

Mark B. Hazelbaker,
Attorney at Law
mark@hazelbakerlaw.com



Kimberly A. Carter,
Paralegal/Office Manager
kimberly@hazelbakerlaw.com

3555 University Avenue
Madison, WI 53705
(608) 663-9770
www.hazelbakerlaw.com

To: Capital Area Regional Planning Commission

From: Attorney Mark B. Hazelbaker, Dane County Towns Association

Date: January 7, 2013

Re: Dane County Water Quality Plan Appendix I Update -- POWTS

The proposed Appendix I to the Dane County Water Quality Plan uses 89 pages to recite a great deal of information which serves no practical planning purpose. Because local regulations of on-site systems and water wells have become both mandatory and uniform since the 2004 revision to the DCWQP, this Appendix is moot. The rules applicable to on-site systems and water wells are the rules. Nothing in this plan can result in modification of the rules. The Appendix serves no purpose except set the stage for needless bickering over rural land use issues.

The Dane County Towns Association supports effective and rational regulation of on-site wastewater systems. Our Association also supports effective regulation of water wells. Existing Wisconsin regulations provide both. The Natural Resources code addresses water supplies, and the Safety and Professional Services code addresses on-site wastewater systems.

On-site Wastewater Regulation

When the Wisconsin plumbing code was re-written in 2000 to allow use of any technically feasible POWTS, Dane County initially reacted by adopting ordinances forbidding introduction of these new systems. The State responded in 2004 by forbidding local governments from imposing more restrictive regulations on POWTS, SPS 383.03(5) (a), Wis. Adm. Code.

Counties are required to adopt and enforce on-site wastewater treatment ordinances. Dane County has an excellent program which has led the state in assuring that systems are pumped and functioning. There is neither authority nor need to do more.

Design and Siting of wells

Wisconsin also provides a system of state – mandated regulation of well construction and siting. The state code on well construction creates established setbacks between wells and other land uses, section NR 845.08, Wisconsin Administrative Code. The code further provides in the next section as follows:

NR 812.09 (4) APPROVALS REQUIRED. Prior department approval is required for the activities described in this subsection. When deemed necessary and appropriate for the protection of public safety, safe drinking water and the groundwater resource, *the department may specify more stringent well location, well construction or pump installation specifications for existing and proposed high capacity, school or wastewater treatment plant water systems requiring approval by this subsection or water systems approved by variance.* Approval by the department does not relieve any person of any liability which may result from injury or damage suffered by any other person. In addition, failure to comply with any condition of an approval or the construction, reconstruction or operation of any well or water system in violation of any statute, rule or department order shall void the approval. [Emphasis supplied].

The Department of Natural Resources' rules also provide for local administration of the water well code. That is found in section NR 845.06 County administration. That section reads in pertinent part:

(1) COUNTY ADMINISTRATION.

(a) Adoption of ordinance. Each county authorized by the department to administer and enforce ch. [NR 812](#) under any delegation level shall adopt a private water systems ordinance, *no less stringent nor more stringent than ch. [280](#), Stats., and department rules adopted under ch. [280](#), Stats.* The ordinance shall be commensurate with the level or levels of the county's delegated authority. The ordinance shall apply to the entire county and shall include cities, towns, villages and sanitary districts in the county. [Emphasis supplied].

With respect to both approval of on-site wastewater systems and the siting of wells, the state code is the sole source of authority to regulate the type of system approved for on-site wastewater treatment, and the location of wells. Local authorities may not be more restrictive in the regulation of either system. The State, not the local unit of government, has authority to modify or deviate from these rules.

For that reason, there would seem to be no basis to include an appendix in the DCWQP which suggests possible circumstances under which local governments might wish to modify or deviate from these rules. There is no authority to deviate from the rules.

The 89 pages contained in appendix I are a lengthy discussion of the issue of nitrate contamination of groundwater and possible impact of nitrates on human health. The Plan recommends that regulation of on-site wastewater treatment systems be continued, be effective and be professional. Dane County is already mandated to do all of those things by state law. Dane County does an excellent job of regulating on-site wastewater treatment systems. There simply is no need for a Plan to support what state law mandates. This is also true with respect to well regulation.

So, to boil it down to a simple point, this plan is moot. No matter what this Appendix recommends, regulations of on-site wastewater systems and wells are what they are: a safe and legal way to develop land.

This brings us to the one point in the plan which is decidedly controversial from the towns' perspective: its suggestion that reviewing agencies consider well locations and concentration of on-site wastewater systems in land development review. Recommendation 3 in the Appendix' first chapter calls on agencies reviewing land development to consider concentrations of on-site wastewater treatment systems in the review of the proposals, and to take actions to assure that there is a separation between water wells and on-site wastewater treatment systems. The original language in the draft appendix states:

In reviewing proposed rural subdivisions or developments, large on-site systems or clusters (more than 20) of one-site systems resulting in a wastewater loading greater than 150 gallons/acre/day (corresponding to an average density of one house per 1-1.5 acres) could result in elevated nitrate levels, and should be evaluated to ensure that drinking water supplies are protected and groundwater standards are met.

The recommendation urges a legal impossibility: variation from mandatory state codes in the approval of land divisions or rezonings. Under chapter 236 of the Wisconsin statutes, entities which have the authority to review proposed land divisions must do so on the basis of criteria enumerated in the statute. At section 236.13, those criteria are listed. They are as follows:

- (1)** Approval of the preliminary or final plat shall be conditioned upon compliance with:
 - (a)** The provisions of this chapter;
 - (b)** Any municipal, town, or county ordinance that is in effect when the subdivider submits a preliminary plat, or a final plat if no preliminary plat is submitted;
 - (d)** The rules of the department of safety and professional services relating to lot size and lot elevation necessary for proper sanitary conditions in a subdivision not served by a public sewer, where provision for public sewer service has not been made;
 - (e)** The rules of the department of transportation relating to provision for the safety of entrance upon and departure from the abutting state trunk highways or connecting highways and for the preservation of the public interest and investment in such highways.

Note that the statutory criteria explicitly provide for compliance with state rules for on-site wastewater treatment systems. There is no provision allowing approval proposed land divisions to be conditioned on regulations more strict than those provided by state codes. Land division is not a zoning decision. Rather, it involves the question of whether or not the proposed layout of lots complies with the quality control rules in

place. If a lot meets state requirements, and setbacks between wells and systems meet the natural resources code, there is nothing further to argue about.

With respect to zoning decisions, refusing to rezone land on the ground that the zoning agency dislikes on-site waste water systems violates the state codes' preemption requirement. It would be an indirect manner of imposing more restrictive regulation of on-site wastewater systems.

Why should we care? It might be argued that the water quality plan is simply a plan, merely guidance to local units of government. As a general proposition, is poor policy to adopt plans that propose regulatory actions contrary to law?

But, we are particularly troubled by the prospect that, once this plan has been adopted, it will be incorporated, as revised, into the Dane County Comprehensive Plan. The County, then, might well attempt to inject these unlawful review criteria into land division and zoning decisions.

There have been decades of action to address issues concerning on-site wastewater treatment systems in Wisconsin. Many were replaced with funding from the Wisconsin Fund. There was a long, protracted battle over on-site wastewater systems in the Legislature. Many interest groups either explicitly or implicitly attempted to strictly curtail use of on-site wastewater systems as a way of controlling rural development. They failed. The State has established technical standards which allow residential development on private wells and on-site systems. In 2004, the State finished the regulatory debate by forbidding counties like Dane County from adopting more restrictive rules.

There is no difference, under current law, between the codes regulating on-site wastewater systems and any other building code. Just as local units of government cannot forbid aluminum siding which meets Uniform Dwelling Code requirements, they cannot in land division or zoning evaluate a code-complaint system to assure it meets groundwater or other standards. If it meets code, it meets code.

We previously commented in earlier communications that the assertions about the danger of nitrates to human health are controversial in the scientific community. Clearly, the CARPC staff's proposal reflects their continued belief that nitrates are a health hazard. It is immaterial to argue this point, which will be settled in the scientific community, not by us.

A study of the impact of on-site wastewater treatment systems performed in Dane County showed that residential development may decrease nitrate levels in groundwater by comparison to agricultural activity. "Nitrate concentrations decreased in shallow groundwater beneath the subdivision site after agricultural loading sources were removed, and a mass balance model showed that nitrogen loading from septic systems may be similar, or even less than previous agricultural land use." **Monitoring and Predictive Modeling of Subdivision Impacts on Groundwater in Wisconsin**, Bradbury, Kenneth, et al., Report to Wisconsin Department of Natural Resources [2005] .

The DCTA is aware that Dr. Bradbury's studyⁱ covered a relatively small area over a short period of time. However, the study comports with common sense, which tells us that intensely fertilizing crops with nitrates may have a more significant impact on ground water than do POWTS. We hope Dr. Bradbury has the opportunity to continue his study.

Recommendation

The DCTA does not believe that Appendix I serves a significant purpose. The policies and proposals it recommends are not appropriate. State regulations on on-site wastewater systems and wells are prescriptive, not discretionary. The Appendix, as drafted, could suggest to local decision makers that they have the authority to exceed the standards established in regulations when they do not. The Appendix should not be included in the DCWQP, or, should not contain any language suggesting that local authorities should do anything other than apply mandated state standards.

ⁱ The DCTA does not state nor suggest that Dr. Bradbury agrees with the DCTA's position on Appendix I.