October 25, 2019

The Honorable Joshua Kaul, Attorney General
Wisconsin Department of Justice
State Capitol, Room 114 East
Madison, Wisconsin 53702

Re: Governor Ever's August 6 Request for a Formal Opinion of the Attorney General

Dear Attorney General Kaul:

By this letter, the Great Lakes Legal Foundation respectfully requests that you decline Gov. Evers' August 6, 2019, request that you provide a formal opinion on agency rulemaking authorities.

The subject matter of the request—"the applicability of 2011 Act 21 ("Act 21") to an agency's ability to promulgate or enforce certain administrative rules"—is squarely before the Wisconsin Supreme Court at this time. Rendering an opinion on an issue soon to be addressed by the state's highest court would be inconsistent with those principles you recently endorsed relating to attorney general opinions.

The Great Lakes Legal Foundation represents eight Wisconsin business associations in *Clean Wisconsin, Inc. v. DNR* (2018 AP 59) relating to high capacity well permits and five of these associations as amici in *Clean Wisconsin, Inc. v. DNR* (2016 AP 1688) relating to CAFO permits. While both cases have Act 21 implications, our focus here is on the high capacity well case. The Supreme Court describes the issues in this case as follows:

> Did [DNR] lawfully approve eight high capacity wells without conducting an additional environmental review not required by statute or rule, given that Act 21 prohibits agencies from enforcing any requirement that is not "explicitly" permitted, and given that no statute explicitly authorizes additional environmental review for these wells?[1]

[1] Wisconsin Supreme Court Table of Pending Cases, https://www.wicourts.gov/sc/sccase/DisplayDocument.pdf?content=pdf&seqNo=246672.

In your motion to the Supreme Court on behalf of DNR aligning your position with Clean Wisconsin and opposing DNR's own permits you state your intent to brief "the effect of 2011 Wis. Act 21 on the [DNR's] authority regarding high-capacity-well permitting."[2] Clearly, you will oppose our clients' positions on the implications of Act 21 on agency authorities. To float a separate AG opinion on this matter pending the Supreme Court's decision would be unfair to our clients and inconsistent with well-established principles.

In conjunction with your transparency reforms to the AG opinion process you cite as applicable 77 Op. Att'y Gen. Preface (1988).[3] That 1988 opinion states:

> An opinion should not be requested on an issue that is the subject of current or reasonably imminent litigation, since an opinion of the attorney general might affect such litigation. 62 Op. Att'y Gen. Preface (1973).[4]

The referenced 1973 opinion provides:

> An opinion normally should not be requested on an issue that is the subject of current or reasonably imminent litigation. Presumably, the answer to the issue will be furnished by the court's decision and opinions of the Attorney General should not be utilized for the purpose of briefing current litigation. 62 Op. Att'y Gen. Preface (1973).

The only plausible way to avoid these directives is to somehow find Gov. Evers' request does not pertain to the same subject as those cases before the Supreme Court. That is not possible given rulemaking authority is inextricably linked to legislative delegations through agency enabling statute. Interpreting the scope of these explicit delegations is the precise Act 21 issue before the Supreme Court in the Clean Wisconsin cases.

In *Koschkee v. Taylor*, the Wisconsin Supreme Court made it clear that any agency rulemaking authority is limited to the four corners of an agency's enabling legislation.

> The powers delegated to administrative agencies by the legislature include the power to promulgate rules *within the boundaries of enabling statutes passed by the legislature*. *Koschkee v. Taylor*, 2019 WI 76 ¶15, 387 Wis.2d 552, 929 N.W.2d 600. (emphasis added.)

To support this foundational administrative law concept, the court cites Wis. Stat.§ 227.11(2)(a), which provides:

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[2] Respondent-Appellant's [DNR] Motion to Modify the Briefing Schedule, https://greatlakeslegalfoundation.org/wwcms/wp-content/uploads/2019/05/HICap_DOJ-DNR-Motion-to-Modify-Briefing-Schedule_05-02-19.pdf.

[3] Attorney General Josh Kaul, Transparency Reforms to Opinion Process (July 15, 2019), https://www.doj.state.wi.us/news-releases/ag-kaul-announces-transparency-reforms-opinion-process.

[4] 77 Op. Att'y Gen. Preface (1988), https://www.doj.state.wi.us/sites/all/themes/wi-doj-ag/ag/files/77-op-atty-gen-preface.pdf.

> Each agency may promulgate rules interpreting provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute..."

In his request, Gov. Evers asserts that this and other statutes provides broad, explicit grants of rulemaking authority. This position ignores *Koschkee*'s directive to discern the *boundaries of enabling statutes* when determining rulemaking authorities. Each of the rulemaking provisions cited by Gov. Evers as containing broad rulemaking authorities are limited by the same restrictive clauses tethering rulemaking authority to underlying enabling legislation. To wit:

- The Department of Transportation (DOT) "may make reasonable and uniform ...rules deemed *necessary to the discharge of the powers, duties, and functions* vested in the department." Wis. Stat.§ 85.16(1) (sic).
- The Department of Administration (DOA) "shall promulgate rules *for administering the department and performing duties* assigned to it." Wis. Stat.§ 16.004(1).
- The Department of Safety and Professional Services (DSPS) "shall adopt reasonable and proper rules and regulations *relative to the exercise of its powers and authorities*..." Wis. Stat.§ 101.02(1)(b).

These provisions may be *clear* grants of rulemaking authority, but none are broad. In each instance, the purpose of the rules must be to "discharge," "administer," or "exercise" otherwise explicitly delegated "powers," "duties," or "authorities." These limiting clauses on agency rulemaking authorities are certainly within the legislature's prerogative.

> Because the legislature has the authority to take away an administrative agency's rulemaking authority completely, it follows that the legislature may place limitations and conditions on an agency's exercise of rulemaking authority. . . *Koschkee* at ¶20.

Thus, to discern the scope of each of these rulemaking provisions one must identify and map the boundaries of the related enabling statutes. And, "when interpreting a statute, Wisconsin courts begin with the language of the statute and if the meaning is plain, the analysis stops there. *State ex rel. Kalal v. Circuit Court for Dane Cty*., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

> Context is important to meaning. *So, too, is the structure of the statute* in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely related statutes; and reasonably, to avoid absurd or unreasonable results." *Id*., ¶46 (internal citation omitted). (emphasis added.)

From a structural standpoint, each statutory chapter providing agencies duties and authorities has multiple enabling provisions. That means there can be multiple tiers of rulemaking authorities and related limitations. At the top of this hierarchy, Wis. Stat.§ 227.11(2)(a), as previously noted, provides that all agencies "may promulgate rules" so long as they are "necessary to effectuate the purpose of the statute." But the legislature invariably includes more specific rulemaking grants within the enabling statute that are first agency specific, and then, program specific.

To this point, Wisconsin Legislative Reference Bureau instructs bill drafters that because of § 227.11's general grant of rulemaking authority, "you do not need to grant rulemaking authority expressly unless you want to mandate rulemaking or confer on the agency some discretionary authority beyond interpretations of statutory language." And "*If a [legislator] wants to restrict an agency's rulemaking authority*, insert the restriction in the section of the statue granting the rulemaking authority." Wisconsin Bill Drafting Manual 2017-2018 § 13.02(1)-(2).

This drilling *down* a statute to find more specific and narrow rulemaking authority is well illustrated by provisions relating to DSPS rulemaking authority. Wis. Stat.§ 101.02(1)(b), as noted above, provides DSPS with authority to "adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities" under Chapter 101 (Department of Safety and Professional Services—Regulation of Industry, Buildings and Safety). This agency specific grant of rulemaking authority adds a "reasonable and proper" criterion beyond that authority granted by Wis. Stat.§ 227.11(2)(a), which only requires the rules be "necessary to effectuate the purpose of the statute."

Drilling down even further, DSPS also finds rulemaking authority relating to its restroom equity program at Wis. Stat.§ 101.128, which directs DSPS to "promulgate rules that establish standards . . . *to achieve the equal speed of access* required under par. (a)." Wis. Stat. § 101.128(2)(b). In turn, paragraph (a) provides the boundary of the enabling statutes that defines the scope of rulemaking authority relating to restroom equity:

> The owner of a facility where the public congregates shall equip and maintain the restrooms in the facility where the public congregates with a sufficient number of permanent or temporary toilets to ensure that women have a speed of access to toilets in the facility where the public congregates that equals the speed of access that men have to toilets and urinals in that facility where the public congregates when the facility where the public congregates is used to its maximum capacity. Wis. Stat. § 101.128(2)(a).

So, Gov. Evers ignores *Koschkee* and basic statutory analysis when concluding Wis. Stat.§ 101.02(1)(b) grants DSPS "broad and explicit rulemaking authority." When it comes to restroom equity, DSPS's rulemaking authority is limited to prescribing the number of toilets for women's restrooms that assures equal speed of access. In other words, DSPS cannot move up the statutory hierarchy to Wis. Stat. § 101.02(1)(b), or for that matter, all the way up to Wis. Stat. § 227.11(2)(a), as authority to mandate comparable mirrors or other restroom attributes unrelated to toilets and speed of access.

Gov. Evers' request also opines that Wis. Stat.§ 101.02(1)(b) provides broad rulemaking authority with respect to fire sprinkler systems. Again, *Koschkee* is clear that any such authority must be within the boundaries of the fire sprinkler enabling legislation, Wis. Stat.§ 101.14.

In conclusion, none of the provisions cited by Gov. Evers in his request for an AG opinion provide broad or explicit rulemaking authority. The scope of these rulemaking authorizations can only be discerned through a statutory interpretation methodology that defines the boundaries of the underlying enabling legislation. This brings us full circle back to the Clean Wisconsin Act 21 cases before the Supreme Court, the final arbiter of what the law is under Act 21.

Rather than providing clarity, an AG opinion now will simply be an unbinding, unhelpful, and unnecessary bridge to a pending Supreme Court decision.

Thank you for this opportunity to provide our thoughts on this important matter,

Sincerely,

/s/

Robert I Fassbender
President and General Counsel
Great Lakes Legal Foundation

Cc: Ryan Nilsestuen
Chief Legal Counsel
Office of Governor Tony Evers