling plant, as well as for a truck fueling station. (EA at 3, AR 00130) Perrier may need a license from the Wisconsin Department of Agriculture, Trade and Consumer Protection to operate as a food processing facility. Lastly, Perrier may have to obtain from Adams County a rezoning of the land from A-1 Exclusive

Agriculture to I-1 Industrial, a permit for the pipeline to use County Highway G's right of way, and a permit for a septic system for its proposed bottling plant. (EA at 3, AR 00130)

At least six of the permits required for the bottling plant are Type II actions.<sup>1</sup> Type II projects require an EA because they have the potential to cause significant impacts. Wis. Admin. Code, NR 150.03(2); NR 150.20(1)(c). If the project had been reviewed in its entirety, it would have been initially classified as a Type II instead of a Type IV project and the DNR would have been required to conduct a more thorough environmental review of all of the potential impacts from the pipeline and bottling plant. See Wis. Admin. Code, NR 150.20(c) and (d).

This initial decision about whether to prepare an EIS "occupies a critical position" in the WEPA process. WED III, 79 Wis. 2d at 419, 256 N.W.2d at 155. "A negative determination at the initial stage may eliminate to a significant degree environmental consideration by the agency and may curtail much of the input, which an EIS is designed to foster, of other government agencies and the public in the agency's decision process." Id.

The rules the DNR promulgated to implement WEPA require the DNR to determine the completeness of an application in accordance with WEPA. Wis. Admin. Code, NR § 150.20(2)(a). "[A]n application or request for approval will not be

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<sup>1</sup> Perrier's project, when taken in its entirety, would require the following Type II actions: 1) permit for 100 or more tons of air emission for direct emissions from boiler, emergency electrical generator, and plastic bottle molding lines (NR 150.03(8)(b)(1)(a)); 2) air permit for new parking facilities (NR § 150.03(8)(b)(1)(b)); 3) wastewater permit for discharges from facilities which result in development of a new site (NR § 150.03(8)(i)(2)(a)); 4) plan approval for industrial wastewater facility which will result in the development of a new site (NR § 150.03(8)(i)(3)(a)); 5) WPDES general permit for non-contact cooling or boiler blow down waters discharged to either surface or groundwater (NR 150.03(8)(i)(2)(b)); and 6) approval of building plans and sanitary wastewater treatment system at any bottling plant (NR 150.03(8)(i)(3)(a)).

considered complete until § 1.11, Stats., and this chapter have been fully complied with.” Wis. Admin. Code, NR § 150.20(2)(a). The code goes on to clarify that when “an EA or EIS is required for a proposal involving more than one department action, the **entire project proposal** including all related department actions **shall** be addressed in a **comprehensive environmental analysis**. . .” Wis. Admin. Code, NR § 150.20(2)(b) (emphasis added).<sup>2</sup>

The DNR claimed that it could not consider this project as a whole because the bottling plant proposal was too uncertain and the DNR has “no authority to compel applications for the pipeline and bottling plant.” (AR 00229) Although an agency to which an application is made can normally act only upon the application before it, “that limitation must not be used to avoid the mandate of WEPA.” Wisconsin’s Env’tl. Decade, Inc. v. Dept. of Natural Res., 94 Wis. 2d at 272, 288 N.W. 2d at 172. Here, the Record shows that the DNR initially considered the project as a whole and then improperly broke it up into smaller segments. (E.g., AR 003096; AR 003067; AR 00128-129) Consequently, the DNR has not even made a good faith effort to comply with WEPA.

Impermissible segmentation exists when an agency defines a project too narrowly for environmental analysis. Wisconsin’s Env’tl. Decade, Inc. v. Dept. of Natural Res., 94 Wis. 2d at 271, 288 N.W. 2d at 173. The court considers a number of factors when deciding whether it was unreasonable for an agency to break up a single project into smaller, less significant segments. These considerations include the following:

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<sup>2</sup> There are some exceptions to this requirement. The rule does not apply if: the action will not limit the choice of reasonable alternatives for remaining actions, the action otherwise meets the procedural requirements of this chapter, the action allows activities that have independent utility, the action does not compel implementation of the remaining actions, and the action does not involve impacts that are cumulatively significant. See Wis. Admin. Code, NR § 150.20(2)(b)(1-3). None of these exceptions apply here, nor has the DNR even asserted that they would apply.

1. The manner in which the segments were planned;
2. The segments' geographic location;
3. The utility of each in the absence of the other;
4. Whether the excluded segment has independent significance;
5. Whether there is a strong nexus between the two segments;
6. Whether one segment is a component or an increment of the other;
7. Whether the segment under consideration fulfills important state and local needs; or
8. Whether commitment of resources in one segment tends to make further construction more likely.

See id. at 279-281, 288 N.W.2d at 176-77.

In Wisconsin's Env'tl. Decade, Inc. v. Dept. of Natural Res., the Court of Appeals applied these factors and held that the DNR's decision to limit the scope of its environmental review to a segment of a proposed sewer interceptor was reasonable. Id. at 280-281, 288 N.W.2d at 176-77. The court based its holding on evidence that demonstrated that the segment had independent utility because regardless of whether the additional segment was constructed, the approved segment would serve a vital local purpose of relieving the sewer system, allowing the abandonment of an existing inadequate wastewater treatment facility, and eliminating the discharge of insufficiently treated effluent to surface waters. Id. at 281-82, 288 N.W.2d at 177. "The segment terminating at Hales Corners not only fulfills a local need at Hales Corners but that is its primary purpose." Id. at 282, 288 N.W.2d at 177. Since the segment had independent utility, installation of the first segment did not compel construction of the second. Id.

Unlike Wisconsin's Env'tl. Decade, Inc. v. Dept. of Natural Res., in this case, the agency impermissibly and unreasonably broke Perrier's proposed project into smaller segments in order to avoid a full environmental review. The DNR limited the scope of the EA to the application for a high capacity well permit, (EA at 1-2, AR 00128-29), despite the fact that Perrier's project is a proposed "**water source and bottling facility**"

in the Big Springs area. (EA at 2, AR 00129) (emphasis added). Applying Wisconsin's Envtl. Decade's test for improper segmentation, the DNR's action is unreasonable because:

- The plans for the bottling plant and pipeline were well known, well developed, and planned in conjunction with the high capacity wells. (E.g. AR 003096)
- The wells, bottling plant and pipeline are all in close geographic proximity. (E.g., AR 00183-84)
- Perrier's development of a spring water source has no independent utility without a bottling plant to move that water into the stream of commerce. (E.g. AR 003064; AR 003143)
- There is a strong logical connection between the bottling plant, the pipeline and the high capacity wells.
- The bottling plant and pipeline are a component of the high capacity wells, forming a bottled water proposal. (E.g. AR 00202; AR 00132)
- The high capacity wells do not fulfill important state and local needs because Perrier would sell the bottled water for profit and not provide it to the public as a public water supply. (EA at 2, AR 00129)

The DNR's use of words like "conceptual" or "potential" or "possible" in reference to the bottling plant serve to obscure the real issue:<sup>3</sup> that the wells would have no independent utility without an economical way to get the water from the springs into bottles and then on to the consumers. The way Perrier planned to accomplish this was with a pipeline and a million square foot bottling plant. (E.g., AR 00202; AR 003200) Perrier needed to find "a site capable of producing the volume and quality of water needed to make the costs of bottling plant development a viable corporate option." (EA at 2, AR 00129)

The manner in which the bottling plant, pipeline, and high capacity wells were planned shows that Perrier's bottled water project consists of high capacity wells, a

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<sup>3</sup> The DNR has denied that the bottling plant is "proposed." DNR Notice of Appearance, ¶ 37. Yet, there are numerous documents in the record that refer to a "proposed" rather than a "possible" bottling plant. E.g., AR 003265; AR 003096; AR 003200.

bottling plant and a pipeline that are all intertwined and that were planned together as a single project. The level of detail in the EA about the proposed bottling plant and pipeline would not have been known by the DNR had they not been extensively negotiating about the future development of the bottling plant.

The DNR had been reviewing Perrier's plan to bottle water from the Big Spring site since at least February of 2000, four months before Perrier ever submitted a formal application for a high capacity well permit. (AR 003265) During the course of those months, Perrier submitted to the DNR detailed information about a bottling plant and pipeline including, but not limited to, a site plan, a building floor plan and phasing plan, a preliminary design report, and a preliminary pipeline design report. (Draft Agreement at 2, AR 00202) Perrier also submitted cost estimates for the bottling plant. (EA at 5, AR 00132) If there is any doubt that this project was not hypothetical, one can review the map that shows both the spring sites and the bottling plant site, as well as a detailed map of the bottling plant. (EA at attachments 1 and 2, AR 00183-84)

In a March 13, 2000, letter from the DNR to Perrier's lawyer, the DNR provided Perrier "with a preliminary list of permitting issues as they apply to the **proposed bottled water plant** in the Town of New Haven in Adams County." (AR 003096) (emphasis added). This letter advised Perrier of the potential need for wetland permits, air permits, and wastewater permits, among others, necessary to complete the entire bottled water project. (AR 003096 – 003101)

Also as early as February of 2000, the DNR staff members who would be responsible for air and wastewater permits for Perrier's proposed bottling plant were involved in project meetings. A DNR email, dated February 28, 2000, listed air and

stormwater employees that would assess the impacts of the bottling plant. (AR 003265) This email stated that “[w]e will likely know more about the **proposed Perrier Plant** in Adams County this week.” (AR 003265 )(emphasis added).

On March 3, 2000, there was a meeting of the DNR’s technical team for Perrier’s bottled water project that included air and wastewater specialists who would be analyzing the impacts of the proposed bottling plant. (AR 003041; AR 003087) Notes from that meeting stated that Perrier met with DNR and is proposing a “Pipeline down Highway G.” (AR 003042). Also in March of 2000, the DNR continued to work on this project as if the bottling plant would be part of the WEPA analysis when DNR staff noted that there “will be just 1 EA so they must act quickly” to choose the bottling plant site. (AR 003036) The notes continue that “by April 14<sup>th</sup> [DNR and Perrier] should know plant site.” (AR 003037) Another set of DNR notes from the same day state that the bottling plant will be operating by May 2001. (AR 003071)

The bottling plant was clearly part of the preliminary proposal reviewed by the agency. DNR notes list a variety of outstanding permit issues related to the environmental impacts of the bottling plant. (AR 003067) These are identified as “Issues w/ Preliminary Proposal.” (AR 003067) A document entitled “Perrier Group of America Midwest Project – Conceptual Building and Site Scope” included information about the building site, energy needs, and waste produced. (AR 003074) This same document includes a handwritten note projecting “100-200 semi/day after build up.” (AR 003074) Another document shows the DNR calculated the air emissions from the bottling plant’s industrial boilers and diesel engines. (AR 003056 – 003063)

On May 2, 2000, the DNR was still discussing the bottling plant as part of the overall proposal. (AR 003194) A DNR email stated that Perrier “indicated that they are still working on the plant site and that the application submittal will depend on when they get that taken care of.” (AR 003194)

However, on June 22, 2000, Perrier submitted a permit application for a high capacity well permit rather than applications for all of the permits that the DNR had indicated Perrier would need to carry out their project. (AR 003196) Perrier simultaneously submitted a Preliminary Design Report and Environmental Analysis for “their **proposed** plant in New Haven, Adams Co.” (AR 003200) (emphasis added). They also submitted a preliminary stormwater management plan for the bottling plant. (EA at 8, AR 00135) Despite these partial submittals, the DNR determined that the application was complete and limited the scope of its WEPA analysis to the high capacity well permit application.

In fact, the “potential” or “proposed” site was so well known that there had already been soil samples taken to show that the soils were adequate for the load of the building. (EA at 6, AR 00133) The site characteristics were so well developed that the DNR knew that not only would another high capacity well be required for the bottling plant, but that it “would be installed **north**” of the plant. (EA at 6, AR 00133) (emphasis added). Similarly, the DNR not only knew that the bottling plant would need a system for sanitary wastewater, but that that system would be “**400 feet southwest** of the plant” and would handle “2,000 gallons/day” of wastewater. (EA at 7, AR 00134) (emphasis added). Perrier even included an assessment of the bottling plant’s air emissions in its permit application to the DNR. (AR 00135)

Perrier's correspondence with the public and the DNR further reveals that the bottling plant and high capacity wells are interconnected components of each other, each having no independent utility in the absence of the other. (E.g., AR 003064) In Perrier's March 1, 2000, letter to the public announcing its intentions, Perrier stated that it was searching for a "water source and bottling plant site . . ." (AR 003064) Perrier defined its project as a "**proposal** to locate a spring water **bottling facility** . . ." (AR 003064) (emphasis added). Perrier indicated that their "plans call for piping or transporting spring water to a bottling plant we hope to construct in a community near the spring we select." (AR 003065). Similarly, in a March 24, 2000, letter from Perrier to the DNR, Perrier referred to its "search for a Midwest spring site and plant . . ." (AR 003143)

Lastly, unlike the segment approved by the DNR in Wisconsin's Env'tl. Decade, Inc. v. Dept. of Natural Res., where the court found that the project's "primary purpose" was to serve a vital local need by relieving the sewer system and eliminating the discharge of insufficiently treated effluent to surface waters, Wisconsin's Env'tl. Decade, Inc. v. Dept. of Natural Res., at 281-82, 288 N.W.2d at 177, Perrier's high capacity wells do not fulfill any important state or local needs. On the contrary, the overwhelming reaction by the majority of citizens of the State of Wisconsin who commented on DNR's preliminary EA was that Perrier's proposal would harm important state and local interests in the conservation and protection of water resources, and would not be in the public interest. The DNR admits that on June 13, 2000, the Town of Newport, held an advisory referendum in which 114 opposed and a mere 26 supported Perrier's proposed water bottling operations in nearby Adams County. (DNR Notice of Appearance, at ¶ 23) The DNR also admits that on June 29, 2000, the Town of Newport passed a resolution

opposing water extraction for commercial purposes where water is taken from the community. (DNR Notice of Appearance, at ¶ 23) There is no dispute that the purpose of Perrier's bottled water project is to meet Perrier's "projected corporate production goals," not the public needs of the state or local community. (EA at 2, AR 00129)

The DNR's actions show that the agency erred and failed to act in good faith when conducting the WEPA process. The DNR's decision to only review Perrier's high capacity well permit application was unreasonable in light of the facts showing that the bottling plant and pipeline were part of the proposal that Perrier had previously submitted to the DNR as early as February of 2000; the high capacity wells have no independent utility in the absence of the pipeline and bottling plant; the wells were planned in conjunction with the bottling plant and pipeline; the bottling plant and pipeline are simply components or increments of the high capacity wells; there is a strong nexus or connection between each of these segments of the project; and the high capacity wells do not fulfill important state and local needs. See Wisconsin's Envtl. Decade, Inc. v. Dept. of Natural Res., at 279-281, 288 N.W.2d at 176-77.

Taken as a whole, Perrier's bottled water project should be considered a Type II rather than a Type IV action, requiring a more thorough environmental review of all of the potential impacts from the entire project. The court should reverse the agency's unreasonable negative EIS decision because it is based on a segment of a much larger bottled water project.

**B. The DNR Violated WEPA by Issuing a Negative EIS Decision that is Not Reasonably Supported by the Record.**

Not only did the DNR improperly divide Perrier's bottled water project into segments, but the EA on Perrier's high capacity wells fails the first part of the WED III

test because it does not support a reasonable conclusion that no EIS is required for this project. See WED III, 79 Wis. 2d at 425, 256 N.W.2d at 158. The DNR did not know what the potential environmental impacts of Perrier’s high capacity wells would be. (See, e.g., EA at 6, AR 00133; EA at 10, AR 00138; EA at 24, AR 00151; EA at 26, AR 00153; EA at 27, AR 00154; EA at 32, AR 00159; EA at 43, AR 00170) Despite the absence of evidence showing that there would be no significant impacts, the DNR unreasonably jumped to the conclusion that Perrier’s “high capacity well project is not a major action that would result in significant impacts.” (EA at p.48, AR 00175)

The EA on Perrier’s high capacity wells reveals that there could be environmental impacts from this project; however, the DNR did not even conduct a preliminary investigation capable of identifying the extent and intensity (i.e., significance) of the environmental impacts. Prior to conducting such a preliminary investigation, the DNR erroneously concluded that the impacts would be insignificant and issued its negative EIS decision. This conclusion is unreasonable in light of the uncertainty the DNR had about the impacts that the high capacity wells would have on groundwater and surface water resources.

**1. Perrier’s High Capacity Wells Could Significantly Impact the Environment.**

Perrier’s high capacity wells could significantly impact the environment in a variety of ways, including: drying up private wells, artesian springs, wildlife ponds and wetlands; decreasing the rate and/or volume of artesian spring water generated at Jensen’s and Buckley Ponds; and reducing flows in the headwaters of Big Spring Creek and Mason Lake, which could adversely affect fisheries, wildlife, and related aquatic and terrestrial life. (EA at 40, AR 00167; EA at 32, AR 00159; EA at 32, AR 00159)

The DNR admitted that “[p]hysical impacts to surface water and groundwater resources in the area will result, such as a lowered water table and reduced flows downstream . . . The functional values of nearby wetlands could be lost or changed.” (EA at 40, AR 00167) Yet, the DNR concluded, without supporting evidence or data, that there would be no significant impacts. (See EA at 40, AR 00167)

The DNR admitted that Perrier’s proposed spring water pumping could also impair water quality in Mason Lake and Amey Pond. (EA at 32, AR 00159) Mason Lake could be adversely impacted if water withdrawals by Perrier reduced the streamflow in Big Spring Creek. (EA at 31, AR 00158) Mason Lake’s temperature, nutrient level and algae growth could increase due to this, and carp could reestablish themselves as the dominant fish species in the lake. (EA at 31, AR 00158) Reduced flows in these waters could also impact management practices on Mason Lake that call for winter drawdowns in water level. Drawdowns on Mason Lake could be discontinued out of fear that water levels would not be restored in time for fish spawning and recreation. (EA at 24, AR 00151)

The DNR admits that Perrier’s water withdrawals could eliminate flows to Big Springs Creek, drain ponds and adjacent wetlands, and stress or eliminate aquatic life. (EA at 32, AR 00159)

Moreover, diversions of water from the public commons for Perrier’s private profit threatens public rights in these waters, such as fishing, water quality, water supply, aesthetics, and wildlife and habitat. (EA at 24, AR 00151)

Surely the DNR could not reasonably conclude that such adverse impacts are insignificant. The DNR stated that the best way to avoid these adverse impacts is to

prevent the cone of depression or area of influence of the high capacity wells from extending to these areas. (EA at 32, AR 00159) But the DNR, at the time of issuing the EA, did not even know if it was possible to do this. “Ongoing additional tests and modeling will be used to determine **if this is possible.**” (EA at 32, AR 00159) (emphasis added).

Despite this lack of data, the DNR concluded that no significant impacts to fish and other aquatic species would be expected. (EA at 32, AR 00159) This conclusion is based not on facts in the record or known to the DNR, but on pure speculation and wishful thinking about future approvals by the DNR that might require modified operations to protect biological communities. (EA at 32, AR 00159)

**2. The DNR Failed to Conduct a Preliminary Investigation Capable of Identifying the Extent and Intensity (i.e., Significance) of Environmental Impacts.**

There is insufficient data in the Administrative Record to determine whether it is even “possible” to operate a high capacity well on the Big Springs site in a manner that renders the potential environmental impacts insignificant. (EA at 32, AR 00159) Ironically, the EA is riddled with admissions that the DNR lacks the data to know what the impacts of the high capacity well will be. (See, e.g., EA at 6, AR 00133; EA at 10, AR 00138; EA at 24, AR 00151; EA at 26, AR 00153; EA at 27, AR 00154; EA at 32, AR 00159; EA at 43, AR 00170) Indeed, one purpose of the private Agreement between Perrier and the DNR was to create the data necessary to predict the environmental impacts. (AR 00201)

The DNR identified critical questions related to their duties as trustees of the water resources of the state, questions for which they had no answers at the time of the

negative EIS decision: “Would fish and other aquatic life survive? Knowing that water temperatures in lower sections of the stream . . . indicated marginal conditions for trout, might Perrier withdrawals trigger temperatures that cause fish stress or death?” (EA at 27, AR 00154) Instead of developing the information needed to answer these questions and make a reasonable EIS determination, the DNR assigned its responsibility to Perrier to develop basic information about the cone of depression, stream flow, and potential impacts of the proposal. (AR 00201) To remedy this lack of information, the DNR entered into an *ultra vires* and unenforceable agreement with Perrier. However, even if the agreement is valid, any information developed pursuant to the agreement would necessarily come to the DNR’s attention too late to be considered for purposes of the EIS determination. (AR 00201)

In assessing the significance of the risk of Perrier’s high capacity wells, the DNR admitted that “the exact effects of Perrier water withdrawals up to 500 gallons/minute are not yet known.” (EA at 43, AR 00170) (emphasis added). Contrary to Perrier’s claims, the DNR determined that the groundwater testing that had been completed when the DNR issued the EA was not designed to reveal whether pumping 500 gallons per minute, every minute of every day of the week, would cause significant adverse environmental impacts. (EA at 25, AR 00152) The tests conducted by Perrier only pumped one well at a time and pumped at much lower rates. (EA at 25, AR 00152) The highest pumping rate was 200 gallons per minute. (EA at 25, AR 00152) By contrast, Perrier intends to pump 500 gallons per minute and has the option of increasing its pumping level even further. (EA at 25, AR 00152; AR 00206) (allowing Perrier to “seek an amended approval for [a] . . . higher extraction rate.”)

The DNR admitted that “[n]o stream flow measurements were taken to document changes in stream flow from withdrawals up to 200 gallons/minute” (EA at 27, AR 00154), so the DNR could not reasonably conclude that pumping water at the higher rate of 500 gallons/minute would not significantly impact stream flow. The agency lacked any “long-term historic Big Spring Creek flow data or underlying groundwater water table data . . .” (EA at 10, AR 00137) “There are no long-term stream flow records at the Big Springs site to say that flow is always, sometimes or rarely at least 17.31 cfs.” (EA at 27, AR 00154) Nor were the only studies that were conducted “designed to evaluate or make conclusions regarding possible long-term impacts of the proposed production wells.” (EA at 6, AR 00133; see also EA at 24-25, AR 00151-52) The DNR conceded that “there is **no technical basis** from which to conclude that Big Spring Creek flow would not be impacted.” (EA at 27, AR 00154) (emphasis added)

At the time the DNR issued the negative EIS decision, it did “not feel sufficient information [was] available” to conclude that there would be no significant adverse impacts to groundwater. (EA at 26, AR 00153) Yet, the DNR claimed it was “unlikely” that neighboring drinking water wells would be seriously impacted if the groundwater table were to be reduced a few feet. (EA at 26) The DNR concluded as such even though the agency was going to ask Perrier to “complete a private well inventory within a 1.5 mile radius of the proposed production wells” **after** the DNR issued its negative EIS decision. (EA at 26, AR 00153)

At the time the DNR made its negative EIS decision, the agency lacked the information it needed to conclude that the impacts would be insignificant because the impacts were “not yet known.” (EA at 43, AR 00170) Instead of developing the

required information to support a negative EIS determination, the DNR abdicated its responsibility under WEPA and jumped to the conclusion it had to reach to allow Perrier to proceed with its project on an incremental basis.<sup>4</sup>

### **3. The DNR Erroneously Decided to Act First and Study the Impacts Later.**

WEPA requires agencies to conduct an investigation of the potential impacts of a project before deciding whether the impacts are significant or insignificant. Wisconsin's Env'tl Decade, Inc. v. Wis. Dep't of Natural Res., 94 Wis. 2d at 267-68, 288 N.W. 2d at 170. Here, instead of following this process, the DNR chose to act first and study the impacts later. This process violates the basic tenets of WEPA. See id. In the DNR's own words, the agency is supposed to conduct an environmental review with public input “**before** the action is taken (i.e. permit issued, land acquired, etc.)” (EA at 4, AR 00131). This process must occur in an open and public manner to ensure the participation of the public and other government agencies. Wisconsin's Env'tl Decade, Inc. v. Wis. Dep't of Natural Res., 94 Wis. 2d at 268, 288 N.W.2d at 171.

When faced with inadequate information on which to base a negative EIS decision, an agency should either require additional testing prior to making a final EA decision or require an EIS in order to more fully develop the information about impacts. See Nat'l Parks & Conservation Assoc. v. Bruce Babbitt, 241 F.3d 722, 731 (9th Cir. 2001).<sup>5</sup> By not doing so, the negative EIS decision fails the WED III test because the information is not developed in sufficient depth to support a reasonably informed

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<sup>4</sup> Prior to issuing the negative EIS decision, the DNR had already assisted Perrier with its plans to locate in Wisconsin. (Stoddard Aff., Ex. 4)

<sup>5</sup> Since WEPA is modeled after NEPA, federal cases interpreting NEPA are persuasive authority when interpreting WEPA. State ex rel. Boehm, 174 Wis. 2d at 676-77, 497 N.W.2d at 454.

conclusion that there will be no significant adverse impacts to the environment. WED III, 79 Wis. 2d at 425, 256 N.W.2d at 158. Here, the DNR has not followed its own description of the law and has attempted to postpone the required environmental review until after it decided to issue the permit to Perrier.

This is similar to the process rejected a few months ago by the Ninth Circuit where the National Park Service in Alaska erroneously believed that, under NEPA, it could act first and study the impacts later. Nat'l Parks & Conservation Assoc. v. Bruce Babbitt, 241 F.3d 722, 731 (9th Cir. 2001). In National Parks & Conservation Assoc., the Park Service, like the DNR in this case, erred in its decision to issue a Finding of No Significant Impact (FONSI) when it lacked the data necessary to determine that the environmental impacts would be insignificant. Id. When faced with uncertainty, the Park Service decided to issue a new policy increasing cruise ship traffic in Glacier Bay and study the impacts after the fact. Id. at 733. The court rejected this because “[p]reparation of an EIS is mandated where uncertainty may be resolved by further collection of data . . .” Id. at 732 - 733.

Likewise, the Court here should reject the DNR’s decision to issue the high capacity well permit prior to obtaining the testing and modeling necessary to show that the wells will not significantly and adversely impact the environment. The DNR responded to the inadequate information regarding significant impacts to water resources (EA at 43, AR 00170), by requiring Perrier to conduct additional testing **after** the EA decision. (See EA at 25, AR 00152) “Additional aquifer tests are planned over the next several months . . . to further define the cone(s) of depression . . . and the area of influence (direction of flow) at pumping rates up to 1000 gallons/minute.” (EA at 25, AR

00152) Similarly, **after** the issuance of the negative EIS decision, Perrier was to construct a groundwater model. (EA at 25, AR 00152) The agency asserted that these studies would be helpful to determine future operational limits. (EA at 4, AR 00131)

The DNR should have conducted the testing and modeling prior to the agency's completion of the WEPA process and its decision to issue the high capacity well permit. Without this information, the DNR's negative EIS decision fails the WED III test because the record contains insufficient data to reasonably conclude that the impacts of the project will be insignificant.

**C. The DNR Violated WEPA by Failing to Adequately Mitigate Significant Environmental Impacts**

WEPA requires state agencies to use an EA to determine if a permit decision is a major action resulting in significant impacts to the quality of the human environment. If the agency decides the project will not significantly impact the environment, it issues a negative EIS decision<sup>6</sup> and concludes the WEPA process. Id. If the project is a major action resulting in significant environmental impacts, the agency must conduct a more thorough evaluation of impacts through development of an EIS or adequately mitigate those impacts to such a degree as to render them insignificant. State ex rel Boehm v. Wis. Dept. of Natural Res., 174 Wis.2d 657, 676, 497 N.W.2d 445, 453-454 (Wis. 1993).<sup>7</sup>

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<sup>6</sup> On the federal level, this decision is referred to as a finding of no significant impact (FONSI). See Nat'l Parks & Conservation Assoc. v. Bruce Babbitt, 241 F.3d 722, 729 (9<sup>th</sup> Cir. 2001).

<sup>7</sup> The Federal law interpreting NEPA is consistent with WEPA law: NEPA's EIS requirement is governed by the rule of reason, Committee for Auto Responsibility v. Solomon, 195 U.S. App. D.C. at 421, 603 F.2d at 1003 (1979), and an EIS must be prepared only when significant environmental impacts will occur as a result of the proposed action. If, however, the proposal is modified prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impacts stemming from the original proposal, the statutory threshold of significant environmental effects is not crossed and an EIS is not required.

In reviewing Perrier's high capacity wells, the DNR based its finding of no significant impact on a private Agreement with Perrier that contained requirements to essentially mitigate any "significant adverse impacts." (EA at 40, AR 00167) Yet, the DNR could not possibly mitigate the potential impacts of Perrier's high capacity wells when, at the time they issued the negative EIS decision, they lacked the information to know if it was even "possible" to operate the high capacity wells in a way that did not adversely impact the environment. (See e.g., EA at 32, AR 00159)

In the two Wisconsin cases that have upheld the use of conditions to mitigate significant environmental impacts, the agency had: 1) already completed a sufficient factual investigation to identify the potentially significant environmental impacts; 2) tailored concrete conditions to eliminate those identified impacts; and 3) required compliance with the conditions to obtain approval for the project. State ex rel. Boehm, 174 Wis. 2d at 676-77, 497 N.W.2d at 453-54; City of New Richmond, 145 Wis. 2d at 546, 428 N.W.2d at 283. The federal cases interpreting NEPA follow this pattern as well. E.g., Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982).

In State ex rel. Boehm, the DNR concluded that a proposed landfill in Waukesha County was not a major action that would significantly affect the quality of the human environment (and thus require an EIS). State ex rel. Boehm, 174 Wis. 2d at 677, 497 N.W.2d at 454. The agency based its conclusion on conditions it had imposed to mitigate the potential impacts. See id. at 670, 497 N.W.2d at 451. After conducting a review that identified the significant impacts of the landfill, the agency imposed twenty-nine

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Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982).

conditions for approval of the landfill that were designed to mitigate adverse impacts. Id. at 673, 497 N.W.2d at 452.

The record in State ex rel Boehm provided evidence that the agency had made a preliminary factual investigation of the environmental consequences of the proposed action. In fact, the circuit court had remanded the EA back to the DNR twice for further investigation, so the record before the Supreme Court was quite developed. It consisted of 2,500 pages and included a two-volume feasibility report with four addenda. Id. at 667, 497 N.W.2d at 450.

In State ex rel. Boehm, the agency concluded that the project would not significantly impact wetlands because “in order to be licensed the site must be developed in accordance with Wisconsin Administrative Code . . .” Id. at 670, 497 N.W.2d at 451. The agency also included a specific mitigation plan that required absorption of runoff and biofiltration basins as part of the DNR’s conditions of approval for the landfill. Id. Further, the DNR evaluated sedimentation impacts, identified the potential impacts, and then designed conditions to mitigate those impacts. Id. The DNR required the project proponent to provide detailed plans, specifications, and performance criteria for a biofilter to treat water that would discharge from the sedimentation basin. Id. at 671-672, 497 N.W.2d at 451-52. The court upheld the DNR’s decision not to prepare an EIS because the record was adequate to show that the DNR’s decision was reasonable. Id. at 676-77, 497 N.W.2d at 449-50.

In City of New Richmond, the Court of Appeals upheld the DNR’s decision not to prepare an EIS where the record showed that the DNR had investigated the impact of air emissions from a proposed municipal waste incinerator, concluded that the impact would

be significant, and required the use of a control system to reduce the air emissions from the facility. City of New Richmond, 145 Wis. 2d at 546, 428 N.W.2d at 283. “[A]ny potentially adverse environmental consequences were adequately considered and controlled through permit conditions.” Id. at 550, 428 N.W.2d at 285. The court held that this satisfied the first part of the WED III test. Id. at 544, 428 N.W.2d at 282-83.

The federal cases interpreting NEPA also allow mitigation to obviate the need for an EIS, as long as there has been a sufficient factual investigation into potential impacts **and** the mitigation requirements are enforceable. E.g., Van Abbema v. Fornell, 807 F.2d 633, 634-637 (7th Cir. 1986) (upholding mitigated FONSI that identified significant impacts of coal facility and included 23 special conditions in the permit to mitigate the impacts); Louisiana v. Lee, 758 F.2d 1081, 1083 (5th Cir. 1985) (upholding mitigated FONSI where conditions were placed in the permit and were enforceable by the Corps); Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 683-684 (D.C. Cir. 1982) (upholding mitigated FONSI that was based on extensive identification of significant impacts to grizzly bears, mitigation measures that were developed during the NEPA review process, and conditions that were enforceable by revocation of permit);

Courts have not upheld mitigating conditions that are nothing more than “tenuous assurances” and “vague statements of good intentions.” Louisiana v. Lee, 758 F.2d 1081, 1083 (5th Cir. 1985); Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 860 (9th Cir.1981).

Tenuous assurances are, at best, what the DNR has provided in this case. The DNR’s EA decision for Perrier stands in contrast to previous mitigating conditions that the court has upheld. The DNR has attempted to circumvent WEPA by entering into a

private Agreement with Perrier. The DNR has not developed concrete conditions to mitigate identified environmental impacts because the agency does not have the information necessary to develop those conditions. (See e.g., EA at 43, AR 00170) The DNR lacked the data to show how Perrier’s high capacity wells would impact ground water, surface water and aquatic resources. (E.g., EA at 10, AR 00137) Instead of developing the necessary data during the WEPA process, the agency required Perrier to submit data after it issued the negative EIS decision. (E.g., EA at 25, AR 00152) The agency based its negative EIS decision on future, undefined operational limits that it might add to Perrier’s high capacity well permit without any further review under WEPA. (EA at 4, AR 00131)

Unlike State ex rel. Boehm, where the project proponent submitted detailed plans which would render potentially significant sediment impacts insignificant, neither the DNR nor Perrier developed a sufficient factual basis to mitigate potentially significant impacts. After the DNR stated that it “does not feel sufficient information is available” to conclude that there will not be significant impacts to groundwater (EA at 26, AR 00153), it concluded that the impacts would be insignificant due to its ability to adjust withdrawal rates as needed to prevent significant adverse impacts. (EA at 43, AR 00170)

In contrast to City of New Richmond, where the court upheld a negative EIS decision based on specific permit restrictions that required control technology to avoid significant impacts, City of New Richmond, 145 Wis. 2d at 546, 428 N.W.2d at 285, here the DNR merely gave a vague assurance that if “proposed withdrawals would cause such a loss of stream flow that may jeopardize aquatic life, DNR would restrict withdrawals to less than that amount.” (EA at 27, AR 00154) The DNR lacked the basic

information to know how much stream flow could be safely reduced without significantly impacting aquatic life, and was unable to construct concrete and enforceable mitigation conditions. The DNR admitted that it was “not so clear . . . what conditions must be placed on a high capacity well approval to ensure no significant impact.” (EA at 44, AR 00171)

The DNR failed to set a maximum pumping rate, minimum stream flows, or even the location of the high capacity wells. (EA at 1, AR 00128) The DNR planned to set the pumping level **after** it made the negative EIS decision and **after** it issued the high capacity well permit. (EA at 26, AR 00153)

The DNR used the operating conditions that could be designed to, at some future date, protect aquatic resources as a basis to conclude that there will be no significant impact. Yet, at the time of the negative EIS decision, the DNR lacked any information to establish those operating conditions and did not incorporate those conditions into the permit decision.

Instead, the DNR indicated that “[o]perating restrictions **will be** identified and incorporated into any DNR high capacity well approval to protect surface waters.” (EA at 29-30, AR 00156-57) (emphasis added) However, this entirely depends on ex post facto studies and monitoring that will be conducted by Perrier, not the DNR, to “help determine such restrictions.” (EA at 29-30, AR 00156-57) The Agreement allows Perrier to provide the vast majority of the information that will form the basis of any future permit terms, thus essentially allowing Perrier to write its own permit conditions with no public WEPA review. (Draft Agreement at 3, AR 00203) The public did not even know how much water the DNR would ultimately allow Perrier to take from the state because

the DNR did not know this at the time of its negative EIS decision. Although the EA asserts that the maximum pumping capacity of Perrier's wells will be 500 gallons per minute, the agreement allows Perrier to seek a higher extraction rate. (Draft Agreement at 6, AR 00206)

In response to the finding that Mason Lake **could** be adversely impacted if water withdrawals by Perrier reduced the streamflow in Big Spring Creek (EA at 31, AR 00158), the DNR's response stated that "Perrier could be required to temporarily restrict pumping if needed to prevent the above adverse impact." (EA at 31, AR 00158)

The DNR based this conclusion and its other findings of no significant impacts on the private Agreement it had with Perrier. That Agreement, however, is invalid and unenforceable because the DNR arguably lacked the authority to enter into it. (See Section III of this Brief)

Assuming, arguendo, that the Agreement was valid, the negative EIS determination still fails the WED III test because it is unreasonable to conclude that the impacts will be mitigated enough to render them insignificant. The mitigating conditions upheld by the state and federal cases all contained well-defined and enforceable conditions. E.g., Van Abbema v. Fornell, 807 F.2d 633, 634-637 (7th Cir. 1986). By contrast, Perrier's Agreement does not provide enforceable restrictions on Perrier's operations. Instead, the Agreement allows Perrier to challenge any future restrictions on pumping and bottling Wisconsin's public water resources. (AR 00206) Unlike the twenty-nine specific mitigating conditions for the landfill upheld by the court in State ex rel. Boehm, 174 Wis. 2d at 673, 497 N.W.2d at 452, Perrier's Agreement and conditional

permit are too indefinite to serve as a reasonable basis on which to rest a negative EIS decision.

Given the lack of information about the extent of environmental impacts, the lack of concrete conditions placed in the permit setting maximum pumping rate and minimum stream flows, and the ability of Perrier to challenge any future restrictions on its operations, the DNR's negative EIS decision fails the WED III test: the record fails to provide reasonable assurances that the impacts of this project will be rendered insignificant through the implementation of specific and enforceable mitigating conditions in the permit.

For all of the reasons set forth above, the Court should declare the EA inadequate and set aside or remand the DNR's September 18, 2000 decision that an EIS is not required under WEPA.

## **II. THE DNR VIOLATED THE PUBLIC TRUST BY ISSUING A HIGH CAPACITY WELL PERMIT TO PERRIER.**

Under the public trust doctrine, the state holds title to navigable waters in trust for use by the public.<sup>8</sup> E.g., State v. Bleck, 114 Wis. 2d 454, 465, 338 N.W.2d 492, 497 (Wis. 1983) (grounding the public trust doctrine in the state constitution); Muench v. Pub. Serv. Comm'n, 261 Wis. 492, 504, 53 N.W.2d 514, 519 (Wis. 1952). Like any trust relationship, there are beneficiaries (the public), trustees (the state legislature and the

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<sup>8</sup> Navigable waters are public waters and as such they should inure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation. Only by so construing the provisions of our organic laws can the people reap the full benefit of the grant secured to them therein. This grant was made to them before the state had any title to convey to private parties, and it became a trustee of the people charged with the faithful execution of the trust created for their benefit.

Muench v. Pub. Serv. Comm'n, 261 Wis. 492, 504, 53 N.W.2d 514, 519 (Wis. 1952) (quoting Diana Shooting Club v. Husting, 156 Wis. 261, 271, 145 N.W. 816, 820 (1914)).

DNR), and trust property (navigable waters). Wisconsin’s Environmental Decade, Inc. v. Dep’t of Natural Resources, 85 Wis. 2d 518, 527, 271 N.W.2d 69, 72 (1978) (describing the DNR as a trustee over navigable waters).

At issue here is the scope of the duty of the trustees (the DNR) to protect trust property when issuing a permit for a high capacity well (a well pumping more than 100,000 gallons per day) pursuant to Wis. Stats. § 281.17(1).

The public trust doctrine applies to activities that impact navigable waters, even when the activity is not directly in a navigable water. Just v. Marinette County, 201 N.W.2d 761, 768-69 (Wis. 1972) (regulating filling of wetlands adjacent to navigable waters); State v. Deetz, 224 N.W.2d 407 (Wis. 1974) (regulating construction activities on land that caused runoff into navigable waters); Omernik v. State, 218 N.W.2d 734, 739 (Wis. 1974) (regulating diversions of non-navigable tributaries of navigable streams); National Audubon Society v. Superior Court, 33 Cal. 3d 419, 440-441, 445 (Cal. 1983) (regulating diversions of non-navigable tributaries of a navigable lake). Likewise, Perrier’s proposal to divert 500 gallons of spring water every minute of every day of the year should be regulated to prevent adverse impacts to navigable waters.<sup>9</sup> Bottled spring water by definition of the Food & Drug Administration, is water with a “demonstrated hydraulic connection to the spring.” (AR 003094)

The DNR recognized that Perrier’s high capacity wells threaten public rights in these navigable waters, such as fishing, water quality, water supply, aesthetics, and

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<sup>9</sup> Almost thirty years ago, the court recognized that we now have a more complete understanding of hydrology as science “establishes the interdependence of all water systems.” State v. Michels Pipeline Construction, Inc., 63 Wis. 2d 278, 292, 217 N.W.2d 339, 345 (Wis. 1974). “It makes very little sense to make an arbitrary distinction between the rules to be applied to water on the basis of where it happens to be

wildlife and habitat. (EA at 24, AR 00151) Water resources expert, Tim Krohelski, commented that “there is no question that there will be effects on water resources from withdrawing groundwater.” (Stoddard Aff., Ex. 1 at 1) He asserted that the concept of “safe yield” is a “false notion and definitely does not apply in the case where pumping affects surface water.” *Id.* Further, the DNR issued the permit for Perrier’s high capacity wells despite the fact that it faced unanswered questions related to its duty as trustee of the water resources of the state: “Would fish and other aquatic life survive? Knowing that water temperatures in lower sections of the stream . . . indicated marginal conditions for trout, might Perrier withdrawals trigger temperatures that cause fish stress or death?” (EA at 27, AR 00154)

In order to avoid adverse impacts to public rights in trust resources, the DNR was required to use its high capacity well permitting authority under Wis. Stats. § 281.17(1) to limit the amount of water that Perrier would be allowed to withdraw. Put another way, the DNR did not have the authority to issue a permit that violates the public trust because:

- A) the DNR has the power necessary by implication to protect the public trust;
- B) the high capacity well statute must be interpreted to uphold its constitutionality; and
- C) the high capacity well statute should be interpreted to avoid absurd results.

**A. The DNR Has the Power Necessary by Implication to Protect the Public Trust When Issuing a High Capacity Well Permit.**

Administrative agencies have only those powers that are conferred by statute, either expressly or by necessary implication. Kimberly-Clark Corp. v. Pub. Serv. Comm’n, 110 Wis.2d 455, 460, 329 N.W.2d 143, 145 (Wis. 1983). The DNR has the

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found.” State v. Michels Pipeline Construction, Inc., 63 Wis. 2d at 292, 217 N.W.2d at 345 (rejecting the property law distinction between ground and surface water).

statutory authority, necessary by implication, to regulate high capacity wells and deny or condition a permit in order to avoid adversely impacting the public trust.

The plain language of the statute is the starting place to determine legislative intent. Brauneis v. Labor and Ind. Rev. Comm'n, 2000 WI 69 ¶ 21, 236 Wis. 2d 27, 38, 612 N.W.2d 635, 642 (Wis. 2000); Kelley Co. v. Marquardt, 172 Wis. 2d 234, 247, 493 N.W.2d 68 (1992). The legislature has declared it to be unlawful to construct a high capacity well without a permit issued by the DNR. Wis. Stat. § 281.17(1). The statute requires the DNR to withhold its approval or grant a limited approval if the well will adversely affect a public utility. However, the plain language of the statute does not require the agency to issue a permit that could harm public rights in trust waters:

If the department finds that the proposed withdrawal will adversely affect or reduce the availability of water to any public utility in furnishing water to or for the public or does not meet the grounds for approval specified under s. 281.35(5)(d), if applicable, it **shall** either **withhold its approval** or **grant a limited approval** under which it imposes such conditions as to location, depth, pumping capacity, rate of flow and ultimate use so that the water supply of any public utility engaged in furnishing water to or for the public will not be impaired and the withdrawal will conform to the requirements of s. 281.35, if applicable.

Wis. Stat. § 281.17(1) (emphasis added).

Although the legislature clearly intended to protect public utilities, Wis. Stat. § 281.17(1) is ambiguous regarding the power of the DNR to regulate the impact of high capacity wells on public trust waters. Where a statute is ambiguous, the court examines further the scope, history, context, subject matter and purpose of the statute in question. Brauneis v. Labor and Ind. Rev. Comm'n, 2000 WI 69 ¶ 21.

The high capacity well statute must be read together with statutes authorizing the creation, powers and duties of the DNR. See Brauneis v. Labor and Ind. Rev. Comm'n,

2000 WI 69 ¶ 21, 236 Wis. 2d 27, 38, 612 N.W.2d 635, 642 (Wis. 2000). “While it is true that statutory interpretation begins with the language of the statute, it is also well established that courts must not look at a single, isolated sentence or portion of a sentence, but at the role of the relevant language in the entire statute.” Brauneis v. Labor and Ind. Rev. Comm’n, 2000 WI 69 ¶ 21 (quoting Alberte v. Anew Health Care Serv., Inc., 2000 WI 7, P 10, 232 Wis. 2d 587, 605 N.W.2d 515).

The legislature expressly conferred both broad powers and mandatory duties on the DNR when it created the agency as the primary trustee of the natural resources of the state. The DNR “**shall** serve as the central unit of state government to **protect, maintain and improve** the quality and management of **the waters of the state**, ground and surface, public and private.” Wis. Stat. § 281.11 (2000) (emphasis added). The legislature empowered the DNR to enact a “comprehensive action program directed at all present and potential sources of water pollution . . . to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water.” Wis. Stat. § 281.11.

The legislature also expressly conferred on the DNR the power needed and the duty to protect public trust resources and human health, among other things. Wis. Stat. § 281.11. “The purpose of this subchapter [entitled Water Resources] 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.” Wis. Stat. § 281.11 (emphasis added). The legislature expressly granted to the DNR the duty and the power necessary to have “general supervision and control over the waters of the state.” Wis. Stat. § 281.12 (2000).

The DNR's duty to protect the waters of the state is mandatory: the agency "shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of this chapter." Wis. Stat. § 281.12. (Emphasis added) The legislature further granted the DNR "all the necessary powers needed to" create rules or issue orders to prevent pollution, protect public health, or abate a nuisance. Wis. Stat. §§ 281.19 (7), and 281.19(1), (5), and (2)(b) (2000). To this end, the agency was required, among other things, to carry out a permit program for high capacity wells, Wis. Stat. § 281.17 (2000).

The legislature clearly expressed its intent that the water resources subchapter "shall be liberally construed" in favor of the legislature's policy objective to create an agency endowed with the power and duty to protect the waters of the state. Wis. Stat. § 281.11.

The Wisconsin Supreme Court has already interpreted this language as furthering the state's "affirmative obligations as trustee of navigable waters" and as delegating "substantial authority" over water management to the DNR. Wisconsin's Environmental Decade, Inc. v. Dep't of Natural Resources, 85 Wis. 2d at 527, 271 N.W.2d at 72 (interpreting Wis. Stat. § 144, later renumbered as Wis. Stat. § 281). "The duties of the DNR are comprehensive, and its role in protecting state waters is clearly dominant." Wisconsin's Environmental Decade, Inc., 85 Wis. 2d at 527, 271 N.W.2d at 72 (1978).

Viewing the statutes together, the legislature clearly intended to give the DNR broad authority and the necessary power to protect and manage all potential impacts to the state's water resources. Wis. Stat. §§ 281.11 – 12. The high capacity well statute, Section 281.17(1) of this subchapter, should be "liberally construed" to allow the DNR to

condition or deny a permit that could adversely impact public trust resources. See Wis. Stat. § 281.11.

**B. The High Capacity Well Statute Must Be Interpreted to Uphold its Constitutionality.**

A statutory interpretation that compels the issuance of a permit when the activity would impair the public trust is unconstitutional. Courts “make every effort to construe a statute consistent with the constitution.” Vincent v. Voight, 2000 WI 93 ¶ 54; 236 Wis. 2d 588, 626; 614 N.W.2d 388, 408 (Wis. 2000). Not only must sections 281.11, 281.12, and 281.17(1), Stats. be read together to determine the intent of the legislature, Brauneis v. Labor and Ind. Rev. Comm’n, 2000 WI 69 ¶ 21, but they must also be read to uphold their constitutionality. Vincent v. Voight, 2000 WI 93 ¶ 54.

The DNR’s interpretation of the high capacity well statute as **requiring** the agency to issue a high capacity well permit to Perrier despite potential adverse impacts to the public trust is inconsistent with and violates Article IX, Section 1 of Wisconsin’s Constitution. The high capacity well statute can only be constitutional if it is interpreted and administered in a manner so as to allow the DNR to condition or deny a permit to avoid adverse impacts to the public trust. See Wis. Const. Art. IX § 1; Omernik v. State, 64 Wis. 2d 6, 13-14, 218 N.W. 2d 734, 739 (Wis. 1974).

When Wisconsin became a state, it incorporated the language of the Northwest Ordinance into Wisconsin’s Constitution:

The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Wis. Const. Art. IX § 1. This provision constrains the trustees from damaging the trust

and imposes an affirmative duty to protect navigable waters from adverse impacts:

From our acceptance of the provisions . . . of the Ordinance of 1787 it follows that it is not a question of state policy as to whether or not we shall preserve inviolate our navigable waters. We are by organic law compelled to do so . . . And this trust we cannot diminish or abrogate by any act of our own.

In re Crawford County Levee & Drainage Dist. No. 1, 182 Wis. at 409, 196 N.W. at 876.

Wisconsin has a well developed public trust doctrine that has changed over time as courts have broadly interpreted it to protect the public beneficiaries of the trust. See e.g., R.W. Docks & Slips v. Dep't of Natural Res., 2001 WI 73, ¶ 19, 2001 Wisc. LEXIS 420, (Wis. 2001); State v. Bleck, 114 Wis. 2d 454, 457, 338 N.W. 2d 492, 494 (Wis. 1983); Muench v. Pub. Serv. Comm'n, 261 Wis. 492, 504, 53 N.W.2d 514, 519 (Wis. 1952).

The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters, cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits.

Muench v. Pub. Serv. Comm'n, 261 Wis. 492, 512, 53 N.W.2d 514, 522 (Wis. 1952) (quoting Diana Shooting Club v. Husting, 156 Wis. 261, 271, 145 N.W. 816, 820 (Wis. 1914)).

Article IX, Section 1 of Wisconsin's Constitution imposes an affirmative duty requiring state action to both preserve and protect the trust. Omernik v. State, 64 Wis. at 13-14, 218 N.W. 2d at 739; City of Milwaukee v. State, 193 Wis. 423, 449-50, 214 N.W. 820, 830 (Wis. 1927); see also Wisconsin's Environmental Decade, Inc. v. Dep't of Natural Resources, 85 Wis. 2d 518, 526 & 534, 271 N.W.2d 69, 72 & 77 (1978) (reciting the legislature's intent that "the positive public duty of this state as trustee of waters

requires affirmative steps to protect and enhance this resource and protect environmental values.”); Just v. Marinette County, 56 Wis.2d 7, 18, 201 N.W.2d 761 (1972).

The Constitution establishes a floor under which the trustees cannot fall. When actions by trustees fall below the basic requirements, the court’s role is to intervene to ensure that the public beneficiaries of the trust are protected. “We have ‘jealously guarded the navigable waters of this state and the rights of the public to use and enjoy them.’” R.W. Docks & Slips v. Dep’t of Natural Res., 2001 WI 73 at ¶ 28 (quoting Delta Fish and Fur Farms v. Pierce, 203 Wis. 519, 523, 234 N.W. 881, 883 (Wis. 1931)). As early as 1927, the court clearly identified the trustee’s duty as both restricting actions that might endanger the trust and requiring affirmative actions to protect the trust.

The trust reposed in the state is not a passive trust; it is governmental, active and administrative. Representing the state in its legislative capacity, the legislature is fully vested with the power of control and regulation. The equitable title to those submerged lands vests in the public at large, while the legal title vests in the state, restricted only by the trust, and the trust, being both active and administrative, requires the law-making body to act in all cases where action is necessary, not only to preserve the trust, but to promote it.

City of Milwaukee v. State, 193 Wis. 423, 449, 214 N.W. 820, 830 (Wis. 1927). The court declared in Omernik v. State that Art. IX, Sec. 1 of Wisconsin’s Constitution is a limitation “to protect public rights in navigable waters from dissipation or diminution by acts of the legislature as trustee of such waters.” Omernik v. State, 64 Wis. 2d 6, 13-14, 218 N.W. 2d 734, 739 (Wis. 1974).

When the legislature created the DNR as a trustee of the resources of the state, it delegated a mandatory duty to protect the public trust in all of its decisions. Wis. Stat. § 281.11. The DNR “shall . . . protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private.” Id. Likewise, when the legislature created Wis. Stat. § 281.17(1) to regulate water withdrawals from high

capacity wells, it acted in a manner consistent with Article IX, Section 1 of Wisconsin's Constitution, to preserve and promote the trust. Any interpretation that Wis. Stat. § 281.17(1) allows or requires the DNR to issue a high capacity well permit despite potential adverse impacts to the public trust would be contrary to statutory directive and unconstitutional.

In Omernik v. State, the court recognized that if nonnavigable tributaries of navigable streams could be diverted without conditions in the permit that protected the public trust there could be a constitutional problem as well as a dry riverbed. Omernik v. State, 64 Wis. 2d at 14, 218 N.W. 2d at 739. Similarly, if the groundwater that feeds Big Springs can be withdrawn and diverted from those surface waters without a finding that the withdrawals will not adversely impact the public trust, there could be a constitutional problem and a dry riverbed downstream of the Big Springs area.

In order to avoid an unconstitutional interpretation of Wis. Stat. § 281.11, the Court should decide that the legislature intended, consistent with Article IX, Section 1 of Wisconsin's Constitution, to give the DNR the power and the duty to condition or deny Perrier's high capacity well permit to prevent adverse impacts to trust resources.

**C. The Court Should Avoid Absurd Results.**

If the DNR cannot condition or deny a high capacity well permit to protect the public trust, the DNR will be forced to issue permits for projects that it knows could adversely impact trust resources and cause a public nuisance. The only option left to the DNR, under such an interpretation, is to allow a private entity, such as Perrier, to drain a trout stream and later bring a nuisance action after the damage has been documented.

The court's interpretation of Wis. Stat. § 281.17(1) should avoid absurd results. See Paul v. Skemp, 2001 WI 42, 242 Wis. 2d 507, 521, 625 N.W.2d 860, 865-866 (Wis. 2001) (rejecting absurd construction of statute of limitations for medical claim); Peters v. Menard, Inc., 224 Wis. 2d 174, 190, 589 N.W.2d 395, 403 (Wis. 1998); Verdoljak v. Mosinee Paper Corp., 200 Wis. 2d 624, 636, 547 N.W.2d 602, 606 (1996).

Groundwater withdrawals that impact surface waters may be deemed a nuisance. State v. Michels Pipeline Construction, Inc., 63 Wis. 2d 278, 303, 217 N.W.2d 339, 351 (Wis. 1974) (explaining that one is entitled to a reasonable withdrawal of groundwater unless the “withdrawal of water has a direct and substantial effect upon the water of a watercourse or lake”). The DNR is the primary trustee of the waters of the state, Wis. Stat. § 281.11, and has the express power to manage and promote these resources, as well as to prevent pollution. Wis. Stat. § 281.11; Wis. Stat. § 281.19(1). As such, the DNR must be able to properly condition a high capacity well permit to avoid and prevent a nuisance to public resources.

For all of the reasons set forth above, the Court should declare that the DNR violated the public trust doctrine by issuing a high capacity well permit to Perrier under Wis. Stat. § 281.17(1) without sufficient conditions to prevent adverse impacts to the water of the state.

**III. THE AGREEMENT BETWEEN THE DNR AND PERRIER IS *ULTRA VIRES*, UNENFORCEABLE AND CONTRARY TO THE PUBLIC INTEREST.**

**A. The Agreement is *Ultra Vires*.**

If WEPA, the high capacity well statute, and the public trust doctrine were construed to authorize the DNR to grant permits and make EIS decisions based upon

contractual agreements with regulated private parties, the process would require standards outside of those statutes, under some other authority expressly delegated to the DNR. Furthermore, the process would have to be conducted in the public interest, with some opportunity for meaningful public input.

Here, however, the Agreement between the DNR and Perrier is not grounded in any statutory or other legal authority. Instead, the Agreement clearly represents a bargain concerning the DNR's authority to regulate Perrier under the police power in a manner that is analogous to illegal contract zoning by local governments.

In Wisconsin, local governments cannot restrict their zoning authority and police powers by contract. See State ex rel. Zupancic v. Schimenz, 46 Wis. 2d 22, 147 N.W.2d 533 (1969). The proscription against contract zoning is rooted in the notion that zoning ordinances and the exercise of the police power by governmental bodies should not be subject to bargaining or contract:

Where zoning is conditioned upon collateral agreements or other incentives supplied by a property owner, the zoning officials are placed in the questionable position of bartering their legislative discretion for emoluments that [have] no bearing on the requested amendment [or permit].

Cedarburg v. City of Rockford, 291 N.E.2d 249, 252 (Ill. App. 1972).

The Agreement between the DNR and Perrier does not discuss its underlying authority but instead simply states that the parties have such authority. (AR 00201) When the DNR was challenged on this issue by the CCN Petitioners (Stoddard Aff., Ex. 12 at 4-5), the DNR defended its authority to enter the Agreement in a September 18, 2000 letter to "Interested Part[ies]" which stated that, "the Department has general authority under s. 227.44(5), Wis. Stats., to enter into such agreements." (AR 00233) No

other authority has ever been cited by the DNR to support its entry into the Agreement with Perrier.<sup>10</sup>

Section 227.44(5) of the Wisconsin Statutes provides as follows:

(5) Unless precluded by law, informal disposition may be made of any **contested case** by stipulation, agreed settlement, consent order or default. In any proceeding in which a hearing is required by law, if there is no such hearing, the agency or hearing examiner shall record in writing the reason why no such hearing was held, and shall make copies available to interested persons.

Wis. Stat. 227.44(5) (emphasis added).

The term “contested case” is defined at Wis. Stat. § 227.01(3), as “an agency proceeding in which the assertion by one **party** of any substantial interest is denied or controverted by another **party** and in which, after a hearing required by law, a substantial interest of a **party** is determined or adversely affected by a decision or order.” Wis. Stat. § 227.01(3) (emphasis added).

Section 227.01(8) defines a “party” as “a person or agency whose substantial interests are adversely affected by a determination of an agency.” Wis. Stat. § 227.01(8).

The fundamental problem with the DNR’s asserted authority to enter the Agreement is that Perrier was never a party to a “contested case” before the DNR. This is a stipulated fact that was agreed to the DNR and Perrier. (Stoddard Aff., Ex. 19, “Stipulation and Order for Intervention by Great Spring Waters of America, Inc.”) This stipulation provided the factual and legal basis for the Court’s order allowing Perrier to intervene as a respondent in this case. Id.

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<sup>10</sup> The Agreement itself states that Perrier has “consented to the DNR using its broad authority under sections 31.02, 227.44(5), 281.11 and 281.12, Stats., to protect the groundwater and nearby surface waters and wetlands.” (AR 00206) However, none of these statutes provide the DNR with authority to enter such an agreement.

Since Perrier and the DNR have both stipulated and the Court has ordered that Perrier was not a “party” to a “contested case” in any underlying proceeding before the DNR, the statute that provides the DNR with authority to resolve or settle contested cases, Wis. Stat. § 227.44(5), cannot reasonably be construed to provide the underlying authority for the DNR to enter into the Agreement with Perrier. Because the DNR has provided no other legal basis of authority to enter the Agreement with Perrier, the Court must declare that DNR’s participation and entry into the Agreement is *ultra vires* or without authority.

**B. Since the Agreement is *Ultra Vires*, it is Unenforceable.**

Since the DNR lacked the authority to enter the Agreement in the first place, the Court must declare the Agreement void and unenforceable. See Village of Butler v. Renner Mfg. Co., 70 Wis. 2d 1, 233 N.W.2d 380 (1975) (Heffernan, J. concurring); Ehrlich v. City of Racine, 26 Wis. 2d 352, 359, 132 N.W.2d 489 (1965); Cornell v. City of Stevens Point, 159 Wis. 2d 136, 142-43, 464 N.W.2d 33 (Ct. App. 1990).

The DNR is attempting to regulate by contract rather than by permit. While the legislature has given the DNR a tool to protect waters of the state by permit, it has not given the DNR the authority to do so by contract. Wis. Stats. § 281.17(1).

The appropriate method for regulating natural resources and protecting the public trust is through a permit system. The legislature has authorized the use of permits, not private agreements, to regulate withdrawals of more than 100,000 gallons of groundwater per day (high capacity wells). § 281.17, Stats. High capacity well permits must be developed in an open and public manner, and such permits can be enforced by any member of the public (as a beneficiary of the trust). See, Gillen v. City of Neenah, 219

Wis. 2d 806, 833, 580 N.W.2d 628, 639 (1998) (holding that a citizen asserting a violation of the public trust doctrine may directly sue a private party whom the citizen believes was inadequately regulated by the DNR).

The DNR's negotiations and Agreement with Perrier, by contrast, excluded the public. The Agreement was drafted and approved without public notice and hearing rights. Moreover, the Agreement is apparently *ultra vires* and unenforceable by the DNR and the public. As such, the Court should declare both the permit and the Agreement void. The Agreement between the DNR and Perrier is unenforceable by the DNR and the public and therefore cannot be upheld by the Court.

**C. The Agreement is Contrary to the Public Interest.**

The Court must assume that the legislature intended the DNR to exercise the police power legitimately and in the public interest when carrying out its duties under WEPA, Wis. Stat. § 1.11, the high capacity well statute, Wis. Stat. § 281.17, and the public trust doctrine, Wis. Const. Art. IX § 1. See Browne v. Milw. Bd. Of School Directors, 83 Wis. 2d 316, 332, 265 N.W.2d 559 (1978) (the duty of the court is to construe a statute in harmony with constitutional principles). Although the police power is broad, it is not without limits. It cannot be exercised arbitrarily. As one court put it, "A state, in exercising its police power, must provide some rules, norms, or standards designed to regulate in the public interest." Grams v. City of Cudahy, 226 F. Supp. 385, 386 (E.D. Wis. 1964).

Neither the process by which it was conceived nor the Agreement itself are in the public interest. The public was not served by the process of negotiations that led to the Agreement because the public was completely excluded from the process. There is no

indication in the Record of any public involvement—or even any attempt by the DNR to involve the public--in the negotiation process over the Agreement. Instead, the Record shows quite clearly that the DNR and Perrier kept their Agreement confidential until after all of the informational meetings and public hearings on the draft EA were completed. (AR 01182-001191)

For example, the DNR held a public informational meeting on the project at the Wisconsin Dells High School on March 16, 2000, which was attended by about 250 people. At this meeting the public was invited to provide comments and concerns in writing until April 10, 2000. (EA at 48; AR 00175) There was no mention of the Agreement at that meeting.

Later, Perrier held its own public meeting on the project on April 17, 2000 at the Wisconsin Dells High School. (AR 00175) About 250 people attended this meeting. Id. Again, there was no mention of the Agreement.

“The Town of New Haven in Adams County and the Town of Newport in Columbia County both held advisory referendums on June 13, 2000. The result in both cases was strong opposition to the project.” Id. Prior to these referenda there was no disclosure of the Agreement by either the DNR or Perrier.

The draft EA was later released by the DNR for public comment on July 25, 2000. (AR 00175) The draft EA did not mention the Agreement. “[The] DNR held a public information meeting on August 1, 2000 at the Wisconsin Dells High School to explain review procedures, timetables and draft EA content and to receive public comments. Approximately 300 people attended, 92 gave oral testimony or provided written appearance slips often with written comments.” Id. Once again, however, there

was no disclosure or mention of the draft Agreement by the DNR or by Perrier's representatives.

It was not until August 11, 2000, that the DNR chose to release the draft Agreement to the public along with a news release to the media just prior to the appearance of Franc Fennessy of the DNR on the Wisconsin Public Television program "Weekend." (AR 01182-001191) This publicity stunt by the DNR was executed on the same date that was originally to be the deadline for public comments on the draft EA; that deadline was extended to August 25, 2000. (AR 00175) This extension barely allowed the CCN Petitioners enough time to comment on and question the validity of the Agreement. (Stoddard Aff., Ex. 12, at 4-5) However, no public hearing or public informational meeting was ever actually held by the DNR on the Agreement as such, and the general public had no opportunity to comment on drafts of the Agreement or participate in any meaningful way in its development by the DNR and Perrier.

Aside from the issues raised above, the Agreement itself is not in the public interest because it was obviously used by the DNR to circumvent the type of thorough environmental review that should have been done prior to the issuance of the final EA and permit.

When the DNR released the final EA the following month, the agency largely justified its negative EIS decision by reference to the Agreement: "The Agreement stipulates that project operations, under all climatic conditions but especially during drought, shall have no significant adverse impacts to nearby groundwater, surface waters or wetlands." (EA at 38; AR 00165) As such, the DNR relied entirely on a document that was created without public input and oversight rather than on a WEPA process that

thoroughly assessed potentially significant environmental impacts and permit conditions to mitigate such impacts. In effect, the DNR used the Agreement as an excuse not to do its job under WEPA, and in the process it improperly excluded the public. Additionally, the DNR bargained away its police powers under the high capacity well statute, which should have been used to impose strict permit conditions to protect the public trust. This bargaining away of the WEPA review process by the DNR behind closed doors and with a private party is contrary to the public interest because it circumvents the principled type of scientific review and public participation process that WEPA was specifically intended to require to protect the public interest in the environment.

For all of the reasons set forth above, the Court must declare the Agreement between the DNR and Perrier null and void and contrary to the public interest.

#### **IV. THE DNR PREJUDGED PERRIER'S PROPOSAL AND VIOLATED THE CCN PETITIONERS' DUE PROCESS RIGHTS.**

The United States Supreme Court has recognized that the right to a fair trial in a fair tribunal applies to agency decisions, as well as those in the courts. Guthrie v. Wisconsin Employment Relations Comm'n, 111 Wis.2d 447, 454, 331 N.W.2d 331, 335 (1983). (Citing Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 1463 (1955) (internal quotations omitted)). "If a decision-maker is not fair or is not impartial, due process is violated." Guthrie, 111 Wis.2d at 454, 331, N.W.2d at 335. The Wisconsin Supreme Court has likewise stated that "an unbiased tribunal is a constitutional necessity in a quasi-judicial hearing and that the denial of such a tribunal is the denial of due process." State ex rel. DeLuca v. City of Franklin, 72 Wis.2d 672, 682, 242 N.W.2d 689, 695 (1976).

Members of an administrative decision-making body are subject to a common law duty of disqualification whenever a fair and impartial proceeding would be at risk because of a members' bias. Guthrie v. Wisconsin Employment Relations Comm'n, 111 Wis.2d at 457-58, 331 N.W.2d at 336. The risk to a fair and impartial proceeding may be demonstrated by bias-in-fact or by an impermissibly high risk of bias. Marris v. City of Cedarburg, 176 Wis.2d 14, 24-25, 498 N.W.2d 842, 847 (1993).

In DeLuca, the court clarified that:

It is thus apparent that the standard of no actual bias used by the trial judge in the instant case is not the proper test. Circumstances which lead to a high probability of bias, even though no actual bias is revealed in the record, may be sufficient to give the proceedings an unacceptable constitutional taint.

DeLuca, 72 Wis.2d at 684, 242 N.W.2d at 695.

Although there is a presumption of honesty and integrity, Bracegirdle v. Board of Nursing, 159 Wis.2d 402, 415, 464 N.W.2d 111, 115 (Ct. App. 1990), the presumption is rebuttable upon showing adequate grounds to suspect bad faith or improper behavior that are not apparent from the administrative record, Sokaogon Chippewa Community (Mole Lake Bank of Lake Superior Chippewa) v. Babbit, 929 F.Supp. 1165, 1176 (W.D.Wis. 1996). Once a question or risk of bias is properly raised, the decision-maker must demonstrate good faith with more than a blank statement that he or she is honest because he or she says so. A showing that a decision-maker is so "psychologically wedded" to a predetermined conclusion that he or she would consciously or unconsciously avoid the appearance of having erred or changed positions is sufficient to constitutionally require disqualification of a decision-maker. DeLuca, 72 Wis.2d at 685, 242 N.W.2d at 696 (quoting Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456 (1955)). A decision-maker

must always endeavor to prevent the probability of unfairness. Id. (citing Larkin, 95 S.Ct. at 1464).

Here, the DNR prejudged Perrier's proposed project and became "psychologically wedded" to Perrier when it began meeting with the DOC to help Perrier find suitable sites for the project in Wisconsin, and when former DNR Secretary George Meyer and DOC Secretary Brenda Blanchard attended a meeting called on Perrier's behalf on December 15, 1999 in the office of Bob Wood, former Governor Thompson's Chief of Staff. (Stoddard Aff., Ex. 4)

Even more disconcerting, however, were the DNR's secret negotiations with Perrier to reach the Agreement that was obviously negotiated in private by the DNR and Perrier early in the process but not disclosed to the public until August 11, 2000. (AR 003102; AR 01182-01191)

By secretly negotiating the Agreement with Perrier to approve the project, the DNR lost all objectivity as a regulatory agency charged with protecting public interests in the environment. In effect, the DNR joined forces with Perrier and became an advocate for the development of its proposed project by virtue of its negotiations. In so doing, the DNR prejudged the project to such a degree that it violated the CCN Petitioners' due process rights by denying them a fair and impartial decision-maker. Moreover, the terms of the Agreement provide for an ongoing process of analysis and negotiation over pumping rates between Perrier and the DNR which completely excludes any public involvement or participation in future DNR decision-making concerning approval of pumping rates for Perrier's high capacity wells.

## CONCLUSION

As set forth above, the DNR has violated WEPA; the Agreement between the DNR and Perrier is *ultra vires*, unenforceable and contrary to the public interest; the DNR violated the public trust by issuing a high capacity well permit to Perrier; and the DNR prejudged Perrier's proposal and violated the CCN Petitioners' due process rights.

**WHEREFORE**, the CCN Petitioners respectfully request the Court grant the following relief, pursuant to Wis. Stats. §§ 1.11 and 227.57:

1. Declare the EA inadequate and set aside or remand the DNR's September 18, 2000 decision that an EIS is not required for the DNR to comply with WEPA, Wis. Stat. § 1.11, and Wis. Admin. Code NR 150.
2. Declare the DNR's approval of a high capacity well permit to be in violation of the public trust doctrine and set aside or remand the DNR's approval of Perrier's high capacity well permit, dated September 20, 2000 for further review.
3. Declare the Agreement between Perrier and the DNR, executed on September 28, 2000, *ultra vires*, void and unenforceable.
4. Provide such other relief as the Court deems appropriate under the circumstances, pursuant to Wis. Stat. § 227.57(9).

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