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SUIT OVER WELL COULD BE PRECEDENTIAL
THE SUIT TARGETS THE STATE'S GROUNDWATER LAW

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The state Department of Natural Resources and the village of East Troy in Walworth County are the subjects of a potentially precedent-setting lawsuit filed last week by several individuals and two lake management districts over potential damage to a spring-fed lake and nearby wetlands by a proposed municipal high-capacity well.

The well could pump 1.4 million gallons of water a day, more water than Perrier sought in the late 1990s to use for its ill-fated and highly controversial water bottling plant in Adams County. The lawsuit, filed in Dane County Circuit Court, argues that the East Troy well would damage 840-acre Lake Beulah in Southeast Wisconsin, a source of the Mukwonago River, as well as adjacent wetlands and springs.

The lawsuit targets the ineffectiveness of a much-touted state groundwater law that was passed in the wake of the Perrier fight but which critics say falls short of truly protecting underground drinking water supplies as well as important surface waters such as springs and wetlands. It may also force an important legal determination regarding the extent and power of the public trust doctrine, a part of the Wisconsin constitution under which the state is required to protect all navigable waterways. Whether that protection extends to groundwater has been open to interpretation, according to Daniel Bach, a lawyer with **Lawton & Cates**, the Madison law firm that filed the suit on Tuesday.

"It's really a statewide issue," Bach said. "It's not just about little Lake Beulah and a bunch of local property owners." Village officials say they simply need water.

"Really, for the village of Troy, it's about the fundamental responsibility of the village trying to provide water for its residents," said Paul Kent, the village's attorney.

Kent said state law requires that a municipality demonstrate that it is able to provide water for emergencies such as fire fighting even if its highest capacity well stops operating.

"We can't do that," he added.

As for the potential damage to Lake Beulah and surrounding waters, Kent said tests by the village and by independent experts have shown operation of the well would have little or no impact.

"The last thing the village wants is that they end up causing a problem," Kent said. "There shouldn't be any problems here."

PUMP TEST RESULTS

But the lawsuit argues that the well, built just 1,000 feet from the shores of Lake Beulah, will harm the lake and adjacent wetlands by drawing down the groundwater that replenishes the spring-fed lake. Bach said pump tests conducted by the village actually did show a drop in water levels though the tests were halted before a final determination could be made.

A major part of the lawsuit, however, concerns what Bach charges is the failure of the DNR to conduct its own tests and to adequately review the threat posed by the well to the lake, wetlands and the Mukwanago River.

The lawsuit charges that a reduction in the flow of groundwater due to the operation of the high capacity well could change the temperature and chemistry of surface waters and hasten the growth of invasive weeds. The well could also drop the level of the lake and surrounding wetlands.

Todd Ambs, head of the DNR's water division, said the agency allowed the well based on the testing data it got from the village. He said a thorough examination of the well's impacts by DNR staff was not required because the lake does not fall under the state's groundwater law, passed in the wake of the Perrier controversy. That law requires the DNR to review the impact of a well if it is within 1,200 feet of any trout streams or special waters classified as outstanding or exceptional resource waters.

Lake Beulah, Ambs said, does not meet any of those criteria.

"We certainly looked at the well extensively under the law as it exists on the books now," Ambs said. "I think what this suggests certainly is that there are water bodies out there not covered by the law."

VULNERABILITY ALLEGED

Ken Bradbury, a hydrogeologist with the Wisconsin Geological and Natural History Survey who has been involved in shaping the groundwater legislation, said many are concerned that the law as it is written leaves the majority of lakes and other waters in the state unprotected from high capacity wells, those wells that pump

more than 100,000 gallons of water a day.

Because of this, Bradbury said, lawsuits such as this are probably going to arise frequently.

"This is probably the first of many," Bradbury said. "We hear of a lot of disputes like this." The impacts of high capacity wells, such as municipal wells or wells used in agriculture, have been a major issue in Wisconsin in the years since the Perrier debate. Last summer in Central Wisconsin, for example, farm irrigation wells were blamed for drying up lakes and trout streams. And a study of springs in the state released last year by the Wisconsin Geological and Natural History Survey showed dozens of springs dried up by high volume wells pumping the groundwater upon which the springs depend.

The East Troy lawsuit argues that, even in the face of weaknesses in the groundwater law, the DNR is required by the state constitution to protect water resources such as those threatened by the well. Bach said the agency is bound by the constitution's public trust doctrine, which charges the state with protecting all navigable waters.

The question, however, is whether that doctrine applies to groundwater. It's a long-standing question that has never been adequately answered, even in case law, according to Madison attorney Bill O'Connor, an expert on public trust issues.

"There is a serious question about whether groundwater is covered," O'Connor said.

Ambs agreed. "We don't have any clear case law on this," he said.

Perhaps, O'Connor added, this case could provide that clarification since a major charge in the suit is that the state "breached its statutory, common law, and constitutional duties to protect public trust resources." Were constitutional protection clearly afforded groundwater, O'Connor said, the impact on other such cases and on the evaluation of future high capacity wells would be considerable.

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